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THE HIGH COURT
JUDICIAL REVIEW

2007 No. 67 J.R.

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

BETWEEN

CORBALLY HOMES LIMITED
DAVID O'REILLY AND JOHN O'REILLY

APPLICANTS

AND
AN BORD PLEANALA

RESPONDENT

AND
KILDARE COUNTY COUNCIL
JOHN DUFFY AND PAULINE McHUGH

NOTICE PARTIES

Judgment of Mr. Justice John Hedigan delivered on the 27th day of February, 2008.

1. These proceedings seek to challenge a decision made by An Bord Pleanála (The Board) on the 6/12/06 (Reference PL 09.216802) granting planning permission for the construction of a new mixed development of two hundred and twenty nine residential dwellings at what is described by the applicants as "the Island and Townland of Skirteen, Portlaoise Road, Monasterevin, Co. Kildare". The applicants challenge condition 12 attached thereto on the basis that it is *ultra vires* and unlawful. It is accepted that the relevant legislation is the Planning and Development Act 2000 and reliance is not placed on the Planning and Development (Strategic Infrastructure) Act 2006.

The Background.

2. A previous planning permission was granted in respect of a larger site of which the site herein forms a part. This was overturned on appeal for two reasons;

> (i) There would be an adverse effect on a candidate special area of conservation (cSAC). A cSAC refers to lands that the Minister for the Environment, Heritage and Local Government proposes to nominate as such an area under the Habitats Directive.
>
> (ii) There would be an unacceptable impact on the character of the local landscape which forms an important part of the setting of Monasterevin and on the setting of the adjacent Charter School which is an eighteenth century protected structure.

3. In January 2005 the applicants made a second application. This application, the subject of these proceedings, was on a smaller scale. No development was proposed for a plot of land to the northeast of the new proposed development known and referred to herein as "The Monasterevin lands". These lands at this stage were still designated as a cSAC.

4. While this application was before the Planning Authorities, this cSAC was reduced to a strip of 2.5 metres approximately in width along the banks of the river. The rest of the Monasterevin lands were therefore free from this status.

5. The above application for planning permission was granted subject to a condition to protect the cSAC. This planning permission was appealed to the Board and it granted permission but subject to condition 12 which stated:-

> 12. "The low lying area outside the Skirteen Townland boundary and between the boundary and the river Barrow shall be kept free from development, notwithstanding its zoning in the local area plan.
>
> Reason:
>
> In the interest of visual amenity and nature conservation, as this area forms part of the flood plain of the river Barrow and part of the setting of the town of Monasterevin".

6. The result is that the applicants have the permission they sought on the Skirteen lands but subject to a condition that effectively sterilises the Monasterevin lands of which they are also the owners. The applicants argue that the condition imposed was not expedient for the purposes of or in connection with the development authorised. They further argue that the condition is unreasonable, disproportionate and unduly burdensome because it sterilises the lands in question, i.e. the Monasterevin lands. In the event the Court agrees with them, the applicants do not wish the whole permission to fall but simply wish that condition 12 would be severed so that the permission would remain but without the restrictive condition on the Monasterevin lands. The Monasterevin lands were and remain zoned for residential development.

7. The relief sought herein is;

> (i) An order of *certiorari* quashing condition 12 only of the decision of the respondent dated the 6th December, 2006 granting planning permission for the construction.
>
> (ii) In the alternative a declaration that condition 12 of the decision is *ultra vires* the respondent and, if necessary, an order remitting the matter to the respondent for reconsideration.

8. The law applicable to such an application as this is set out in the judgment of Finlay C.J. in *O'Keeffe v. An Bord Plenála* [1993] I.R. 39.

> "In dealing with the circumstances under which the Court could intervene to quash the decision of an administrative officer or Tribunal on grounds of unreasonableness or irrationality, Henchy J. in that judgment *State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642) set out a number of such circumstances in different terms.

They are:

(1) It is fundamentally at variance with reason and common sense.

(2) It is indefensible for being in the teeth of plain reason and common sense.

(3) Because the Court is satisfied that the decision maker has breached his obligation whereby he "must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision"…

9. Finlay C.J. said that he was satisfied that these three different methods of expressing the circumstances under which the Court can intervene are not in any way inconsistent with one and other, but rather compliment each other and constitute not only a correct but a comprehensive description of the circumstances under which the Court may, according to our law, intervene in such a decision on the basis of unreasonableness or irrationality.

10. In the case cited above, Henchy J. quoted with approval the statement of Lord Greene M.R. in "*Associated Provincial Picture Houses Limited v. Wednesbury Corporation* [1948] 1 K.B. 223 where at page 230 he stated:

> "It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the Courts can interfere.....; but to prove a case of that kind would require something overwhelming".

