Neutral Citation Number: [2011] IEHC 193

THE HIGH COURT

2010 539 JR

IN THE MATTER OF SECTION 50 and 50 A OF THE PLANNING AND DEVELOPMENT ACT 2000 (AS INSERTED BY SECTION 13 OF THE PLANNING AND DEVELOPMENT (STRATEGIC INFRASTRUCTURE) ACT, 2006) AND IN THE MATTER OF AN APPLICATION

BETWEEN

McCAUGHEY DEVELOPMENTS LIMITED

APPLICANT

V.

DUNDALK TOWN COUNCIL

RESPONDENT

Judgment of Mr. Justice Hedigan delivered the 10th day of May 2011.

1. The applicant is a limited liability company engaged in property development and is the owner of lands at Lower Point Road, Dundalk, Co Louth. It's registered office is located at Carrick Road, Dundalk, Co Louth. The respondent is the Town Council with responsibility for the administrative area of Dundalk, Co Louth.

2. The relief's sought by the applicant are as follows:-

(i) An order of certiorari quashing the decision made by resolution of the Elected Members of the respondent believed to have been taken on 25th November, 2009, to make the Dundalk and Environs Development Plan 2009-2015, which Plan includes a land zoning objective "RAO" (Recreation Amenity and Open Space) in respect of the Applicant's lands at Lower Point Road, Dundalk, County Louth.

(ii) A Declaration that the decision of the Respondent to make the Dundalk and Environs Development Plan 2009-2015, which contains a land use zoning objective of "RAO" (Recreation, Amenity and Open Space) in respect of the Applicant's said lands is irrational, invalid, ultra vires and of no legal effect.

(iii) A Declaration that the decision of the Respondent to make the Dundalk and Environs Development Plan 2009-2015, which contains a land use zoning objective of "RAO" (Recreation, Amenity and Open Space) in respect of the Applicant's said lands was made and brought into effect in breach of the Applicant's legitimate expectation that its lands would be zoned residential and in deliberate breach of the Applicant's rights to natural and constitutional justice.

(iv) A Declaration that the failure by the Elected Members of the Respondent to set out in its resolution to make the Dundalk and Environs Development Plan 2009-2015 the reasons for zoning the Applicant's lands "RAO" in the teeth of two recommendations of the Respondent's Manager that the lands be zoned "RES 1" renders the said Plan invalid in that regard.

(v) A Declaration that the Respondent and/or the Elected Members of the Respondent were guilty of negligence and misfeasance in public office in passing the said resolution to make the Dundalk and Environs Development Plan 2009-2015, in circumstances where the Plan includes a land use zoning objective of "RAO" (Recreation, Amenity and Open Space) in respect of the Applicant's lands at Lower Point Road, Dundalk, County Louth.

(vi) Damages pursuant to Order 84, rule 24 of the Rules of the Superior Courts and/or the inherent jurisdiction of this Honourable Court for misfeasance in public office and/or negligence on the part of the Respondent in making and/or allowing to be made the Dundalk and Environs Development Plan 2009-2015, in circumstances where the said plan includes a land use zoning objective of "RAO" (Recreation, Amenity and Open Space) in respect of the Applicant's lands at Lower Point Road, Dundalk, County Louth.

(vii) If necessary, an Order providing for the discovery of documentation which are or have been in the power, possession or procurement of the Respondent and which are relevant to any issue in these proceedings.

(viii) If necessary, an Order extending the time for the making of this application.

(ix) Further or other Order's of relief.

(x) Liberty to file further Affidavits.

(xi) Costs.

