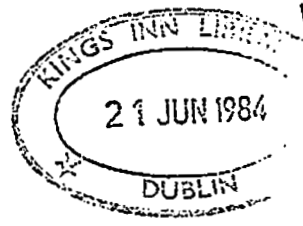


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THE HIGH COURT
STATE SIDE
1983 No. 336 S.S.

IN THE MATTER OF THE LOCAL GOVERNMENT (PLANNING AND DEVELOPMENT) ACTS 1963 TO 1976 AND

IN THE MATTER OF A DECISION OF AN BORD PLEANALA DATED THE 29TH DAY OF APRIL 1983 GRANTING OUTLINE PLANNING PERMISSION FOR DEVELOPMENT AT 39/40 GREAT STRAND STREET AND 26 LOWER LIFFEY STREET TO HIBERNIAN SHIRT COMPANY LIMITED AND R.E. FLANAGAN AND SONS LIMITED

THE STATE AT THE PROSECUTION OF
CORAS IOMPAIR EIREANN

Prosecutor

-and-

AN BORD PLEANALA

Respondent

Judgment of Miss Justice Carroll delivered the 22nd February 1984.

On the 27th of June 1983 the Prosecutor, Coras Iompair Eireann, (herein referred to as C.I.E.) obtained a Conditional Order of Certiorari against An Bord Pleanala (herein referred to as the Board) in respect of an Order of the Board dated the 29th of April 1983 granting outline Planning Permission to Hibernian Shirt Company Limited and R.E. Flanagan and Sons Limited (herein referred to as the Notice parties) for shop/office development at 39/41 Great Strand Street and 26 Lower

Liffey Street, Dublin in accordance with the plans and particulars lodged with Dublin Corporation for the reason set out in the schedule thereto, viz:-

"The area in which the site is located is zoned for the provision and improvement of city centre activities in the Dublin City Development Plan. The proposed development is consistent with the zoning and is not considered to be otherwise contrary to the proper planning and development of the area. While the site is within an area which may be affected by U.I.E. proposals for Dublin Transportation Centre, the Board is not satisfied that it is an essential part of the land required for such a centre and having regard to the status of the relevant U.I.E. proposal, it is not considered that a refusal of outline permission for the proposed development would be warranted by reference to those proposals."

The grounds on which the Conditional Order was obtained were:-

Firstly, that there was an error on the face of the Order

in view of the facts set out in paragraph 22(a), (1), (3) and (4) of the grounding Affidavit of Patrick G. Byrne, viz:-

(a) that in granting the said outline permission the Board mis-directed itself in fact by holding expressly or by implication:-

- (1) that a specific area had not been designated by C.I.E. as the area where a section of the Dublin Transportation Centre was to be sited.
- (3) that the said site was not an essential part of the land required by C.I.E. for part of the Dublin Transportation Centre, and
- (4) that it was not necessarily the settled policy of C.I.E. to set up the Dublin Transportation Centre; and

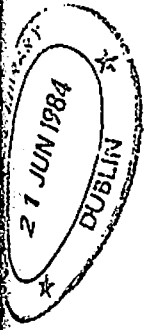
Secondly, that the Board acted in excess of its jurisdiction:-

- (a) in granting Planning Permission in conflict with the Dublin Development Plan 1980
- (b) that in granting the said Planning Permission it did not have regard to the policy and objectives of C.I.E.; and

Thirdly, that the Board acted contrary to natural justice in refusing to give an opportunity to C.I.E. to make representations.

The following facts were established. At a meeting of the Board of C.I.E., held on the 5th of February 1976 C.I.E. approved in principle a plan to have a Dublin Transportation Centre located north and south of the Liffey in the area between O'Connell Street Bridge and Capel Street Bridge in accordance with a plan first put forward in 1969 by Professor Schaechterle and Regierungsbaumeister Holdschuer in a commissioned Report, which was endorsed in 1972 by an Foras Forbartha and further endorsed by two further commissioned Reports, one from Alan M. Voorhees and Associates Limited in April 1975 and one from Messrs. Skidmore Owings and Merrill in October 1975. The area is identified in a map annexed to this latter Report and the drawing of a possible outline design of the Centre on the northside of the Liffey is contained in a further Report by Messrs Skidmore, Owings and Merrill dated November 1975.

at a meeting held on the 4th of November 1976 the Board of C.I.E. approved the acquisition of property within the area



identified by the plan. A map of the property acquired by C.I.E. is exhibited and shows that a not inconsiderable amount of property has already been acquired.

