Neutral Citation Number: [2010] IEHC 16

THE HIGH COURT

2008 1234 JR

BETWEEN

WEST WOOD CLUB LIMITED

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

DUBLIN CITY COUNCIL

NOTICE PARTY

JUDGMENT of Mr. Justice Hedigan delivered on the 26th of January 2010

1. These proceedings concern an application for leave to apply by way of judicial review pursuant to s.50A of the Planning and Development Act 2000 ("the Act of 2000"), as amended by the Planning and Development (Strategic Infrastructure) Act 2006. It was agreed by the parties that the hearing of this matter should proceed by way of a "telescoped hearing", that is, on the basis of the application for leave and the substantive grounds being heard together.

2. The applicant is a limited liability company which owns a sports and leisure centre at Clontarf Road, Fairview, Dublin 3. Its facilities include a 50 meter swimming pool, seven indoor tennis courts, three outdoor tennis courts, an indoor basketball court, a 24,000 square foot gym, dance studios, an indoor running track, a climbing wall, child care facilities, a spa, a sports shop, a café and a restaurant.

3. The respondent is an independent appellate authority, established pursuant to the Local Government (Planning and Development) Act 1976 charged with the determination of certain matters arising under the Planning and Development Acts 2000 to 2006.

4. The notice party is the local authority with responsibility for the administrative area of the City of Dublin. One of its functions is the control, registration and decision-making for new developments, in particular, through granting or refusing applications for planning permission.

Planning History

5. On the 7th August, 1998, the applicant was granted planning permission by Dublin Corporation, the predecessor to the notice party, for the development of lands adjoining Fairview Park. Provision was made in the plans, which were approved, for, *inter alia*, a restaurant use. On the 23rd December, 1999, the applicant was granted planning permission in respect of certain alterations to the original grant of permission.

6. The applicant subsequently obtained an intoxicating liquor licence from the District Court. In 2002 the applicant began to operate a bar/disco on the premises called "Bar Code". The notice party took exception to this, primarily on the grounds of the scale of the bar usage. It wrote to the applicant on the 22nd January, 2003, on the 13th February, 2003, and again on the 10th June, 2003, alleging that part of the building was unauthorized for use as a public bar.

7. On the 17th July, 2003, the applicant applied for a declaration pursuant to s.5 of Act of 2000, on a without prejudice basis, as to whether certain matters constituted exempted development including "*the use of that portion of the premises referred to as the 'leisure centre' for use as a leisure centre together with the ancillary use for the sale of intoxicating liquor*." Section 5 of the Act of 2000 enables any person to request in writing a declaration from the relevant planning authority as to whether or not a development is or is not exempted development within the meaning of the Act of 2000.

8. The notice party determined that the development was not exempted development in its decision dated the 21st August, 2003. On appeal, the respondent also determined that the bar usage was not exempted development in a decision dated the 30th January, 2004, and that the use of part of the leisure area for the sale of intoxicating liquor constituted a material change of use, having regard to its scale and the provision of a separate entrance.

9. Enforcement proceedings were commenced by the notice party against the applicant in May 2005 pursuant to s.160 of the Act of 2000 on the grounds that the bar usage was unauthorized development. Those proceedings were adjourned generally on the 17th July, 2007, upon the applicant agreeing to submit an application for retention permission, without prejudice to its position that the development was unauthorized.

10. The applicant then made two separate applications for retention permission on the 5th December, 2007 to the notice party. One of the applications, referred to by the applicant as the "*use application*", was an application for retention of a change of ancillary use of part of the established leisure centre for the sale of intoxicating liquor together with extensions and facilities related to this change of use. The other application, referred to by the applicant as the "*works application*", was for the retention of various other works that had been carried out on the site including various extensions, alterations to approved elevations, retractable awning, signage, portacabins, metal shipping containers, a water feature, a climbing

wall and car parking.

11. The "*use application*" was refused by the notice party in its entirety in a decision dated the 2nd February, 2008. Some of the works as detailed in the "*works application*" were granted retention permission by it and others were refused.

12. The applicant appealed the decisions of the notice party to the respondent on the 1st March, 2008. The respondent received various submissions/observations from third parties, which were not circulated to the applicant. In decisions dated the 12th September, 2008, the respondent refused retention permission in respect of the "*use application*" and only granted retention permission in respect of some of the works in the "*works application*" i.e. north-westward extensions of 243 square meters; offices and storage on the second floor; an increase in roof level from one to three storeys to provide for a climbing wall and one portacabin and metal shipping container.

13. It is these decisions of the respondent of the 12th September, 2008, that the applicant seeks to challenge in these proceedings. It does so by reference to eight principal grounds, which will be dealt with below. The reasons and considerations for the respondent's decision in respect of the "*use application*" were stated in the decision to be as follows:-

> *"1. The proposed retention of use of part of the previously approved Sports Leisure Club complex within the West Wood Leisure Centre for the sale of alcoholic liquor (indicated as 'Bar Code'), by reason of its scale, separate entrances and operational hours, is not considered subservient to the primary use of the site as a sports and leisure centre. The retention of 'Bar Code' a licensed premises, of the scale proposed, for the sale and consumption of alcoholic liquor is a 'non permissible use' as set out in paragraph 14.4.9 and 14.5.0 of the current Dublin City Development Plan. The retention of use would, therefore, materially contravene the "Z9" zoning objective set out in the development plan, which seeks to preserve, provide and improve recreational amenities and open space' and would, therefore, be contrary to the proper planning and sustainable development of the area.*
>
> *2. On the basis of the planning history of the site and the submissions made in connection with the application and the appeal it appears to the Board that the proposed development relates to a site, the use of which is unauthorised for use as a licensed premises, Bar Code, for the sale and consumption of alcoholic liquor. The retention of works associated with the facility as a licensed premises would facilitate the consolidation and intensification of this unauthorised use. Accordingly, it is considered that it would be inappropriate for the Board to consider the grant of a permission for the proposed development in such circumstances."*

