Neutral Citation Number: [2013] IEHC 83

THE HIGH COURT

[2011 No. 1165 J.R.]

IN THE MATTER OF SECTION 180 OF THE PLANNING AND DEVELOPMENT ACT 2000

BETWEEN

WHITE MAPLE DEVELOPMENTS LIMITED AND CASTLEWIN PROPERTIES LIMITED

APPLICANTS

AND

DONEGAL COUNTY COUNCIL AND

BUNDORAN TOWN COUNCIL

RESPONDENTS

JUDGMENT of Mr. Justice Hogan delivered on 26th February, 2013

1. In these judicial review proceedings the applicants seek an order of *mandamus* compelling the respondents to take in charge certain housing developments under the provisions of s. 180 of the Planning and Development Act 2000 (as amended) ("the 2000 Act"). The applicants are development companies and they were involved in the construction of some 167 houses in two separate developments, Maple Drive and Ross View, in Magheracar, Bundoran, Co. Donegal. These developments were completed in 2006.

2. The companies then sought to have the developments taken in charge and engaged for this purpose with senior local authority personnel attached to Bundoran Town Council. The Town Council's engineer identified certain further works that required to be carried out and these matters were then duly attended to by the applicants to the Council's satisfaction.

3. At that point, the applicants then applied in May 2010 for the two developments to be taken in charge. It should be said that no issue has been raised by the respondents as would suggest that the requirements specified by s. 180(1) (such as, for example, compliance with the terms of the various planning permissions) have not otherwise been satisfied by the applicants: the only question is whether the applicants have actually applied to the Council to have the estates taken in charge *pursuant to s. 180(1).*

4. The applicants formally applied for the housing estates to be taken in charge on 27th May, 2010. As it happens, this application was made pursuant to a non-statutory scheme which the Council operates for this purpose in parallel to the statutory scheme, If the extent to which the applicants realised the potential significance of this is to some degree unclear, the pre-printed form which was completed and signed on their behalf provided:-

> "I hereby apply for the above services to be taken in charge of the local authority, Donegal County Council. I am aware that the takeover if agreed will be subject to the terms as detailed overleaf and such further terms as may be determined by the local authority."

5. The final page of the form set out a number of general terms and conditions including condition No. 10:-

> "It is acknowledged that this application for takeover is not made in accordance with the provisions of s. 180 of the Planning and Development Act 2000. Any application for takeover in accordance with that provision [should] be made separately thereunder and will be processed in accordance with the terms thereof."

6. In passing, it may be observed that the Council does not actually have a pre-printed form for applications under s. 180, and all applications for housing schemes to be taken in charge are apparently processed pursuant to the non-statutory scheme unless a specific request is made that the application be treated as an application under s. 180.

7. On the 1st June, 2010, the applicants' solicitor wrote to Donegal County Council indicating its preparedness to transfer the title to the services to the Council as part of the taking in charge procedure.

Section 180(1) of the 2000 Act

8. Section 180(1) of the 2000 Act (as amended) provides:-

> "Where a development for which permission is granted under s. 34 or under Part IV of [Local Government (Planning and Development) Act 1983] includes the construction of two or more houses and the provision of new roads, open spaces, car parks, sewers, water mains or service connections (within the meaning of the Water Services Act 2007) and the development has been completed to the satisfaction of the planning authority in accordance with the permission and to any conditions to which the permission is subject, the authority shall, where requested by the owner carrying out the development, or, subject to sub-section 3, by the majority of the owners of the houses involved, soon as may be, initiate the procedures under s. 11 of the Roads Act 1993."

9. As we have just noted, in addition to the statutory procedure whereby housing estates are taken in charge, Donegal County Council also operates for this purpose a non-statutory scheme for which, it would appear, it has a decided preference. Counsel for the respondents, Mr. Flanagan S.C., was at pains to emphasise the advantages from the perspective of the local authority of a non-statutory scheme of this kind. Specifically, it would seem that the non-statutory procedure has the advantage that it enables the Council to take a transfer of the title to roads and common areas such as would facilitate the provision of adequate services by the public authority to the residents of the estate. Furthermore, the non-statutory scheme is operated by the executive arm of the authority, whereas the statutory scheme involves a decision under s. 11 of the Roads Act 1993 by the elected members in the exercise of their reserved functions.

10. That may well be, but it is important to recall that the non-statutory scheme has no particular legal standing. At the risk of stating the obvious, by virtue of Article 15.2.1 of the Constitution only the Oireachtas can amend the law and Article 28A.2 provides that the powers and functions of local authorities "shall be exercised and performed in accordance with law". Accordingly, this Court, bound as it is to uphold the Constitution and the law, cannot allow a legislative enactment to be diluted, qualified or even undermined by the operation of a non-statutory scheme of this kind.