Dublin Corporation were apprised of all these Reports and co-operated closely with C.I.E. In the 1980 Development Plan the following reference is made in the section on policy relating to public transport:-

"Its (i.e. the Planning Authority's) policy is to encourage and facilitate the efficient growth of public transport and its use by the public. To this end the Planning Authority will co-operate with Coras Iompair Eireann in developing a co-ordinated transport policy." and further

"The Planning Authority notes that Coras Iompair Eireann is considering a proposal to establish central city transportation termini adjoining Ormond Quay Lower and Wellington Quay and generally over the stations in the proposed rapid rail transit system and will co-operate in the provision by C.I.E. of any such termini required for more efficient transport services. The lines of the

proposed busways and the rapid rail transit system as proposed by Coras Iompair Eireann are shown on maps 1 to 9."

It is agreed that map 6 is the relevant map and that it does not show the outline of the area proposed by C.I.E. for the location of the transportation centres.

No Permission for development has been granted by the Corporation as Planning Authority, which would be inconsistent with the C.I.E. plan. C.I.E. have undertaken with Dublin Corporation to indemnify the Corporation in respect of any compensation which has to be paid consequent upon a refusal. Permission has been granted for change of user, minor extensions, re-instatement and re-building after fire but no development which would involve demolition and re-development on a large scale has been granted.

In this case Dublin Corporation refused Planning Permission to the Notice parties on the 16th of February 1981. An appeal to the Board was out of time. A further seemingly identical Planning application by the Notice parties was made on the 28th of July 1981 and refused by the Corporation on the 25th of

September 1981. This was appealed within time by the Notice parties to the Board.

Dublin Corporation furnished C.I.E. with a copy of the submissions made on behalf of the Notice parties. Among the documents was a copy of C.I.E.'s map of the proposed terminal super-imposed on an area map. This map shows that the site in question is clearly within the area required for the proposed terminal.

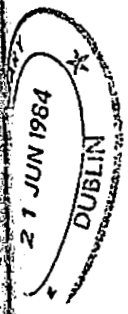
C.I.E.'s answer to the Notice parties' submissions were sent to Dublin Corporation and submitted by them to the Board as coming from C.I.E.

The Board made its Order granting Planning Permission on the 29th of April 1983.

The first ground on which the Conditional Order was granted is that there is an error on the face of the Order.

It is common case that if the C.I.E. proposals did not affect the area, there would be no reason to refuse the Permission which is consistent with zoning and not otherwise contrary to proper planning and development.

If the view of the Board is that because of the status of



C.I.E.'s proposals, i.e. because in its opinion the proposals are so unformulated or uncertain as to time or liable to change, it will not refuse outline Permission for this (or presumably any) type of development in the area consistent with zoning and proper planning and development, it has not stated this four square as the reason for granting Permission.

An additional element is introduced by stating (as a disjunctive and therefore separate reason) that it is not satisfied the site is an essential part of the land required.

If the status of C.I.E.'s proposals at present is rejected for all purposes, the reason given is meaningless because there is no other way the identity of land essential or non-essential to the project can be ascertained.

If the reason given is not to be considered meaningless it must be inferred that the identity of essential and non-essential land is capable of being established now, even though the only source of information is C.I.E.'s proposals and the existing maps relevant thereto.

Obviously the Court must lean in favour of giving a meaning to the expressed reason of the Board and therefore must assume

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that the proposals as they stand at present are capable of identifying essential and non-essential land.