3.1 The applicant is a property development company and the owner of a plot of land within the functional area of the respondent. The applicant purchased this plot of 10.85 acres from the Dundalk Port Company in March, 2006, for €1.7 million. In the Dundalk and Environs Development Plan 2003-2009, the plot in question had been zoned "RES1" (residential). The lands were purchased with the intention of securing planning permission to carry out residential development. At the time when the applicant purchased the lands, there were two issues that impacted on the development potential of the lands. The first related to access the second issue was the use of part of the lands as a playing field by Quay Celtic Football Club. In relation to the access issue the respondent agreed to sell a strip of land to the applicant in order to facilitate access to the applicant's lands. The agreed purchase price was €155,000. Planning permission was granted on 16th June, 2008, by the respondent for an access road into the lands. Quay Celtic Football Club were compensated by the applicant paying for the construction of an all-weather training area at Quay Celtics Football ground at a cost of

approximately €350,000.

3.2 In July 2009 the Dundalk and Environs Development plan 2009-2015 went on display. On inspection of the Draft Plan the applicant's managing director, Mr Martin McCaughey discovered that the zoning of the applicants land was changed to "RAO" (recreation, amenity and open space). This changing in zoning dramatically effected the development potential of the lands. In effect, residential development would not be possible. The respondent accepts that in the process of making the 2009 development plan there was a mistake in relation to the applicant's lands. Specifically, when the first draft of what ultimately became the plan was published, there was a mapping error which resulted in RAO zoning being applied to the plot in question. The intention had been to continue to apply RES1 zoning to the plot. The applicant noticed the change and made contact with the town clerk Mr Pentony who admitted the mistake in relation to the applicant's lands, and said that the applicant would have to make a submission with a view to having the RES1 zoning restored. On 9th July, 2009, the applicant furnished a detailed submission to the respondent objecting to the proposal to change the zoning of the applicant's lands from residential to recreational.

3.3 The draft plan came before the elected members of Louth County Council and Dundalk Town Council on 15th and 22nd September, 2008, at joint meetings. A report was prepared by the manager of the respondent recommending that the applicant's lands be changed from recreational to residential. The lands in question were considered at the second meeting and the elected members accepted the recommendation to change the zoning back to RES1. The elected members were advised that this change was a material change and would require re-advertisement of the plan with the public being invited to make submissions on the amendment and the issue ultimately being put to the elected members for further consideration. On 23rd September, 2009, Mr Pentony and Councillor Jim D'Arcy, both telephoned Mr Martin McCaughey to inform him that the respondent's elected members had voted to return the zoning of the applicant's lands to residential. The applicant complains that neither party informed him that the resolution was not the end of the matter and that further public consultation and a further vote by the elected members would be required. The applicant ultimately took no further steps to protect the residential zoning in terms of making submissions, lobbying elected members or otherwise.

3.4 After the vote of 22nd September, 2009, the revised draft of the plan was put out for further public consultation and an advertisement to this effect was published in a local newspaper. The change back to residential zoning in respect of the applicant's land elicited 24 submissions from members of the public, all of which were opposed to the change. The applicant did not make any further submission believing the matter to be resolved. The draft plan came before the elected members of the respondent on the 17th November, 2009, and a vote was taken to change the zoning to RAO. The decision was effectively ratified by Louth County Council on 25th November, 2009. The plan then came into effect on 23rd December, 2009; notice of its making was given by a newspaper advertisement on 16th December, 2009.

3.5 It was not until the 19th March, 2010, when Mr McCaughey received a telephone call from a third party, that he became aware that his lands had in fact had been zoned RAO. Mr McCaughey viewed the 2009 plan on the respondent's website however the word "draft" appeared in the footer of some pages of the document creating confusion as to whether the plan was a draft or final. On 22nd March, 2010, Mr McCaughey visited the respondent's office seeking a copy of the plan. John Lawrence an administrative officer with the respondent noticed the plan had the word "draft" contained in the footers and was uncertain that he had the final version therefore he informed Mr McCaughey that the 2009 plan was unavailable for inspection. Mr McCaughey sought minutes of the meeting that took place on 22nd September, 2009, but was refused. Although the respondents website contained minutes of the meetings of the 17th and 25th November 2009, there was nothing contained therein which would have informed Mr McCaughey that the zoning of his land had been considered again at those meetings. On 31st March, 2010, the applicant's solicitors wrote to the respondent's town clerk pointing out the plan had not been published or made available for inspection. The respondent's solicitors replied on 14th April, 2010, confirming a new plan had been made on 25th November, 2009, and had come into effect four weeks later. The letter said the plan had been available for inspection from 23rd December, 2010. On 26th April, 2010, Mr McCaughey obtained for the first time a copy of the further Manager's Report in relation to submissions received by the respondent on foot of the further public consultation, the Manager recommended that residential zoning should remain, but this was rejected by the elected members. On 29th April, 2010, these proceedings were commenced, the key relief sought is an order of certiorari quashing the 2009 plan insofar as same provides for the applicant's lands to be zoned for recreational uses, various ancillary declarations are also sought. These proceedings are by way of telescoped hearing the submissions therefore firstly address the issue of whether leave should be granted and then assuming leave is granted proceed to deal with the substantive matter.