14. The reasons and considerations with regard to the "*works application*" are as follows:-

> *"1. On the basis of the planning history of the site and the submissions made in connection with the application and the appeal, it appears to the Board that the proposed development relates to a site the use of which is unauthorised for use as a licensed premises, Bar Code, for the sale and consumption of alcoholic liquor. The retention of works associated with this facility as a licensed premises would facilitate the consolidation and intensification of this unauthorised use. Accordingly, it is considered that it would be inappropriate for the Board to consider the grant of permission for this element of the development in such circumstances.*
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> *2. It is considered that the Bram Stoker Museum/Dracula Experience is an intensification of use on a severely restricted site, would constitute overdevelopment of the site by reason of access arrangements for this element of the development proposed for retention and would, therefore, be contrary to the proper planning and sustainable development of the area.*
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> *3. The use of portacabins and shipping containers as a permanent/semi-permanent storage facility would constitute overdevelopment of the site and would be unacceptable for visual amenity and health and safety reasons. This element of the development proposed for retention would, therefore, seriously injure the visual amenities of the area and be contrary to the proper planning and sustainable development of the area.*
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> *4. The vehicle access and car parking proposed for retention would cause traffic conflicts, would constitute substandard development with regard to adequate aisle widths and pedestrian linkages, would provide inadequate segregation for cars and pedestrians and would endanger public safety by reason of obstruction of road users and pedestrians. Furthermore, the proposed retention of car parking at the existing scale, which is additional to the original development on the site, would constitute significant overdevelopment of the site and contravene Dublin City Council Policy T2 to encourage modal shift. The retention of this element of the proposed development would, therefore, be contrary to the proper planning and sustainable development of the area.*
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> *5. The signage proposed for retention relates to an unauthorised and non-conforming use 'Bar Code' and, furthermore, it is considered that the signs proposed for retention would create visual clutter and are excessive in size and would be contrary to the Dublin City Development Plan 2005-2011. This element of the development proposed for retention would, therefore, seriously injure the visual amenities of the area and be contrary to the proper planning and sustainable development of the area.*
>
> *6. The development proposed for retention would, when taken in conjunction with existing permitted development, constitute overdevelopment of this site and would be contrary to zoning objective Z9 'to protect, provide and*

improve recreation amenity and open space.' The retention of this element of the development would, therefore, be contrary to the proper planning and sustainable development of the area."

15. The applicant seeks orders of certiorari quashing the impugned decisions of the respondent, various declaratory reliefs and an order remitting the determination of the appeal to the respondent with a direction to the respondent to consider and determine the said appeal in accordance with law.

Leave requirement

16. Section 50A of the Act of 2000, as amended by the Planning and Development (Strategic Infrastructure) Act 2006, provides that leave shall not be granted to an applicant unless this Court is satisfied that there are "*substantial grounds*" for contending that the decision of the respondent is invalid or ought to be quashed and that the applicant has a "*substantial interest*" in the matter.

17. The meaning of the phrase "*substantial grounds*" was explored by Carroll J. in *McNamara v. An Bord Pleanála* [1995] 2 I.L.R.M. 125:-

"In order for a ground to be substantial it must be reasonable, it must be arguable, it must be weighty. It must not be trivial or tenuous. However, I am not concerned in trying to ascertain what the eventual result would be. I believe I should go no further than satisfying myself that the grounds are 'substantial'. A ground that does not stand any chance of being sustained (for example, where the point has been decided in another case) could not be said to be substantial. I draw a distinction between the grounds and arguments put forward in support of those grounds. I do not think I should evaluate each argument and say whether I consider it sound or not. If I consider a ground, as such, to be substantial, I do not also have to say that the Applicant is confined in this argument at the next stage to those which I believe may have some merit."

18. The above passage was approved by the Supreme Court in In *Re Article 26 and the Illegal Immigrants (Trafficking) Bill, 1999* [2000] 2 I.R. 360 and applied by this Court (McKechnie J.) in *Kenny v. An Bord Pleanála* (*No. 1*) [2001] 1 I.R. 565 and (Kelly J.) in *Mulholland v. Kinsella (No.2)* [2006] 1 I.R. 453.

19. It was not disputed by the respondent that the applicant in this matter has a "*substantial interest*" in the matter. What remains at issue is whether the applicant has raised "*substantial grounds*" in these proceedings.

(i) Preliminary Point

20. The applicant raises a preliminary point as to the propriety of a senior executive officer at the office of the respondent, Mr. Michael Donlon, who was not a member of the respondent's board and who did not attend at board meetings, swearing the respondent's verifying affidavit to the statement of opposition.

21. Mr. Collins S.C., for the applicant, submitted that Mr. Donlon was not an appropriate person to swear a verifying affidavit as he did not have personal knowledge of the matters contained therein. He cited the Supreme Court decision of *Probets v. Glackin* [1993] 3 I.R. 134 which, he submitted, was authority for the proposition that an affidavit grounding an application for judicial review should be sworn by the applicant. He contended that, in the same way, a verifying affidavit should be sworn by a person who can verify facts in light of his or her own knowledge. He argued that members of the Board would clearly be in a better position to swear a verifying affidavit than Mr. Donlon, whose affidavit, in his submission, included several hearsay statements. He also relied on *Gavin v. The Criminal Injuries Compensation Tribunal* [1997] 3 I.R. 132 in which Carroll J. held that the respondent in that case was required to speak on its own behalf and that it was not acceptable for the secretary of the respondent to say what the respondent thought and what its reasons were.

22. Ms. Butler S.C., for the respondent, noted that there was no obligation on a respondent to file a statement of opposition or a verifying affidavit in the context of a leave application. She submitted that the intended statement of opposition filed by the respondent set out, in full, the material which was before it and that the affidavit of Mr. Donlon exhibited relevant documentation. She distinguished the case of *Probets v. Glackin* [1993] 3 I.R. 134 on the grounds that the applicant in that case the applicant's solicitor swore the affidavit grounding the application for judicial review and the applicant sought to rely on it so as to confer an evidential status on the statutory declaration of the applicant exhibited therein. Mr. Donlon, she observed, had not exhibited statutory declarations of other members of the Board. The complaint in *Gavin v. The Criminal Injuries Compensation Tribunal* [1997] 3 I.R. 132 was not analogous, she further submitted, in that, the affidavit of the secretary had set out reasons for the decision of the tribunal that had not been set out by the tribunal itself. She referred also to *The Village Residents Association Limited v. An Bord Pleanála* [2001] 1 I.R. 441 where a verifying affidavit was sworn by a person who was not member of the Board but where Laffoy J. found that as the relevant documentation was before the Court, it enabled her to determine the issues which arose.

