Neutral Citation Number: [2011] IEHC 555

THE HIGH COURT

JUDICIAL REVIEW

[2009 No. 645 J.R.]

IN THE MATTER OF SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 2000

BETWEEN

KEN MAHON

APPLICANT

AND

CORK CITY COUNCIL

RESPONDENT

JUDGMENT of Ms. Justice Dunne delivered the 21st day of October 2011

This is a case, in which I previously delivered judgment in respect of two sets of judicial review proceedings on the 22nd December, 2010. The proceedings concerned the zoning of certain lands at Bishopstown, in the City of Cork as public open space. I refused the applicant the reliefs sought by him in those proceedings. It is not necessary to rehearse in detail the issues and arguments set out in those proceedings again, save to refer briefly to the background of this matter as set out at

p. 3 of my earlier judgment where I noted as follows:-

> "The applicant herein is the owner of land and premises known as 1 Parkgate Villas, Bishopstown Road, Cork, together with one Jason Healy. The lands and premises consist of a dwelling house and a green area of in or about 0.66 hectares in total. The applicant acquired the interest in the property together with Jason Healy by an indenture of conveyance dated the 28th October, 2008, made between John McCarthy, Adelaide McCarthy and Jean Morel and Denis McCarthy of the one part and Ken Mahon and Jason Healy of the other part. In the affidavit grounding this application the applicant stated that the property is identified as being zoned 'Residential, Community and Local Services' on the Cork City Development Plan. He said that the subject property was not taken in charge by the local authority and so is not part of a housing estate built in that area but rather remains private land originally retained in the ownership of the builder who built the housing estate at Bishopstown, Cork."

At the conclusion of the judgment previously delivered herein, I said as follows:-

> "I do have a concern about one aspect of the zoning. That relates to the question as to whether or not the zoning of the land as public open space could be understood to include in the dwelling house and its curtilage. There is an issue as to whether the zoning of the house and its curtilage is appropriate or proportionate having regard to the overall objectives of the Development Plan and I will hear the parties further on this aspect of the case."

Subsequently I heard arguments from the applicant and Cork City Council in relation to the question posed by me at the conclusion of that judgment. To some extent the arguments before the court were a reiteration of those previously considered by me in the main proceedings.

Mr. Galligan S.C. in his submissions on behalf of the applicant referred to the zoning history of the property as a whole. He referred to Variation No. 5 which amended Policy NHR 11 of the Development Plan. It provided that certain lands were "deemed to be zoned as 'public open space' to protect and provide for land for recreation, open space and amenity purposes". The 2009 plan zoned lands as public open space which contained a reference in Objective ZO15 to public open space as follows:-

> "To protect, retain and provide for recreational uses, open space and amenity facilities with the presumption against developing land zoned public open space areas for alternative purposes, including public open spaces within housing estates."

Mr. Galligan also referred to that part of the previous judgment herein, where the planning history is set out at pages 11 and 12. He went on to make the point that there was no rationale to the zoning of the dwelling house and the curtilage thereto as public open space having regard to its existing nature and bearing in mind the lack of any basis for the zoning of the dwelling house and its curtilage having regard to the objective of a zoning of land as public open space. It was contended that the zoning of the house and its curtilage as opposed to the remaining lands was disproportionate having regard to the need identified in the policy underlying the zoning of the objective. In this regard reliance was placed on the judgment of the High Court in *Holland v. Governor of Portlaoise Prison* [2004] 2 I.R. 573 at para. 32 where McKechnie J. stated:

> "The limitation [on a constitutional right] should be no more than what is necessary or essential and must be proportionate to the lawful objective which it is designed to achieve."

Mr. Collins S.C. also reiterated some of the points made in the earlier part of the proceedings. His main point was that the 2009 Development Plan was a valid and lawful plan and could not be impugned insofar as it affects the applicant's property.