Applicant's Submissions

4.1 The respondent makes a number of preliminary objections against granting leave in this case. Firstly the respondent asserts that the application has not been made within the time period of 8 weeks from the date of the decision specified under Section 50(6) of the Planning and Development 2000 Act. Secondly, it contends that Louth County Council should also be a party to the proceedings and that the proceedings are badly constituted by reason of the failure to name Louth County Council as a party. Section 50 (8) of the 2000 Act empowers the Court to extend the time for making an application for leave for judicial review where the High Court is satisfied that-

> "(a) there is good and sufficient reason for doing so, and
>
> (b) the circumstance's that resulted in the failure to make the application for leave within the period so provided were outside the control of the applicant for the extension"

Representations were made to Mr McCaughey on 23rd September 2009, by the Town Clerk and Councillor D'Arcy informing him that the elected members had voted to return the lands to residential. Mr McCaughey had no reason to continue monitoring the process, he was entitled to assume that the mapping error had been rectified by the resolution passed on 22nd September, 2009. It was clearly within the knowledge of both the Town Clerk and Councillor D'Arcy that there would be another period of public consultation as the change in zoning was a "material alteration". Neither of them communicated this to Mr McCaughey. Had they informed him that the zoning of residential might be subjected to reversal, the applicant would have taken all necessary steps to protect his position.

On the 19th March, 2010 Mr McCaughey became aware of the fact that his lands were zoned residential; he immediately checked the respondent's website, it was reasonable for him to assume the plan contained on the website was a draft when the website said so. He also visited the respondents office and Mr Lawrence did not show him the plan as it said draft in the footers, he then took legal advise and his solicitors wrote to the applicant on 31st March, 2010, this letter was not responded to until 14th April, 2010. Having obtained the Managers report on 26th April,2010, it became apparent that the resolution of the elected members did not bring finality in relation to zoning. It is submitted that the applicant could not be criticised for any delay between becoming aware of the fact that its land were zoned recreational on 19th March, 2010, and instituting proceedings on 29th April, 2010. During this period Mr McCaughey and his legal advisors sought to clarify the true situation with regard to the zoning of his lands. The circumstances which

resulted in the delay were outside his control.

4.2 The respondent says that the 2009 plan was made jointly by the respondent and
Louth County Council on this basis its argued that the proceedings are badly constituted by reason of the failure of the applicant to name Louth County Council as a party to the proceedings. It is common case that all the applicant's lands are situated within the functional area of respondent. The involvement of Louth County Council was only required insofar as some lands included in the Plan fall within the functional area of Louth County Council. The applicant has no quarrel with the Plan other than in relation to its own lands. It is within the power of the Court to quash only that part of the development plan which relates to the zoning of the applicant's lands. No practical purpose could be served by the joining of Louth County Council and it is submitted that even if that party had been joined to the proceedings, the interests of both the Respondent and Louth County Council would be co-extensive. It is submitted that the applicant has demonstrated substantial grounds to entitle it to seek the relief claimed herein, assuming leave is granted the applicant makes the following submissions in relation to whether the substantive relief claimed should be given.
4.3 Although the making of a development plan is a function reserved to the elected members, they are not at large in that regard and must only take into account relevant matters. In the context of including zoning objectives in a development plan, the elected members are restricted to considering only the proper planning and sustainable development of the area. In assessing whether that consideration requires a particular zoning objective in respect of particular lands, the elected members will usually be guided to a significant extent by the planning expertise available within the planning authority itself. It is note worthy that the planning authority itself did not put before the elected members any information which justified recreational zoning of the applicant's lands on grounds that same was required by reference to proper planning and sustainable development. Rather the Manager accepted that the proposal to zone the applicant s lands recreational appeared as a result of a draft error and the manager recommended that they remain residential.