23. I am satisfied that the cases of *Probets v. Glackin* [1993] 3 I.R. 134 and *Gavin v. The Criminal Injuries Compensation Tribunal* [1997] 3 I.R. 132 are distinguishable for the reasons outlined above by Ms. Butler and do not assist the applicant's contention that the respondent's verifying affidavit should have been sworn by a member of the Board, in circumstances where, as in *The Village Residents Association Limited v. An Bord Pleanála* [2001] 1 I.R. 441, the entirety of the material upon which the respondent reached its decision is referred to in the statement of opposition (at para. 27) and where Mr. Donlon exhibited relevant documentation in his affidavit including copies of the original grant of planning permission and the amendments made to it in 1999; copies of the Inspector's Report Discharge Form and the s.131 of the Act of 2000 assessment forms; a copy of the Board's planning inspector's report and a copy of the Board's order. The basis upon which the Board made its decisions that are impugned in these proceedings is clear. To stipulate that an individual member of the Board swear an affidavit would be superfluous in such circumstances. The objection of the applicant on this point is, therefore, dismissed.

(ii) The respondent proceeded on a false assumption.

24. The first substantive ground raised by the applicant is that the respondent allegedly proceeded to determine the applications for retention permission on the false assumption that no alcohol could be served on the premises at all, in disregard of the permitted use as a leisure centre with ancillary restaurant usage.

25. Mr. Collins argued that there was a basic obligation in any application for planning permission that the respondent would consider the actual permitted use and then go on to consider the proposed use. He further argued that the express statement of the respondent in the decisions that "*the proposed development relates to a site, the use of which is unauthorised for use as a licenced premises, Bar Code, for the sale and consumption of alcoholic liquor*" disregarded the permitted use of the premises as a leisure centre and its ancillary use. This erroneous assumption, he submitted, fettered the discretion of the respondent.

26. Ms. Butler argued that no user for the sale of alcohol had ever been advanced by the applicant other than the development of a bar/disco in the form and scale presented by it and that was what was rejected. The respondent, she contended, had never been asked to decide on the issue of whether alcohol could be served in the restaurant or in a members' bar and she further contended that it was always within the contemplation of the respondent that there would be an ancillary restaurant use to the leisure centre use. The decision of the respondent in the retention applications did not, she added, exclude this possibility. She characterised the effect of the respondent's decision so as to exclude a public house user on the basis that it was not ancillary or consistent with the zoning objectives for the site.

27. Having regard to the applicant's arguments, I consider it may well be that the threshold required for leave has been reached. However, it is quite clear to the Court, from the evidence on affidavit and the submissions made to it, that what the applicant sought to achieve was the retention of the substantial bar/disco it operates and not the relatively limited bar use that might be ancillary to the sports club. The purpose of such an extensive use, i.e. as a means of providing financial support for the leisure centre, is obvious and the applicant made no secret of what it sought and why. Its independence from the leisure centre facility is clear, in that, it has a separate entrance and has different opening hours, opening much later than the rest of the facility. In addition, it is open to the general public, as opposed to members only. The independence of "Bar Code" is evident from the description of its use as being "*complementary*" to that of the leisure centre, as stated at para.4.3 of the submission of Mr. Kieran O'Malley, town planning consultant, of Kieran O'Malley & Co. Ltd, to the respondent dated the 5th March 2008.

28. I am satisfied that the applicant was not interested in anything else or in anything less than what it sought in its application for retention permission, that is, a bar/disco serving alcohol to the general public, open late at night. Although it was prepared to agree a slight reduction in the limit for the use of 1100 persons, as opposed to 1300 persons, as it proposed to the respondent on appeal, a limited bar service ancillary to the leisure centre was of no interest to the applicant. The respondent was not asked to consider such a proposition. It determined the application as presented to it by the applicant only. The substance of the applicant's complaint that the respondent fettered its discretion by not acknowledging that any alcohol could be served on the premises is not supported by the evidence. Thus, although I grant leave albeit with some doubt, no relief should be granted on this ground.

(iii) The respondent relied on its previous determination under s.5 of the Act of 2000.

29. The applicant also makes the case that the respondent fettered its discretion or pre-judged the appeals by relying on its previous determination in respect of the s.5 declaration and that it did not deal with the applications for retention permissions on their own merits. The applicant complains that the respondent considered itself bound by the terms of its 2004 declaration and that it was unaware that this approach would be taken and so did not obtain an opportunity to make any arguments in this regard.

30. Mr. Collins submitted that the respondent erred in law. He cited the judgment of Keane J. in *Carrigaline Community Television Co. Ltd. v. Minister for Transport* [1997] 1 I.L.R.M. 241 which refers to a number of U.K. decisions dealing with the duty of public authorities with a statutory discretion to listen to each application. He also highlighted the pronouncements of the Supreme Court on the issue of pre-judgment in *O'Callaghan v. Mahon* [2008] 2 I.R. 514 and *Radio One Limerick Ltd. v. I.R.T.C.* [1997] 2 I.R. 291. He submitted that there were considerable differences between the s.5 reference in 2004 and the application for the use retention in 2008 (e.g. specific information was given in the use application as to the proposed occupancy of the club; comparative information was furnished with the use application and the area proposed for the sale of alcohol was smaller in the use application). He argued that the respondent had disregarded the 1997 and 1999 planning permissions in place of the 2004 declaration, in error.