11. The applicants' solicitors wrote on 15th September, 2011, in the following terms:-

> "Our clients instruct us that a formal application was made in the summer of 2010 by Duggan & Associates, architects and engineers on behalf of our clients for the taking in charge of these estates pursuant to s. 180 of the Planning and Development Act 2000. Please note that under the terms of conditions 5 and 6 for the taking in charge application, the authority are required to acknowledge the receipt of the application within four weeks and the receipt of the application immediately to initiate the procedures under s. 11 of the Roads Act 1993 to take the estate in charge. This has not been done and our client has received no acknowledgement of the application and the authority have taken no steps to initiate the procedures for taking the estates in charge as is required from the statute.
>
> Our clients have been informed that they have met all the pre-conditions outlined in s. 180 of the Planning and Development Act 2000, and it is now incumbent on the authority to initiate the procedures to take all physical aspects of the development including sewers, water mains, green areas, drain and all ancillary facilities in charge. The Council itself has a statutory obligation to immediately initiate the procedures under s. 11 so that the estate may be taken in charge. It is entirely unacceptable that the application has been before the authority for a period of over one year and no steps have been taken or no acknowledgement received."

12. The letter further called upon the Council to take immediate action and when no response was forthcoming, the applicants applied on 19th December 2011 to this Court for leave to apply for judicial review and such leave was duly granted by Ryan J. It is not really in dispute but that no action had been taken by the Council either on foot of the original application of May, 2010 or by virtue of the September, 2011 letter.

13. In response, however, to the commencement of the judicial review proceedings, on 31st January, 2012, the solicitors for the Council wrote to the applicants' solicitor suggesting as that they seemed minded to pursue an application under the statutory scheme, they should now formally apply under s. 180 which, it was contended, they had not done to date. Their applicants were accordingly reminded that they had not actually applied under the statutory scheme and that the Council took the view that there had been no application to date under section 180.

14. One may fairly surmise that the applicants did not really care about the legal niceties of the situation or whether they had actually applied under the statutory or the non-statutory scheme. Some six years after the completion of the estates, the applicants' priority was simply that the estates now be taken in charge by the local authority and the exact legal mechanism whereby this was to be achieved was a matter to which they were candidly – and understandably - indifferent. As far as they were concerned they were legally entitled to have the Council take steps to have the two estates taken in charge and there was, frankly, so far as they could discern, little evidence that the Council was measuring up to its legal responsibilities.

15. It is probably unnecessary for present purposes to look any further than the actual terms of the letter of 15th September, 2011. In that letter the applicants' solicitors unambiguously called upon the Council to perform its legal duty to initiate the statutory taking in charge procedure under s. 180(1) of the 2000 Act. It is accepted that the requirements of the sub-section are otherwise satisfied, so that in effect the only basis for resisting the application for mandamus is that the applicants first made an application under the non-statutory scheme and that it would now be necessary for them to make a separate application under s. 180(1) before such a request would be entertained.

16. Reviewing the evidence as a whole, I think that I am entitled to draw the inference that the Council found the statutory scheme to be an inconvenient one and it is unwilling to operate it unless it is actually compelled to do so, whether by legal proceedings or other force of circumstances. Here the failure to provide applicants with a form in respect of s. 180 applications is telling. It is true that the form actually supplied by the Council to persons who request that certain housing estates be taken in charge does state expressly that the application is not to be treated as one made under s. 180, but the potential significance of this would not be apparent to the general public and might only be appreciated by the local government specialist.

Conclusions

17. The short answer to all of this is that the taxpaying public are entitled to suppose that their applications will be dealt with by the Council in accordance with law and not by reference to non-statutory schemes which the Council has itself been pleased to create. If, in the present case, there had indeed been some misunderstanding on the part of the Council so far as the precise intentions of the applicants were concerned, it could have responded to the letter of 15th September, 2011, by requesting confirmation that the applicants were now seeking to have the estates taken in charge by reference to s. 180(1) and, upon receipt of such confirmation, thereafter taking immediate steps to initiate the statutory procedure.

18. Whatever may have been the situation prior to that date, as we have seen, the 15th September letter unambiguously called upon the Council to discharge its legal obligations under section 180(1). The Council has not done so to date. As it has offered no reason acceptable to the Court for its failure to discharge this legal obligation, it follows that I find myself coerced to make an order of mandamus compelling the Council forthwith to take steps to initiate the s.180 procedure so far as the applicants' request to have the Maple Drive and Ross View estates taken in charge is concerned.