The respondent appears to justify the decision by reference to the fact that a number of submissions were received during the public consultation. The councillors did not have the submissions before them and the only document that made reference to the contents of the submissions, namely the Managers report, makes no reference to the proper planning and sustainable development of the area in summarising those submissions. There is no record of was said when the matter came before the elected members on the 17th November, 2009, therefore it cannot be confirmed that they restricted themselves to considering only the proper planning and sustainable development of the area in deciding to zone the applicant's lands recreational. Indeed it appears from the affidavit of Councillor Dearey that he took into account an irrelevant matter, namely a letter from Denis and Joanne Daly which was received outside the statutory lime limit for making submissions. In the circumstances, it is submitted the decision was irrational, in the sense expressed in O'Keeffe v. An Bord Pleanala [1993] 1 IR39.

4.4 It is submitted that in the absence of an adequate record, it is impossible to ascertain whether the elected members addressed and considered matters in relation to the zoning of the applicant's lands in a reasoned manner and by reference only to the proper planning and sustainable development of the area. In Farrell and Another v. Limerick County Council (Unreported McGovern J. 17 June 2009) the High Court set aside a decision of the elected members of the respondent to zone lands in a particular way for the purposes of a local area plan on the basis, inter alia, of an inadequate record. Mc Govern J stated:-

> " I accept the submissions on behalf of the Respondents that the reasons for making the proposed changes by resolution must be stated in the resolution itself. This, the elected members have clearly failed to do."

In the present case, there is no evidence in the form of a reasoned resolution which could permit the Court to safely conclude that the elected members only took into account relevant considerations in coming to their decision to zone the applicant's lands recreational.

4.5 In the present case it is submitted that a statement amounting to a representation was made by the Town Clerk and Councillor D'Arcy to Mr McCaughey on 23rd September, 2009, to the effect that the applicant's lands would be zoned residential in the new Development Plan. It is quite clear from the affidavit of Mr. McCaughey that he acted on the faith of the representation, insofar as had he been aware that the decision to revert to residential zoning was capable of further amendment, he would have taken such steps as he considered necessary to lobby the elected members and to make submissions in that regard. He took no such steps because he understood from representations that matters had been resolved to the applicant's satisfaction. In the particular circumstances of the case there was a reasonably entertained expectation by Mr McCaughey on behalf of the applicant that the respondent would abide by the representation made by the Town Clerk and Councillor D'Arcy that the applicant's lands would be zoned residential in the new Development Plan, having regard to the unusual circumstances whereby the lands came to be zoned recreational in the draft plan in the first instance, i.e. a mapping error. It is particularly important to bear in mind that when Mr McCaughey first approached Mr Pentony in July 2009, having realised the change in zoning in respect of the applicant's lands in the draft plan, he was advised by Mr Pentony of the need to make a submission to the effect that the mistake should be corrected by restoring the residential zoning to the lands. No similar advice was proffered by Mr Pentony to Mr McCaughey on 23 September, 2009. Having regard to Mr Pentony's position Mr McCaughey was entitled to place reliance on the representation and to assume no further steps would be required to be taken by him in order to protect the applicant's interests. When the Town Clerk realised that this was not the case he should have immediately ensured that the applicant was given an opportunity to be heard.