31. Ms. Butler submitted that the inspector's report in the retention applications demonstrated a comprehensive analysis of whether the use should be granted planning permission on its merits by reference to the proper planning and sustainable development of the area, as is required under s. 34(2) of the Act of 2000, having first determined that the use was not ancillary to the permitted use. She noted that the respondent had agreed with the inspector's assessment that the proposed development was not in accordance with the proper planning and sustainable development of the area and she contended that the use decision did not start from the proposition that the issue was already decided. In her submission the respondent considered the application and rejected it on the merits. Moreover, the s.5 declaration formed part of the planning history of the site to which the respondent is permitted to have regard when determining an appeal, as was accepted by Murphy J. in *Fitzgerald v. An Bord Pleanála* (Unreported, High Court, 11th November, 2005).

32. I am satisfied that the applicant has satisfied the requirement of substantial grounds on this point. Dealing with this ground on a substantive basis; it is clear from the terms of the reasons given by the respondent to refuse the works application, quoted at para.13 above, that the respondent first addressed the question of whether the bar usage was ancillary or not. It did not start from the proposition that the issue was already decided. In paragraph 1 it outlined the objective reasons as to why it was not an ancillary use, in its view, i.e. "*scale, separate entrances and operational hours*". I note that in the s.5 declaration the respondent did not find that the use was not ancillary based on its operational hours. The reason given in that declaration as to why the "Bar Code" use constituted a material change of use and thus was not exempted development was "*its scale and the provision of a separate entrance*".

33. The reasons for refusing retention permission go on to outline that the respondent considered that the proposed use "*of the scale proposed*" was a non-permissible use as per paragraphs 14.4.9 and 14.5.0 of the current Dublin City Development Plan ("the development plan") and materially contravened the "*Z9*" zoning objective of that plan, the objective being "*to preserve, provide and improve recreational amenities and open space*." The reasons also acknowledge that the respondent took the planning history of the site into account together with the submissions made to it in reaching its conclusion. In addition, the report of the inspector notes the previous s.5 declaration and its effect but then goes on to state that the main issues in the appeal "*is whether the principle of 'Bar Code' … is acceptable in terms of the proper planning and sustainable development of the area*." In determining that issue she assessed "Bar Code" as against the development plan and the impact upon the character of the area. Therefore, the evidence is such that the respondent embarked upon a new and distinct analysis in the context of the application for retention permission by reference to the factors identified in s.34 (2) of the Act of 2000, as opposed to determining whether the use constituted development or not under s.5 of the Act of 2000.

34. It is also to be observed that the s.5 declaration was never challenged by the applicant. It formed part of the planning history of the site, as mandated by s. 5(5) of the Act of 2000. It seems to me that the respondent was correct to have regard to it when determining the appeals before it. Indeed it was inevitable that the s.5 declaration would be revisited in circumstances where the applicants themselves had formulated their application for retention of an existing use in terms of an ancillary or complementary use to the leisure centre. It was proper that the respondent had regard to a relevant planning decision which it made only a relatively short time before it dealt with the applicant's appeal in the interests of consistency. That was a decision made following a formal process and which was entered in the planning register. Once entered it became part of the planning history of the site and was properly taken into consideration as held by this Court in *Fitzgerald v. An Bord Pleanála* (Unreported, High Court, 11th November, 2005). In my view, for the reasons outlined, it is clear the respondent did not in fact fetter its discretion as contended by the applicant and therefore the relief sought should not be granted.

(iv) There was a breach of fair procedures on the part of the respondent.

35. The next ground to be advanced was that the respondent breached natural justice or fair procedures for the following reasons: i) by failing to inform the applicant of the approach it was going to take in respect of the s.5 declaration; ii) by failing to circulate third party submissions to the applicant, which made allegations of corruption against it, thus depriving it of an opportunity to comment on them; iii) by failing to have regard to the comparative information from St. Vincent's G.A.A. club and city centre licensed premises, as included in the submissions of Mr. Kieran O'Malley of Kieran O'Malley & Co. Ltd., Town Planning Consultants, when reaching its decision. Mr. Collins relied on *McGoldrick v. An Bord Pleanála* [1997] 1 I.R. 497 in arguing that the decisions of the respondent should be set aside on this ground. In that case the respondent was held not to have acted in accordance with fair procedures when it concluded, despite the known willingness of the applicant to supply further evidence if so required, that insufficient evidence had been adduced on an issue of fact and law that hitherto had not been disclosed to him.

36. In response to the allegation that there was a failure by the respondent to give notice to the applicant of its intention to consider its approach regarding the s.5 declaration, Ms. Butler pointed out that the applicant was aware that the s.5 application had been determined against it and made submissions with regard to it. She referred to *Stack v. An Bord Pleanála* (Unreported, High Court, Ó Caoimh J., 7th March, 2003) which concerned inter alia the reliance by the respondent on a previous decision made by it in respect of an adjacent site. She noted that Ó Caoimh J. held that the previous decision was a matter of which knowledge must at least be imputed to the applicants as it formed a matter of public record and that there was no breach of natural justice in relying on it. She noted that this case involved a decision on the same site of which the applicant must have been aware. Ms. Butler submitted that the issues raised by the third parties in their submissions had previously been raised in the submissions to the notice party, of which the applicant was aware. As to the failure to have regard to the comparative information, Ms. Butler disputed the relevancy of the comparators furnished by the applicant. She submitted that the procedure adopted by the respondent conformed to the requirements of fair procedures in the planning context, as set out by Murphy J. in *State (Haverty) v. An Bord Pleanála* [1987] I.R. 485. She distinguished *McGoldrick v. An Bord Pleanála* [1997] 1 I.R. 497 on the basis that the applicant in the instant case was on notice of the submissions made and did get an opportunity to respond to them and in that case Barron J. appeared to be influenced by the fact that the outcome of the respondent's decision would be to brand the applicant a liar. She also relied on *Evans v. An Bord Pleanála* (Unreported, High Court, 7th November, 2003) in support of the proposition that to be circulated submissions must go beyond the original issues raised.