In my opinion, if this view is taken, it is incorrect to state, as appears on the face of the Order, that the site "may" be affected by the proposals, when in fact it is affected. It is also completely contrary to the evidence for the Board to hold, as they must have done, that the evidence before them did not establish that the site is essential for the transportation centre. It is not a question of just being against the weight of the evidence. As the proposals stand at the moment, it is incontrovertible that the site in question forms an integral and essential part of the proposed layout.

In my opinion therefore C.I.E. have established that there is a mis-statement of fact on the face of the Order namely that a specific area had not been designated by C.I.E. for the Transportation Centre and that the site was not an essential part of the area.

However the error is an error of fact and in order for Certiorari to lie, an error of fact must produce an error of law. It seems to me that the mistake of fact is not a mistake which goes to the jurisdiction of the Board. The Board by this

mistake has not given itself power which otherwise it would not have.

If the Board had not made this mistake of fact, if it had acknowledged that the site was at present an essential part of the land required, it would nevertheless have been entitled within its jurisdiction to come to the same conclusion and allow the appeal.

It may seem like bad forward planning to grant planning permission for a site to build an office block which will have to be demolished afterwards, particularly as C.I.E. are willing to underwrite the compensation payable now to any person refused permission because of their plans. But whether it is or not, it is a decision which is peculiarly within the competence and jurisdiction of the Board.

21 JUN 1984
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One of the allegations in the grounding Affidavit is that in granting the outline permission the Board mis-directed itself in fact in holding expressly or by implication that it was not necessarily settled policy of C.I.E. to set up the Dublin Transportation Centre. This does not appear to me to follow by implication from the wording of the schedule to the Order. The reference to the status of the proposals does not imply

that C.I.E. has no settled policy to set up the Dublin Transportation Centre. It was not contested before me that the time when the proposals can be put into effect is uncertain and it was not contested that the proposed layout may be changed. These two elements, which go to the status of the proposals, could in the Board's opinion be sufficient to justify allowing the appeal even though C.I.E. have a firm commitment to the plan and have identified the area.

The next ground on which the Conditional Order was granted was that the Board acted in excess of jurisdiction in granting Planning Permission in conflict with the Dublin Development Plan.

However the extract from the 1980 Development Plan merely notes that C.I.E. is considering a proposal to establish central city transportation termini adjacent to Ormond Quay Lower and Wellington Quay and says the Corporation will co-operate in the provision by C.I.E. of any such termini. The maps referred to in the plan do not show the outline of the area affected by the proposals.

I am of opinion that the expression of co-operation by the

Planning Authority with C.I.E. in the provision of termini, the location of which is not identified on the relevant map, is not sufficient to hold that the provision of transport centres in the location envisaged by C.I.E. forms part of the Dublin Development Plan and accordingly this ground fails.

The next ground is that the Board acted in excess of jurisdiction in that, in granting the Permission, it did not have regard to the policy and objectives of C.I.E.

Section 5(1) of the Local Government (Planning and Development) Act, 1976 provides as follows:-

"The Board shall so far as may in the opinion of the Board be necessary for the performance of its functions, keep itself informed of the policies and objectives for the time being of the Minister, Planning Authorities and any other body which is a public authority whose functions have or may have a bearing on the proper planning and development (including the preservation and development of amenities) of cities, towns or other areas whether urban or rural."

By regulation 65 of the Local Government (Planning and Development) Regulations 1967 (S.I. No. 65 of 1977), C.I.E. is declared to

be a public authority for the purpose of this Section.

Section 5 does not mean that the policy and objectives of C.I.E. are binding on the Board. The Board obviously knew of the existence of C.I.E.'s proposals, considered them but rejected them, as they were entitled to do in the exercise of their statutory function.

The last ground to be considered is that the Board acted contrary to natural justice. I can find no basis for this ground. C.I.E. could have been an objector but they were content to leave matters in the hands of the Corporation. The Corporation advised them of the submissions and C.I.E.'s counter-submissions were laid before the Board. While the Board might have invited C.I.E. to make further or separate submissions under Section 5 there is no obligation placed on them to do so if in their opinion they had sufficient information necessary for the performance of its functions.

In my opinion the cause shown should be allowed and the Conditional Order discharged.



Approved.

Mella Cusell.