Respondent's Submissions

5.1 Under s.50 (6) of the Planning and Development Act 2000 leave to apply for judicial review shall be made within eight weeks beginning on the date of the decision. The plan was made by the respondent and Louth County Council at meetings of their respective elected members on 25th November, 2009. This, it is submitted, is the relevant date for the purpose of reckoning time. The Act of 2000 is quite clear that it is the date of the decision that starts time running, not the date on which it is published or notified to an applicant or on which an applicant for relief learns of it. The period of eight weeks allowed by section 50 (6) therefore expired on 19th January 2010. These proceedings were instituted on 29th April, 2010, a date well outside the eight week period prescribed by section 50 (6). If the applicant is to get an extension of time s.50 (8) of the Act provides that there must be good and sufficient reason for doing so. In this regard the applicant relies heavily on Mr Mc Caughey's telephone conversation with Mr. Pentony and Councillor D'Arcy on 23rd September, 2009. As result of this conversation he took no further steps to protect his position. It is submitted that it was a leap of faith by Mr McCaughey from being told that the resolution was passed to assuming that everything would be ok. As a developer who was well familiar with the planning process he was not entitled to make such an assumption.

5.2 The plan under challenge in these proceedings was made jointly by the respondent and Louth County Council. The area it affects encompasses the whole functional area of the respondent and part of the functional area of Louth County Council. The instant application for leave to apply for judicial review should have been made on notice to both local authorities by virtue of section 50 (2) (a) of the Planning and Development Act 2000 which provides:-

" An application for section 50 leave shall be made by Motion on Notice (grounded in the manner specified in [Order 84] in respect on an ex parte Motion for leave -

(a) If the application relates to a decision made or other act done by a planning authority or local authority in the performance or purported performance of a function under this Act, to the authority concerned…"

The Plan came into force as a result of the decisions of both planning authorities concerned. The relief claimed is certiorari, which would have the effect of quashing the plan. This would have implications not only for the respondent, but also for Louth County Council.

5.3 In order to persuade the Court that the decision of the respondent is irrational the applicant must satisfy the court that there was no material before it capable of supporting its view. It is submitted that there was ample material before the respondent to justify the decision that was made. All the submissions made in this case were opposed to residential zoning for the plot of land in question. The submissions raised genuine issues relating to the proper planning and sustainable development of the area which were summarised in the managers report as follows:-

"The existing road cannot cope with an increase in traffic and there is a lack of facilities servicing the area.

The recreational facility on this site is used daily and there is at present an abundance of semi-complete dwellings.

The change in zoning will have an impact on protected view V2"

The Manager's recommendation was short on justification by reference to planning considerations. He merely said that the change to RAO zoning had been inadvertent without addressing the substance of the submissions made by the members of the public. The applicant does not like the way in which the elected members of the two local authorities voted on this issue. The Court might be inclined to say that it would have taken a different view of the matter. However, none of this is relevant to the question of whether the decision was irrational by reference to administrative law standards. The Court cannot stand in the shoes of the decision maker. There was material before the Respondent to justify the decision, that is enough.

5.4 The decisions of the respondent that are impugned in these proceedings were made on the 17th and 25th November 2009. On the 17th of November 2009 the elected members of the respondent voted by eleven votes to nil with one abstention to reject the Manager's recommendation that the zoning of the site should revert to residential. This is recorded in the minutes of the meeting of the 17th November 2009, which are exhibited to the affidavit of John Lawrence. Affidavits sworn by Mark Dearey and Marianne Butler set out clearly the basis upon which the respondent and Louth County Council arrived at their decisions in relation to the applicant's lands. They also indicate what material was before the elected members of the two planning authorities, namely the draft plan and the Managers report on submissions received, in which the individual submissions are summarised. The mangers report also reminded the elected members of their obligations under section 12(11) of the Act of 2000 to restrict their consideration to the proper planning and sustainable development of the area. It is therefore submitted that there is no substance to the contention that the record of the impugned decision is inadequate.