37. The reports of the respondent's inspector set out the matters which she considered to be of relevance, in identical terms in the two reports as follows:-

> *"I consider the following observations, in conjunction with the objections summarised in the planner report above, of relevance:-*
>
> *- Negative impact on residential amenity*
>
> *- Material contravention of the Development Plan zoning 'Z9'*
>
> *- Over development of the site*
>
> *- The two concurrent planning applications (Reg. Ref. 6467/07 & 6466/07) are deliberately misleading and confusing.*
>
> *- Traffic hazard*
>
> *- Set a negative precedent for similar unauthorised development*
>
> *- The Bar Code use is not ancillary to the leisure club use, due to its size and the nature of the use, which is unrelated to sports & leisure uses."*

38. Considering whether these grounds are sufficient to grant leave; with regard to the argument that the applicant should have been notified as to the fact that the respondent intended to take the s.5 declaration into account, this decision formed part of the planning history of the site and was never appealed. It was a decision well known to all and which the applicants needed no invitation to argue. In any event it was the applicant itself that raised the matter in circumstances where it sought to bring the bar/disco use within the concept of an ancillary or complementary use. In *Stack v. An Bord Pleanála* (Unreported, Ó Caoimh J., 7th March, 2003) Ó Caoimh J. held as follows at p.21:-

> *"I am satisfied that the matter as represented in the earlier decision on what has been referred to as the historic file was not in reality a new matter that required the application of s.13(12) of the Act of 1992 or any specific notification to the applicants insofar as the same was taken into consideration by the Board. The earlier decision is a matter of public record and was so at the time and I am satisfied that it was a matter of which knowledge must at least be imputed to the applicants as the decision in question was made before the appeal in the instant case."*

39. In this case the s.5 declaration related to the same site. I am satisfied that it was legitimately taken into consideration by the respondent when reaching its conclusion. I am satisfied that substantial grounds have not been raised with regard to this aspect of fair procedures.

40. As to the failure to circulate the third party submissions; those submissions, which were forwarded to the respondent, raised no new issues. They were broadly the same as those which were raised against the original application to the notice party. The personal abuse contained within some of the submissions received by the respondent was no doubt very insulting and annoying when discovered. However, it was clearly not of any relevance to that which the respondent was charged with determining, i.e. the planning application. Therefore, the submissions did not require to be circulated unless it was the case that the respondent intended to rely upon them, which it clearly did not in the instant case. The personal characteristics, attributes or character of an applicant are not of relevance in the determination of permission for development and are not stipulated as matters to be regarded under s.34 of the Act of 2000.

41. I am satisfied that *McGoldrick v. An Bord Pleanála* [1997] 1 I.R. 497 may be distinguished. The respondent, in that case, drew an adverse conclusion against the applicant based on a submission received by it by a resident's group that was not furnished to the applicant. The applicant in the instant case was on notice of the allegations against it, given that similar allegations had been made against it at first instance. In addition, no finding was made against the applicant in the present case in respect of the submissions and its honesty was not impugned by the respondent.

42. However, if it were the case that the submissions so altered the nature of the original application so as to materially change it or go beyond the original issues raised, then the relevant party may have to be notified so as to allow him address the new scenario. See *Evans v. An Bord Pleanála* (Unreported, High Court, Kearns J., 7th November, 2003).

43. A similar view seems to have been taken by Murphy J. in the *State (Haverty) v. An Bord Pleanála* [2008] 2 I.L.R.M. 485. In that case the further submissions at issue concerned those submitted by or on behalf of a developer. Although the Court found that on the facts of that case the prosecutrix chairman of a resident's association along with that association had made a "*detailed professional argument*" before the planning authority at first instance and the planning board on appeal, it concluded that natural justice did not require that they be permitted to amplify their same arguments in response to the further submissions of the developer's planning consultant, Murphy J. commented as follows at p.493:-

> *"To avoid misunderstandings perhaps I should make it clear that I do not accept and I have not accepted any general proposition that An Bord Pleanála could discharge its obligation to an interested party by delivering part only of the appellant's submission to any person entitled to receive the same. I could imagine cases in which further communications from the developer extended the original submission so radically as to constitute a different or additional case and in that event natural justice might well require An Bord Pleanála to postpone its decision until it had afforded interested parties an opportunity of commenting upon the revised submission. "*

44. I am satisfied that the submissions in question raised no new issues requiring the respondent to circulate them for comment. There is no obligation on the respondent to repeatedly circulate submissions treating of the same matter. I am satisfied therefore that leave should not be granted.

45. As to not taking the comparators of St. Vincent's GAA Club and city centre public houses into account as referred to in Mr. Toal Ó Muire's submissions to the notice party, I am satisfied that these are not valid comparators. The differences between "Bar Code" and the bar at the clubhouse at St. Vincent's GAA Club are so obvious, that the latter was not even pursued as a comparator in the submissions of Mr. Kieran O'Malley to the respondent on appeal. It only featured in the submissions of Mr. Ó Muire to the notice party at first instance. The comparison Mr. O'Malley made in respect of large city centre pubs is also not a relevant comparator to a sports and leisure centre operating in the suburbs of Dublin. Any failure of the respondent to take these comparators into account was therefore in my view justifiable. Substantial grounds not having been demonstrated, I therefore refuse leave in this regard also.

(v) Failure to have proper regard to the Dublin City Development Plan 2005-2011

46. The complaint is also made by the applicant that the respondent failed to have proper regard to the development plan in finding that the retention of the use would constitute a material contravention of the plan and that it failed to take into account that a leisure centre is a permitted use under zoning objectives Z9 of the development plan. Permissible uses in Z9 are outlined as follows:-

"Club house and associated facilities, Municipal golf course, Open space, Public Service installation which would not be detrimental to the amenity of Z9 zoned lands."

47. Mr. Collins submitted that the respondent erred in law in determining that the use, as formulated in the use application, was in material contravention of the development plan, as the service of alcoholic beverages, in his submission, was an ancillary use to a club house's leisure centre. He noted that section 14.5.2 of the development plan provided for uses which are open for consideration and he argued that a licenced premises came within these uses, insofar as it was ancillary to a permitted use and that this relevant consideration was disregarded by the respondent. He further argued, in respect of the works application that there was no basis for the respondent's finding that the application would be contrary to the zoning objective Z9 "*to protect provide and improve recreation amenity and open space.*" He pointed out that the works included the onsite Bram Stoker Museum/Dracula Experience, which he submitted, was not at variance with the aforementioned zoning objective.