He went on to note that the Development Plan sets out the zoning and planning objectives for the area. In his written submissions he noted a number of the findings of the court in the judgment referred to. In that regard he noted for example that the zoning of land as public open space did not involve the acquisition or expropriation of the land. He also noted the finding that zoning of the land as

public open space did not, in itself, have the effect of making lands available to members of the public. He further noted that the public had enjoyed access to the lands at Bishopstown for in excess of 40 years. In addition he noted the fact that the object and purpose of zoning is to regulate the future use and development of the land.

He contended that the findings in relation to the lands as a whole applied with the same force to the house and curtilage. In other words the zoning did not involve the acquisition of the house or the curtilage or involve any transfer of any interest in the house, does not make the house and curtilage available to the public and does not give the public any rights in or over the house or their curtilage. It was also noted that the planning is future directed and as was pointed out in the judgment, to some extent, aspirational.

He made the point that the applicant never sought to identify the house and garden as a separate issue for challenge and that no relief was sought in respect of the dwelling house alone. Strictly speaking, that is correct. The applicant did seek the following relief in the statement of grounds:-

> "A declaration that the zoning of lands used as a dwelling house as public open space offends against the right to privacy as enshrined in the Irish Constitution in Article 8 of the European Convention on Human Rights."

However, that particular relief was not pursued at the hearing.

Mr. Collins went on to say that the fact that a house is on the lands is not an exceptional fact. He referred in particular to the provisions of s. 10(2)(a) of the 2000 Act which provides that the Development Plan shall include objectives as follows:-

> "The zoning of land for the use solely or primarily of particular areas for particular purposes (whether residential, commercial, industrial, agricultural, recreational, as open space or otherwise, or a mixture of those uses), where and to such extent as the proper planning and sustainable development of the area, in the opinion of the planning authority, requires the uses to be indicated."

He said that it was not the role of the Planning Authority in preparing a Development Plan to micromanage the planning of a particular area. That was the role of the Planning Authority in considering an application for planning permission.

He went on to make the point that the only basis upon which the zoning of the dwelling house and curtilage could be subject to challenge was on the basis that the designation of the house as public open space was irrational. To that extent he referred to a passage from the decision in *McEvoy v. Meath County Council* [2003]

1 I.R. 208, in which it was stated by Quirke J. at p. 227 as follows:

> "In considering the issue of irrationality the Court is not concerned with the merits of the plan. In order to succeed in their claim on this ground the Applicants must discharge the onus of establishing that the Respondent 'had before it no relevant material which would support its decision' (*O'Keeffe v An Bord Pleanála* [1993] 1 I.R. 39). I am not satisfied that the Applicants have discharged that onus."

It was Mr. Collins' contention relying on that authority that the rational approach taken by the Planning Authority in this case was to have zoned the land as a whole. He pointed out that the house was not occupied and had not been so occupied as a dwelling for a considerable period of time. The purpose of zoning was to set out the future objectives in relation to particular lands and did not curtail the existing use of the land.

By way of reply, Mr. Galligan made the point that the zoning in respect of the planning must be in accordance with proportionality and therefore must be proportional to the objective. In this instance he made the point that the zoning could not be proportionate having regard to the objective required.

In the course of the submissions made in relation to this point, reference was made to the fact that a Development Plan provides for a presumption against development of land zoned public open space for alternative purposes. It was suggested by Mr. Collins that this did not preclude the development of the dwelling house and its curtilage. Nonetheless, it is clear that any development would be a material contravention of the plan. Mr. Galligan made the point in this respect that this was unduly restrictive.