The suggestion is made that the resolutions of the elected members are deficient in that they fail to state the reasons for passing the resolution, it is submitted that the Court should be guided by the following observation of Hardiman J. in F.P v. Minister for Justice [2002] I.L.R.R 16 at 43:-

"… it seems clear that the question of the degree to which a decision must be supported by reasons stated in detail will vary with the nature of the decision itself"

The making of the development plan is a function that is reserved to the by legislative choice to the elected members. It necessarily entails a vote. It is, therefore, closer to a legislative than a judicial function. In the context of a decision of this character, it is plainly impossible for anything akin to a reasoned judgment to be provided.

5.5 The starting point for any analysis of a case based on legitimate expectation in the context of the making of a development plan must be section 10(8) of the Act of 2000. It provides:-

"There shall be no presumption in law that land zoned in a particular development plan (including a development plan that has been varied) shall remain so zoned in any subsequent development plan"

The applicant founds its case in this regard on Mr McCaughey's telephone conversations with Mr Pentony and Councillor D'Arcy on 23rd September, 2009. However, neither Mr. Pentony or Councillor D'Arcy informed Mr McCaughey that the draft Plan with amendments would not go on further display, or that further submissions could not be made in respect of it, or that a further vote of the elected members of the local authorities would not be required before the Plan could come into effect. The most authoritative statement of the law in relation to legitimate expectation was made by Fennelly J. in Glencar Exploration plc v. Mayo County Council (No.2) [2002] 1 I.R. 84. There must be (a) a representation, (b) a person/group must act on the faith of the representation, (c) it must create an expectation reasonably entertained by the person or group that the public authority will abide by the representation to the extent that it would be unjust to allow the public authority resile from it.

Taking these requirements in turn (a) neither Mr Pentony nor Councillor D'Arcy represented to Mr McCaughey that the matter was at an end or that there could be no further consideration of the issue. There is also no evidence to suggest that either gentleman purported to bind the other elected members of the two local authorities concerned. (b) It is accepted that the telephone calls which were made to Mr McCaughey were made to the applicant. There is a problem in identifying what the applicant did on faith of the representations. The applicant's case seems to be that it did nothing. (c) As for the third requirement, the applicant again runs up against the problem that the representations on which it seeks to rely were so short of content. They were in truth, merely reports of something that had happened, rather than promises as to future conduct, and there was no suggestion that the matter could not be revisited as part of the statutory process. It was not, therefore, reasonable for the applicant to rely on the conversations in the manner it seeks to do in these proceedings. It is appropriate to observe that, under statute, there was no obligation whatsoever on the respondent to notify the applicant personally of the fact that a further vote was to take place on matters including the zoning of the applicant's lands.

Decision of the Court

6.1 These proceedings are by way of telescoped hearing. I will firstly address the issue of whether leave should be granted. The

respondent submits that the applicant is not entitled to leave to apply for judicial review due to its delay in instituting proceedings and because of it's failure to join Louth County Council. It is proposed to deal with each of these issues in turn. Section 50 (6) of the Planning and Development Act 2000 provides:

> "(6) Subject to subsection (8), an application for leave to apply for judicial review in respect of a decision or other act to which subsection (2) (a) applies shall be made within the period of 8 weeks beginning on the date of the decision or, as the case may be, the date of the doing of the act by the planning authority, the local authority or the Board, as appropriate."

On the basis that the plan was made by the respondent on 25th November, 2009, the time period of eight weeks allowed by section 50 (6) expired on 19th January, 2010. In normal circumstances this would be an end to the matter however at the heart of this case is the fact that something very odd occurred.