48. Ms. Butler submitted that the interpretation and application of a development plan was clearly a planning question. She cited the recent case of *Quinlan v. An Bord Pleanála* (Unreported, High Court, 13th May, 2009) where Dunne J. concluded that matters involving planning policy lie properly within the remit of the planning authority and An Bord Pleanála and so long as decisions are made in accordance with law that the courts should not interfere. In any event Ms. Butler contended that the decision regarding the Bram Stoker Museum/Dracula Experience was made by reference to intensification of use and access arrangements and not by reference to the area zoning.

49. I am satisfied that leave should not be granted on this aspect of the applicant's case for the following reasons; in *Quinlan v. An Bord Pleanála* (Unreported, High Court, 13th May, 2009) in respect of the jurisdiction of the respondent, Dunne J observed:-

"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 its considerations."

50. I am satisfied that it has not been demonstrated to this Court that there was a failure on the part of the respondent to have proper regard to the development plan or that the respondent proceeded on a mistake of law or an egregious error on the facts in this case. This is evident from the terms of the inspector's report and the decision as adopted by the respondent. In particular, with respect to the Bram Stoker Museum/Dracula Experience decision, I am satisfied that there was no error of law. Although such a museum came within the zoning objective of the site, there was a refusal of the retention permission for it by reason of the intensification of the site and inadequate access to it, as is clear from the terms of point 2 of the decision, to be found above at paragraph 14.

(vi) Failure to give adequate reasons

51. It was further submitted that the respondent failed in its duty to give adequate reasons for its decision, in such a manner that the applicant could not ascertain what would be acceptable to it in the future. The cases of *Mulholland v. An Bord Pleanála* (No.2) [2006] 1 I.R. 453; *Deerland Construction Ltd. v. Agricultural Licences Appeals Board* [2008] I.E.H.C. 289; *South Bucks District Council & Anor. v. Porter* [2004] U.K.H.L. 33 and *Sweetman v. An Bord Pleanála* [2007] I.E.H.C. 153 were relied upon by the applicant in this regard. Mr. Collins submitted that *Stack v. An Bord Pleanála* (Unreported, Ó Caoimh J., 7th March, 2003) was not a correct statement of the law in this jurisdiction.

52. Ms. Butler submitted that the level of reasons required to be given by the respondent was not one which was to a high standard. She cited *Dunne & Anor. v. An Bord Pleanála* (Unreported, High Court McGovern J., 14th December, 2006) and *Grealish v. An Bord Pleanála* [2006] I.E.H.C. 310 in support of this contention. She further submitted that the decision of the respondent complied with this standard, given that it had addressed the central issues in its decision. The law in this jurisdiction, she submitted, was not such that a statement of reasons must identify what development is likely to be acceptable on the site in future, rather the reasons must demonstrate that the decision-maker adequately addressed his mind to the substantive issues and must be sufficient to enable a person to consider an appeal or judicially review the decision as per Kelly J. in *Mulholland v. An Bord Pleanála (No. 2)* [2006] 1 I.R. 453. She noted that the only support for the *South Bucks* position was the *obiter* comments of Birmingham J. in *Sweetman v. An Bord Pleanála* [2007] I.E.H.C. 153 but that Ó Caoimh J. in *Stack v. An Bord Pleanála* (Unreported, Ó Caoimh J., 7th March, 2003) had expressly rejected such an approach, the point having been fully argued between the parties. She argued that if the respondent was duty bound to give reasons as to the type of development that might be acceptable in the future it would fetter the discretion of the respondent into the future and would deprive third parties of their right to make submissions as to the proposed development.

53. The applicant has, in my view, demonstrated substantial grounds on this point and leave should accordingly be granted. Addressing the issue substantively; the statutory duty to give reasons is enshrined in s. 34(10) of the Act of 2000 as follows:-

> *"(a) A decision given under this section or section 37 and the notification of the decision shall state the main reasons and considerations on which the decision is based, and where conditions are imposed in relation to the grant of any permission the decision shall state the main reasons for the imposition of any such conditions, provided that where a condition imposed is a condition described in subsection (4), a reference to the paragraph of subsection (4) in which the condition is described shall be sufficient to meet the requirements of the subsection.*
>
> *(b) Where a decision by a planning authority under this section or by the Board under section 37 to grant or refuse permission is different, in relation to the granting or refusal of permission from the recommendation in-*
>
> *(i) the reports on a planning application to the manager (or such other person delegated to make the decision) in the case of a planning authority, or*
>
> *(ii) a report of a person assigned to report on an appeal on behalf of the Board, a statement under paragraph (a) shall indicate the main reasons for not accepting the recommendation in the report or reports to grant or refuse*

permission."

54. In *Mulholland v. An Bord Pleanála* [2006] 1 I.R. 453 Kelly J. found that although the legislature had introduced a statutory duty to give reasons in the Act of 2000, the existing jurisprudence regarding what is required for reasons to be considered as adequate at law continued to apply. In this regard he referred to the cases of *O'Donoghue v. An Bord Pleanála* [1991] I.L.R.M. 750 and *State (Sweeney) v. Minister for the Environment* [1979] I.L.R.M. 35. Murphy J. in *O'Donoghue* summarised the duty to give reasons as follows at p.757:-

"…it is clear that the reason furnished by the Board (or any other tribunal) must be sufficient first to enable the courts to review it and secondly to satisfy the persons having recourse to the tribunal that it has directed its mind adequately to the issue before it. It has never been suggested that an administrative body is bound to provide a discursive judgment as a result of its deliberations …"

Finlay P. in the *State (Sweeney) v. Minister for the Environment* [1979] I.L.R.M. 35 earlier found that the purpose of the requirement for reasons was:-

"…to give … [to an] applicant such information as necessary and appropriate for him, firstly, to consider whether he has got a reasonable chance of succeeding in appealing against the decision of the planning authority and secondly to enable him to arm himself for the hearing of such an appeal."

Kelly J. , having reviewed the statutory framework and relevant jurisprudence outlined what is required to comply with the duty to state considerations and reasons as follows at pp.464-465:-

"The statement of considerations must therefore be sufficient to:-

(1) give the applicant such information as may be necessary and appropriate for him to consider whether he has a reasonable chance of succeeding in appealing or judicially reviewing the decision.