11. Griffin J. in the *State (Keegan) v. Stardust Compensation Tribunal* agreed with the principles laid down by Henchy J. and quoted with approval the speech of Lord Brightman in *R .v. The Chief Constable of North Wales Police ex parte Evans* [1982] 1 W.L.R. 1155 where he stated at page 1160:

> "Judicial review is concerned, not with the decision, but with the decision making process. Unless that restriction on the power of the Court is observed, the Court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power..... Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made".

12. Finlay C.J. in *O'Keeffe v. An Bord Pleanála* agreed with the above statement. He then synopsized the law at page 71 as follows;

> "It is clear from these quotations that the circumstances under which the Court can intervene on the basis of irrationality with the decision maker involved in an administrative function are limited and rare. It is of importance and, I would think, of assistance to consider not only as was done by Henchy J. in *The State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642, the circumstances under which the Court can and should intervene, but also in brief terms and not necessarily comprehensively, to consider the circumstances under which the Court cannot intervene.
>
> The Court cannot interfere with the decision of an administrative decision making authority merely on the grounds that (a) it is satisfied that on the facts as found it would have raised different inferences and conclusions, or (b) it is satisfied that the case against the decision made by the authority was much stronger than the case for it.
>
> These considerations, described by Counsel on behalf of the appellant as the height of the fence against judicial intervention by way of review on the grounds of irrationality of decision, are of particular importance in relation to the questions of the decision of planning authorities.
>
> 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.
>
> 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.
>
> As was indicated by this Court *in P. and F. Sharpe Limited v. Dublin City and County Manager* [1989] I.R. 901, the onus of establishing all that material is on the applicant for judicial review"……

13. From the above outline of the law in respect of an application such as this I have deduced the following principles:

(i) The Court intervenes only rarely on the grounds of irrationality.

(ii) The Court does not interpose its judgment of the facts for that of the designated deciding body.

(iii) Questions in relation to planning, environmental balance, local amenities and convenience are all firmly and unequivocally matters placed within the jurisdiction of the planning authorities and the Board. The Court cannot and should not exercise discretion with regard to planning matters.

(iv) To succeed in establishing irrationality, an applicant for judicial review must establish that the decision making authority had before it no relevant material which would support its decision.

The relevant legislation.

14. The Planning and Development Act 2000 s. 34; 34(1) provides;

> "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 requirement of the regulations are complied with,

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

15. Section 34(4)(a) of the 2000 Act provides:

"(4) Conditions under subs.(1) may without prejudice to the generality of that subsection, include all or any of the following;

(a) Conditions for regulating the development or use of any land which adjoins, abuts or is adjacent to the land to be developed and which is under the control of the applicant, so far as appears to the planning authority to be expedient for the purposes of or in connection with the development authorised by the permission;"

16. Section 34(4)(a) clearly provides for conditions to regulate the development or use of adjoining lands such as the Monasterevin lands. The applicants maintain that condition 12 is not one that is expedient for the purposes of or in connection with the development. The Board says that it is.

17. In the planning permission the Board set out the reasons for condition 12. It is necessary to examine these reasons and set them against the *O'Keeffe* test. The Board gave as its reasons for imposing condition 12 that it was in the interest of visual amenity and nature conservation as the area forms part of the flood plain of the river Barrow and part of the setting of the town of Monasterevin. The Board in its submissions takes visual amenity and town setting together and argues these two parts of the reason confirm that the condition is for the benefit of the development. Nature conservation and the fact that the Monasterevin lands form part of the flood plain of the Barrow are also, argue the Board, for the benefit of the development and the preservation of what remains of the cSAC. Moreover it argues the reduction in the risk of flooding which has occurred four times in forty eight years is a benefit also to the development.

18. The applicants argue that condition 12 does not regulate the development or use of the Monasterevin lands. It is they argue an absolute prohibition on development. They further dispute that the condition can be fairly regarded as expedient for the purposes of or in connection with the development authorised.

19. The applicants also argue that the reason given should demonstrate that the condition is within the power of the Board. They rely upon the judgment of Henchy J. *in Killiney and Ballybrack Development Association v. Minister for Local Government* [1978] ILRM at page 78:

"It will be seen, therefore, that the power to impose a condition in a 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".

20. The applicants argue that the reasons given do not come within the conditions set by Henchy J. i.e. the reasons given cannot fairly and reasonably be held to be capable of justifying the condition.

21. Both sides rely on the judgment of McCarthy J. in the *State (F.P.H. Properties S.A.) v. An Board Pleanála* [1987] I.R. 698 in which a condition of the kind now impugned under s. 26(2)(a) of the 1963 Act was quashed. At page 710 McCarthy J. said:

"Reliance was placed upon a number of authorities. In the High Court, Lynch J. was of the view that the planning authority could "reasonably take the view that the preservation of Furry Park House would be an amenity to the authorised development in that it would improve the visual attractiveness of the whole area and in that it would also preserve for low density residential purposes the house itself and its site which immediately adjoins the area to be developed.