In the creating of the 2009 Development Plan a mistake was made in relation to the applicant's lands. A mapping error was made. The result was that the applicant's lands which had been zoned residential were zoned recreational. To their credit the officials at Dundalk Town Council admitted to the mistake. When the Town Clerk Mr Pentony was contacted by Mr McCaughey he admitted that the change in zoning in relation to the applicant's lands had come about as a result of a mapping error. Mr Pentony advised Mr McCaughey how to go about rectifying the error. Mr McCaughey was told he would have to make a submission to the respondent seeking to have the mistake rectified by having the residential zoning reinstated. The manager of the respondent compiled a report recommending that the applicant's lands be changed from recreation to residential. When the matter came before the elected members of Dundalk Town Council and Louth County Council on the 15th and 22nd of September 2009, the members accepted the recommendation to change the zoning back to residential. On 23rd September, 2009, Mr Pentony and Councillor Jim D'Arcy, both telephoned Mr Martin McCaughey the managing director of the applicant, to inform him that the respondent's elected members had voted to return the zoning of the applicant's lands to residential. Mr McCaughey understood from the conversations that the resolution of 22nd September, 2009 was the end of the matter and he took no further steps. In the public consultation that followed, he made no submissions apparently relying on the assumption that the problem had been resolved. Clearly, with the benefit of hindsight, this was unwise. Following this public consultation, the elected members decided on 25th November, 2009, to retain recreational zoning despite a recommendation by the manager to the contrary. The applicant did not learn of this further vote until the 19th March, 2010. It is a measure of his certainty that the problem had been resolved that there could be this delay in his apprehension of what had occurred. H e was not notified by the officials that this apparent volte face had occurred. Once he was informed of what had happened, he took immediate action. In these highly unusual circumstances it seems to me that justice demands that the court take 19th March, 2010, as the relevant date for the purpose of reckoning time. Adopting this approach, proceedings were initiated within eight weeks of the date of his knowledge of the decision made and were brought within time. It is not therefore necessary to look at the issue of extending time.

6.2 The Dundalk and Environs Development Plan 2009-2015, was made jointly by the respondent and Louth County Council. It is contended that the instant application for leave to apply for judicial review should have been made on notice to both local authorities. It is clear to me however that the involvement of Louth County Council was merely to confirm the decision of Dundalk Town Council. In this regard Councillor Mark Dearey states at paragraph 11 of his affidavit of the 16th June, 2010, that:-

> "I attended the meeting of the elected members of Louth County Council on 25th November, 2009. My recollection is that there was not much discussion of the zoning of the lands in question at this meeting. The lands are within the functional area of Dundalk Town Council and Louth Council was merely confirming the decision of Dundalk elected members in relation to their zoning"

It is within the power of the Court to quash only that part of the development plan which relates to the zoning of the applicant's land. Such an order would have implications solely for Dundalk Town Council as none of the applicant's lands involved herein lie within the functional area of Louth County Council. On a formal basis it may have been preferable to join Louth County Council, however in reality Dundalk Town Council is the only authority involved and was well able and did present a full case against the granting of an order of certiorari. If Louth County Council had a point they wished to raise they could have made it through Dundalk Town Council's submissions. I am therefore satisfied that the proceedings are not badly constituted by reason of the failure of the applicant to name Louth County Council as a party to the proceedings.

6.3 It is contended that the decision of the local authority to zone the applicants land was irrational in the sense expressed in O'Keeffe v. An Bord Pleanala [1993] 1 IR39. In order to deem the decision taken by Dundalk Town Council to be irrational the Court would have to be satisfied that there was no material before it capable of supporting its view. The Council did have the manager's report before it when it made its decision. The manager's report summarised the submissions which were made to the Council following the further public consultation. The submissions were all opposed to residential zoning for the plot of land in question. A number of the issues relating to the proper planning and sustainable development of the area were raised in these submissions. It was stated that the existing road would not be able to cope with an increase in traffic and that the recreational facility on this site was used daily. It was further stated that there is at present an abundance of semi-complete dwellings, and that the change in zoning would have an impact on a protected view. I am satisfied that there was relevant material before the Council upon which it could act it's decision was not therefore irrational in the sense expressed in O'Keeffe v. An Bord Pleanala [1993] 1 IR39.