(2) arm himself for such hearing or review.

(3) know if the decision maker has directed his mind adequately to the issues which it has considered or is obliged to consider.

(4) enable the courts to review the decision."

55. McGovern J. in *Dunne & Anor v. An Bord Pleanála* [2006] I.E.H.C. 4000 had regard to *inter alia* the above authorities when assessing the adequacy of the reasons given in the case before him and he also had regard to the following passage from the judgment of Finlay C.J. in *O'Keefe v. An Bord Pleanála* [1993] I.R. 39 at p.76:-

"What must be looked at is what an intelligent person who has taken part in the appeal or has been appraised of the broad issues which had arisen in it would understand from this document, these conditions and these reasons …"

56. In *Grealish v. An Bord Pleanála* [2006] I.E.H.C. 310 O'Neill J. described the duty to give reasons as follows:-

"As set out above the legal obligation resting on the respondents to explain their decisions is a very light one, one could even say almost minimal. It is well settled that they do not have to give a discursive judgment. They do however, as set out in the judgment of Kelly J., in Mulholland's case have to provide sufficient information to enable somebody in the position of the applicant in this case to consider whether he has a reasonable chance in succeeding in judicially reviewing the decision; can arm himself for such a review; can know if the respondent has directed its mind adequately to the issues it had to consider; and finally give sufficient information to enable the court to review the decision. Insofar as two of the main elements of the decision in this case are concerned i.e. reasons and considerations based on scale and non integration, the decision fails on every aspect of the foregoing test. There is literally nothing there to explain why a different conclusion is reached on these issues to that in 1990 or 1997."

57. In the recent case of *Sweetman v. An Board Pleanála* (Unreported, High Court, 9th October, 2009), Birmingham J. refused leave to the applicant on the ground that there was a failure on the part of the respondent to give adequate reasons in circumstances the decision of the respondent left "*no room for doubt as to how and why the Board came to the decision that it did*." He expressed the view that the courts in this jurisdiction take a similar approach to the courts in England as to the adequacy of reasons, referring to the judgment of Lord Brown of Eaton-Under Heywood in *South Bucks District Council v. Porter (No.2)* [2004] 1 W.L.R. 1953 in particular at p.27:-

"Overall, the approach taken in England seems very similar. The observations of Lord Brown of Eaton-under-

Heywood in South Bucks District Council v. Porter (No.2) [2004] 1 W.L.R. 1953 which offers an overview of how the situation is viewed in England and Wales generally accord with the approach of the Irish courts. In that case, Lord Brown said that the decision must be intelligible and adequate and the decision must enable the reader to understand why the matter was decided as it was and what conclusions were reached on 'the principle important controversial issues, disclosing how any issue of law or fact was resolved". Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision maker erred in law, for example, by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. Such adverse inferences will not be readily drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission or as the case may be, it should enable the development's unsuccessful opponents to understand how the policy or approach which underlies the grant of permission may impact upon future, similar applications. The reasons for the decision must be read in a straight forward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. Therefore, a reasons challenge will only succeed if the party aggrieved can satisfy the court that he is genuinely being substantially prejudiced by the failure to provide an adequately reasoned decision."

The applicant places much emphasis on the sentence above to the effect that reasons should indicate how future applications would be dealt with. It is to be observed that the above comments are clearly *obiter*.

58. The only case where this issue was squarely before the Irish Courts and fully argued was in *Stack v. An Bord Pleanála* (Unreported, High Court, Ó Caoimh J., 7th March, 2003). There, an argument was made that the decision to refuse to grant the applicants planning permission was *ultra vires* due to the failure of the respondent to furnish any or adequate reasons for its decision. It was contended that the decision was formulaic and ambiguous, in that, it was not clear if the respondent intended to indicate that no development would be permitted on the site or in such areas or if the Board intended to rule out all development on the site. Counsel for the applicant in that case relied on a passage from the judgment of Lord Bridge of Harwich in *Save Britain's Heritage v. Secretary of State* [1991] 2 All E.R. 10, which is consistent with the position the House of Lords adopted in *South Bucks District Council v. Porter (No.2)* [2004] 1 W.L.R. 1953 as to the adequacy of reasons. That passage reads:-

"The single indivisible question, in my opinion, which the court must ask itself whenever a planning decision is challenged on the ground of a failure to give reasons is whether the interests of the applicant have been substantially prejudiced by the deficiency of the reasons given. Here again, I disclaim any intention to put a gloss on the statutory provisions by attempting to define or delimit the circumstances in which the deficiency or reasons will be capable of causing substantial prejudice, but I should expect that normally such prejudice will arise from one of three causes. First, there will be substantial prejudice to a developer whose application for permission has been refused or to an opponent of development when permission has been granted where the reasons for the decision are so inadequately or obscurely expressed as to raise a substantial doubt whether the decision was taken within the powers of the Act. Secondly, a developer whose application for permission is refused may be substantially prejudiced where the planning considerations on which the decision is based are not explained sufficiently clearly to enable him reasonably to assess the prospects of succeeding in an application for some alternative form of development. Thirdly, an opponent of development, whether the local planning authority or some official body like the respondents, may be substantially prejudiced by a decision to grant permission in which the planning considerations on which the decision is based, particularly if they relate to planning policy, are not explained sufficiently clearly to indicate what, if any, impact they may have in relation to the decision of future applications."

Ó Caoimh J. at p.22, found that the above observations were *obiter* and rejected the statement as being a correct statement of the law in this jurisdiction:-

"With regard to Save Britain's Heritage v. Secretary of State [1991] 2 All E.R. 10, I accept the submissions of counsel for the Board that the observations of Lord Bridge in his speech were obiter as they relate to the failure to grant a developer planning permission and in the particular case the developer had in fact been granted planning permission. I am not at all convinced that the views expressed by Lord Bridge accord with what has been stated as being required in this jurisdiction and I am not inclined to accept this authority as representing a correct statement of the law in this jurisdiction."