Lynch J. rejected the argument of alleged uncertainty and the contention that there was no evidence to support the conclusion of the inspector as to the reasonable distribution of the alleged cost of restoration at a price of three thousand pounds per apartment. I do not accept these conclusions. I accept Mr. Smyth's proposition that, since the requirement for planning permission constitutes an encroachment on property rights, it must be strictly construed. No doubt the curtilage of Furry Park House adjoins, abuts and is adjacent to the land to be developed and is under the control of the prosecutor (see s. 26, subs. 2(a)). I do not accept, however, that the impugned condition is one for regulating the development or use of such land; further, in my view, it is not covered by the expression "so far as appeared to the planning authority to be expedient for the purposes of or in connection with the development authorised by the permission". I have no doubt it appears to the planning authority to be highly expedient to require the developer to expend a significant sum of money in preserving Furry Park House but that does not make it expedient for the purposes of or in connection with the authorised development. Without seeking to delimit the type of conditions envisaged by s. 26, subs. 2(a), I would think it appropriate for example to conditions which sterilise adjoining land as an integral part of the amenity of a particular development".

22. In relation to these submissions it seems to me that the question in essence may be expressed as whether the condition was for the benefit of the development, expedient thereto and whether the reasons given can fairly and reasonably be held to be capable of justifying the condition.

23. The requirement to expend monies on restoration of Furry Park House estimated at about three thousand pounds per apartment, seems to me to be in a different category to what is intended here. So also the condition imposed in *Ashbourne Holdings Limited v. An Bord Pleanála* [2003] 2 I.R. 114 which was cited by the applicants. In this case it seems to me that the condition does in fact preserve the amenity of the development and also is likely to reduce the risk of flooding. I agree with the submissions of the Board that provided the condition is capable of being expedient for the purposes of the development the determination of whether it is in fact expedient for the purposes of the development is a matter of fact to be determined by the Board. It seems to me that concerns re: flooding, preserving the amenity of the immediate environment including views of the town of Monasterevin are highly relevant

factors capable of being determined as expedient for the purposes of the development. It also seems to me that the reasons which were given for the condition can on any interpretation be held capable of justifying the said condition. Preserving the view of the town of Monasterevin from the development would in fact primarily benefit the development. So too preserving a part of the flood plain of the river Barrow since flooding, notably four times in forty eight years which is a disturbing level of frequency is something that can at the very least be held capable of benefiting the development and therefore justifying the condition.

24. The applicants have further pleaded that the condition is unreasonable, disproportionate and unduly burdensome to them in sterilising their adjoining lands as a condition of the permission. The Board plead that the requirement a condition should not be so derives from the amendments to s. 34(4) effected by the Planning and Development (Strategic Infrastructure) Act 2006 and therefore did not apply to the impugned condition. Nonetheless they wish to meet the argument as if it were a 'stand-alone plea relating to conditions affecting adjoining lands generally'.

25. It must be accepted that any such condition will be onerous in respect of the lands affected thereby. The question is as to whether it would be unduly, unreasonably or disproportionately so. As with all other matters relating to judicial review, this falls to be decided by reference to *O'Keeffe* principles. In this case the Board had before it as, appears from paragraph 5 of the affidavit of Michael Donlon sworn herein on its behalf evidence that these lands were subject to flooding. The fact that the Minister of the Environment, Heritage and Local Government concluded the lands in question were not within the functional floodplain of the river Barrow does not, in my view, preclude the Board from taking a different view of the evidence before it. It seems to me there was ample evidence that, at least for the purposes of planning and development, it is part of the said floodplain. The different roles of the two bodies provide a justification for this apparent contradiction as the requirements of the Habitats Directive with which the Minister was dealing, i.e. conservation of habitats, population of species and geological features warranting protection are quite different from the requirements of the planning code with which the Board was dealing. There was, therefore, relevant evidence before the Board upon which it could reach this conclusion and this conclusion alone would make the decision, one which in my opinion was fair, reasonable and proportionate thus rendering it secure from challenge on *O'Keeffe* principles. Moreover, it was as noted above, one explicitly contemplated by the Supreme Court as constituting a permitted condition under s. 34(4)(a) of the 2000 Act. See *F.P.H. Properties S.A. v. An Bord Pleanála* [1987] I.R. 698.

26. For all these reasons the applicants have not satisfied me that the condition imposed was done in a manner contrary to *O'Keeffe* principles and consequently I must refuse the reliefs sought. I should add for the sake of completeness that had I come to a different conclusion I would not have severed the condition as requested because in the circumstances of this case I think that that would have amounted to rewriting the permission. See *F.P.H. Properties S.A. v. An Bord Pleanála* [1987] I.R. 698.