6.4 It is argued that there has been a breach of fair procedures and natural and constitutional justice in this case. It seems to me that there was a crucial opportunity not available to the applicant to make his case. The unfairness to the applicant of not getting a chance to make submissions concerns me. It could have for example pointed out that while this site had been used daily by Quay Celtic, the applicant had spent €350,000 on a new all weather pitch for the club. It could have pointed out that the council itself had sold the applicant some of its land in order to allow access to the land in question. There may have been other relevant submissions the applicant might have made. The councillors were thus deprived of submissions which were relevant to the decision which they had to make. With the benefit of hindsight it could be said that Mr McCaughey should have been more attentive, however he was obviously satisfied from what he heard that there was no further cause for alarm. Normally such assumptions could not avail an applicant in proceedings such as these. However the circumstances are quite unusual and there seems to have been what might be considered unwitting assurance from the council that a mistake had been rectified. In the result when the matter went out to further public consultation the applicant did not put in any submission in support of the change back to residential zoning.

6.5 Moreover, the situation might have been ameliorated had the Council alerted the applicant that they had received submissions and asked the applicant if it wished to make further submissions. In P& F Sharpe Limited v. Dublin City and County Manager [1989] IR 704 Finlay CJ stated at page 717-718 that:-

> "The decision making authority must have regard to all relevant and legitimate factors which are before it and must disregard any irrelevant or illegitimate factors which may be advanced. Parties affected by such a decision must get a fair

and proper opportunity of having their views conveyed to the decision making authority which must act fairly in all respects in arriving at its decision."

While Sharpe concerned provisions of the City and County Management (Amendment) Act 1955, it does seem to me that this statement of principle has application to this case. Whilst it was not a mandatory requirement, it was open to the respondent to invite the applicant to make submissions to it under Section 12 (15) of the 2000 Act, prior to the making of the 2009 Plan. The respondent could have informed the applicant that it had received submissions and asked whether there was anything it wished to say. Given that it was the respondents Town Clerk who informed Mr McCaughey on 23rd September, 2009, that the elected members had resolved to zone the applicant's lands for residential uses in the 2009 plan, the Council should have been mindful of the applicant's rights of fair procedures and natural justice in the making of the plan.

Had the respondent invited the applicant to make submissions under Section 12 (15), it would be difficult for the applicant to contend that its rights to fair procedures had been breached. However, this did not happen. The applicant was not entitled to presume that the land would remain zoned residential but he was entitled to fair procedures when the matter was being considered. The respondent was aware of the applicant's plans for a residential development on the site. The respondent agreed to sell the applicant a strip of land for €155,000 to deal with access to the site. On the 16th June, 2008, the respondent granted the applicant planning permission to build an access road into the site. The applicant spent €350,000 on an all weather pitch for Quay Celtic. It does not appear to me that it was fair or just, in the unusual circumstances herein, that the applicant was deprived of the opportunity to make submissions on the issue of the zoning of its lands.

6.6 It seems to me that an injustice has occurred in this case. The applicant has lost the benefit of residential zoning arising out of what was initially a mapping error by the respondent without getting the chance to say what it wished to say. I make this observation without criticising the respondent's officials. A mistake was made. Such things happen. The officials were quick to admit the mistake and they attempted to rectify it. Mr Pentony advised the applicant of the need to make a submission. Furthermore on both occasions when the matter came before the elected members of the respondent and Louth County Council the County Manager tried to have the mistake rectified by recommending the lands be zoned residential.

6.7 I also would not criticise the elected members. The making of a development plan is a function reserved to the elected members. The members were entitled to reconsider matters, submissions were received which raised issues in relation to whether proper planning and sustainable development was best served by zoning the plot in question residential. The elected members fulfilled their duty by giving this matter their full consideration. They were not responsible for the absence of submissions from the applicant. Nonetheless in the circumstances of this case an injustice has occurred. The decision to zone the applicant's lands as recreational without the applicant being afforded an opportunity to make submissions thereon was in breach of the applicant's right to natural and constitutional justice. Where the essentials of natural and constitutional justice have not been followed, certiorari is an appropriate remedy. The Court will therefore exercise its power under section 50 (9) of the Planning and Development Act 2000, to sever and quash that part of the Development Plan which refers to the applicant's lands. The remainder of the plan remains unaffected. The question of the zoning of the applicant's land will be remitted back to the respondent whose elected members should have the opportunity to consider submissions from all interested parties before reaching a decision.