It seems to me that the question I have to consider on this application is whether the decision to zone all of the lands including the house and its curtilage at Bishopstown could be said to be disproportionate, unreasonable or irrational. In the course of the written submissions, reference was made by Mr. Collins to the decision in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 which is the *fons et origo* of the approach to be taken by the court on applications of this kind. I propose to refer to the lengthy passage from the judgment of Finlay C.J. referred to by Mr. Collins in his written submissions. In his judgment Finlay C.J. stated:-

> "It is clear from these quotations that the circumstances under which the court can intervene on the basis of irrationality with the decision-maker involved in an administrative function are limited and rare. It is of importance and, I would think, of assistance to consider not only as was done by Henchy J. in *The State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642, the circumstances under which the court can and should intervene, but also in brief terms and not necessarily comprehensively, to consider the circumstances under which the court cannot intervene.
>
> The court cannot interfere with the decision of an administrative decision-making authority merely on the grounds that (a) it is satisfied that on the facts as found it would have raised different inferences and conclusions, or (b) it is satisfied that the case against the decision made by the authority was much stronger than the case for it.
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> These considerations, described by counsel on behalf of the appellants as the height of the fence against judicial intervention by way of review on the grounds of irrationality of decision, are of particular importance in relation to questions of the decisions of planning authorities.
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> Under the provisions of the Planning Acts the legislature has unequivocally and firmly placed questions of planning, questions of the balance between development and the environment and the proper convenience and amenities of an area within the jurisdiction of the planning authorities and the Board which are expected to have special skill, competence and experience in planning questions. The court is not vested with that jurisdiction, nor is it expected to, nor can it, exercise discretion with regard to planning matters.
>
> I am satisfied that in order for an applicant for judicial review to satisfy a court that the decision-making authority has

> acted irrationally in the sense which I have outlined above so that the court can intervene and quash its decision, it is necessary that the applicant should establish to the satisfaction of the court that the decision-making authority had before it no relevant material which would support its decision."

That decision seems to me to set out as clearly as possible the approach that should be taken by me in considering whether or not the decision to include the dwelling house and its curtilage in the zoning of the lands as public open space was a decision which was disproportionate, irrational or unreasonable. To that extent I think it is necessary to look once again at some of the facts of the case. I noted at p. 39 of the judgment delivered previously by me as follows:-

> "It is not unfair to say that the term [public open space] is intended to be descriptive of an open space to which members of the public have or may be intended to have access. There is no doubt that in the context of the lands at issue in these proceedings the public have enjoyed access to the lands at issue for in excess of 40 years whether as of right or not. The lands have been landscaped and footpaths have been laid across the land as has previously been described. There is no doubt that the public have used the lands as an amenity. That is not to say that the public necessarily have rights over the land."

There is no doubt that in its Development Plan the Council has sought to preserve the lands as an amenity for the public in the Bishopstown area. However, there was never any suggestion that the public had access to the house and its curtilage at any stage. The objective as set out in the Development Plan in Policy 11(3) has already been referred to. The inclusion of the dwelling house and its curtilage in the zoning of the lands as public open space does not, and could not, now or in the future, come within the terms of the objective. I referred in the course of the judgment to a number of phrases used in the Development Plan such as "public open space", "semi private open space", and "private open space". (See p. 38 and 39 of the previous judgment). The dwelling house and its curtilage in this case could not be said to fall within the type of open space contemplated within the Development Plan.

I cannot see any basis upon which the objectives of the Council in its Development Plan can be met now or in the future by the inclusion of the dwelling house and its curtilage in the zoning of the lands as public open space. To that extent and considering the judgment of Finlay C.J. in the case of *O'Keeffe* referred to above, I cannot see that the Council in this case had before it any relevant material which would support its decision to include the dwelling house and its curtilage in the zoning, having regard to the objective of that zoning. It makes no sense. I do appreciate that going back to the original planning permission in the '60s it was contemplated that the dwelling house would be demolished in the future. That never happened and it was also contemplated that the lands would be transferred to the Council. That also never happened. As has been pointed out the Development Plan is forward looking and not meant to look to what was intended to have been done some 40 or more years ago. I can see no logical basis having regard to the objectives of the Council in the Development Plan for the inclusion of the dwelling house and its curtilage in the zoning as public open space. To that extent I will hear the parties further on what appropriate order should be made at this point.