59. I am satisfied, having regard to the above and to the jurisprudence on the duty to give reasons as set out in paragraphs 55-59 that the law in this jurisdiction does not go so far as to impose a duty on the respondent to cite what may be acceptable to it in a future application in order to comply with its duty to give reasons. On the facts of this case I am satisfied that the reasons given as to why retention permission was not granted satisfy the requirements as enunciated by Kelly J. in *Mulholland v. An Bord Pleanála* [2006] 1 I.R. 453. Sufficient reasons must be given so as to equip the applicant to appeal the decision or to judicially review it. I am of the view that the reasons given by the respondent conform to this standard. I note however that in fact it does appear that the reasons given do actually provide an indication as what type of development would be likely to obtain permission on the site in question in any future application i.e. changes to "*scale, separate entrances and operational hours*". For the reasons above, I must refuse the relief sought on this ground.

(vii) Irrationality

60. Mr. Collins submitted there was irrationality on the part of the respondent in granting permission in respect of some of the works in the works application and in refusing others. He urged the Court to apply a test of anxious scrutiny in assessing what the respondent did.

61. Ms. Butler submitted that some elements of the works application were undoubtedly connected with the use as a bar/disco, such as the water feature, awning, outdoor chairs and tables. She argued that the construction of a structure could not be divorced from a use which was found to be unauthorised.

62. Leave should be refused to the applicant on this ground. I am satisfied that it would be illogical on the part of the respondent to allow works that are clearly connected with the refused bar/disco use. For example, taken together a water feature, awning, outdoor chairs and tables would constitute a beer garden and thus would complement an unauthorised use.

63. As to the signage, the decision made by the respondent was that some signs proposed for retention constituted visual clutter. This is clearly a planning matter properly within the remit of the respondent. Leave is refused on this ground.

64. In relation to the Bram Stoker Museum/Dracula Experience, the refusal was based on over intensification of the site and inadequate access. This is a perfectly rational reason well within the remit of the respondent. Leave is also refused on this ground.

(viii) Failure to take account of relevant matters and the taking into account of irrelevant matters

65. The applicant made the case that the respondent had regard to an irrelevant consideration based on the fact that a note of a pre-planning consultation between the applicant's representatives and the planning authority, prepared by the planning authority, was not contemporaneous and omitted relevant information, in particular the alleged view of the planning authority that it did not have a difficulty with some of the development. The consultations took place in accordance with s.247 of the Act of 2000.

66. Ms. Butler submitted that although there was a statutory basis for pre-planning consultations that the content of those discussions were not binding on the planning authority and cannot be relied on. She characterised the obligation on the planning authority under s.247 of the Act of 2000 as being quite limited, a written record only being required for the benefit of the planning authority to ensure consistency in its position. Even if the Court were to hold that the note was insufficient, in her submission it was evident that the respondent was fully appraised of the applicant's position that the planning authority had led it to believe that it would receive permission for the works.

67. The note was exhibited in the second affidavit of Patricia Hyde, sworn on the 3rd July, 2009. The relevant segment reads as follows:-

> *"Proposed Development: Main issue discussed was the regularisation of unauthorised public bar and nightclub at the premises, lesser issue was regularisation of minor extensions to the premises, e.g. lift shaft and corridor.*
>
> *…*
>
> *Was proposal broadly acceptable? No*
>
> *No 29 zoning precluded the use of the premises as a large public bar and nightclub."*

68. It is, clearly, a terse account of events but all that is required under s.247(5) of the Act of 2000 is that a record in writing be kept of "*any consultations … that relate to a proposed development including the names of those who participated in the consultations, and a copy of such record shall be placed and kept with the documents to which any planning application in respect of the proposed development relates*". What the planning authority is required to do during the course of these discussions is outlined in s.247(2) as follows:-

> *"(2) In any consultations under subsection (1), the planning authority shall advise the person concerned of the procedures involved in considering a planning application, including any requirements of the permission regulations, and shall, as far as possible, indicate the relevant objectives of the development plan which may have a bearing on the decision of the planning authority."*

69. Section 247 (3) contains the following disclaimer:-

> *"The carrying out of consultations shall not prejudice the performance by a planning authority of any other of its functions under this Act, or any regulations made under this Act and cannot be relied upon in the formal planning process or in legal proceedings."*

70. The above provisions make it clear that the pre-planning consultations are precluded from being relied upon in the planning process. They serve mainly to advise an applicant of the relevant procedures in the planning sphere and the aspects of the development plan relevant to their application. In circumstances where they cannot be relied on in the planning process it is difficult to see how a failure to comply with any requirements in relation thereto could invalidate the decision reached at the end of that process. The applicant must be refused leave on this ground.

71. The applicant also complained that the respondent had misconstrued a photograph (photograph no. 4) which showed portacabins on an adjacent site which, it was alleged, the respondent took to be on the site of the applicant leading it to refuse permission for containers on the site on the grounds of visual amenity.

72. Ms. Butler submitted that there was no doubt that the location of the portacabins on the adjacent site were identified to the respondent. She referred to the inspector's report in this regard. For the respondent to have been misled, in her submission, would have meant that the members of the board misread the map, which clearly displayed the boundaries between the applicant's site and the adjacent site and ignored the submissions of Mr. Ó Muire, on behalf of the applicant, such a sequence of errors being an unsustainable proposition, in her submission.

73. I am satisfied that there is no evidence put forward to suggest that the respondent did not understand the exact location of the containers on site. The photograph clearly shows what are shipping containers and what are portacabins on the adjacent site. The map itself specifies and names the portocabins as belonging to Irish Rail, who operate on the adjacent site. For these reasons, substantial grounds have not been raised on this point and accordingly, leave should be refused.

Summary

74. For the reasons given above, I refuse leave in respect of the following grounds that were raised; breach of fair procedures; the failure to have proper regard to the development plan; the irrationality of the decision and the failure to take into account relevant matters and the taking into account of irrelevant matters. In respect of the remaining grounds; i.e. that the respondent proceeded on a false assumption; that the respondent relied on its previous determination under s.5 of the Act of 2000; that there was a failure to give adequate reasons, although I consider it was appropriate to grant leave, on substantive examination I must refuse the reliefs sought by the applicant in this case for the reasons as outlined above in this judgment.