THE HIGH COURT

JUDICIAL REVIEW

[2020] IEHC 564

[2020 No. 388 JR]

BETWEEN

MARK HIGGINS, CLARA LUCEY, KEVIN BOURKE, PETER ANDREWS, DONAL RIGNEY, KAREN GIBBONS AND WOLFRAM SCHLUTER

APPLICANTS

AND

AN BORD PLEANÁLA AND THE MINISTER FOR HOUSING, PLANNING AND LOCAL GOVERNMENT, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

GLENVEAGH HOMES LTD. AND FINGAL COUNTY COUNCIL

NOTICE PARTIES

JUDGMENT of Mr. Justice Richard Humphreys delivered on Friday the 13th day of November, 2020

1. Balroy House in the townland of Diswellstown, Castleknock, Dublin 15 was constructed in the early 1970s and is an extensive property consisting of a dwelling house, outbuildings, stables, a tennis court and 1.77 hectares of lands. That property lies on one side of Carpenterstown Road. The immediate opposite side of the road is occupied by a modern housing estate, known as Cottonwood, where the applicants live.

2. The developer in this case acquired Balroy House in August 2018 and proposes to build a housing development involving 192 units. The developer engaged in pre-planning consultations in January and February 2019 and held a tripartite meeting with the board and Fingal County Council on 13th June, 2019.

3. The board issued a notice of pre-application consultation opinion dated 28th June, 2019 stating that the documentation submitted with the consultation would constitute a reasonable basis for an application for strategic housing development. It requested that specific information be included in the application for permission, including in relation to a daylight and sunlight analysis.

4. A planning application was duly made under the Planning and Development (Housing) and Residential Tenancies Act 2016. Section 8(5)(b)(ii) of that Act requires the planning authority to include in its report for the purposes of the application *"a statement as to whether the authority recommends to the Board that permission should be granted or refused, together with the reasons for its recommendation*". For some reason, the Chief Executive did not do that. So there does not seem to have been compliance with the council's obligation under the Act although in fairness the sense of the Chief Executive's report is relatively positive as regards at least the principle of the development, albeit subject to recommended conditions.

5. On 16th March, 2020 the board granted permission for the development. A statement of grounds in the present proceedings challenging that decision was filed on 16th June, 2020 and I have now received helpful submissions from Mr. Neil Steen S.C. (with Mr. Alan Doyle B.L.) for the applicants, from Mr. Brian Foley S.C. (with Mr. David Browne B.L.) for

the board and from Mr. Rory Mulcahy S.C. (with Ms. Suzanne Murray B.L.) for the notice parties. Mr. Vincent P. Martin S.C. and Ms. Suzanne Kingston S.C. appeared for the State respondents essentially in an observing capacity because the challenge to the validity of the relevant policies and the validity of the legislation was postponed pending the outcome of an initial module as against the board. On 29th October, 2020 following the hearing of that initial module, I informed the parties of the order being made and indicated that reasons would be given later.

6. The applicants' points consist of a mix of domestic law issues and EU law issues. How the court is to deal with that situation may vary from case to case, but in the present case the applicants said that the matter could be potentially decided on the domestic issues first, so I heard argument on those issues before deciding whether it was necessary to deal with the European issues. Essentially, four headings were raised in relation to the domestic law challenge - zoning, density, road safety and overshadowing. I should clarify that the implied premise of dealing with the domestic law issues separately was on the assumption that EU law did not impose a more exacting requirement in any relevant respect, so any analysis or in particular rejection of such point doesn't preclude reconsideration of the point from an EU perspective.

Zoning

7. The relevant planning objective RS of the Fingal Development Plan relating to residential zoning says that the stated vision for RS zoning is to *"[e]nsure that any new development in existing areas would have a minimal impact on and enhance existing residential amenity*" (p. 396). The complaint was made that while the inspector and the board considered the impact on existing residential amenity, they didn't satisfy themselves that the development enhanced existing residential amenity and, therefore, acted in material contravention of the development plan.

8. I don't think that is a realistic interpretation of the development plan in this context. The intention of the zoning objective seems to me to require either a positive impact or a minimal negative impact. The two concepts are really disjunctive despite the use of the word "*and*".

9. A second complaint is made that Development Management Standard DMS39 requires that new development should "*respect*" the height and massing of existing residential units, but that the inspector failed to indicate how the proposed development would do so. But it seems to me how the notion of "*respecting*" the height and massing of existing units in this sort of context means essentially having due regard to the impact on existing units, which was done by the board, subject to more specific points under other headings.

Density

10. A complaint is made that the board did not take account of section 2.2 of the Guidelines for Planning Authorities on Sustainable Residential Development in Urban Areas (published in May 2009) or give adequate reasons.

11. First of all, the board did state that it took account of the 2009 guidelines (p. 2 of the board direction). It doesn't normally have to list the particular internal sections it had

regard to. Secondly, while the inspector's discussion of density at paras. 12.3.11 to 12.3.17 doesn't specifically refer to section 2.2 of the 2009 guidelines or indeed to those guidelines at all, it does deal with the issues in substance by considering the proximity of the site to a transport hub. In such circumstances, I don't see any material departure from the objectives that the guidelines are intended to advance.

12. The applicants also complain that the board failed to demonstrate an appropriate methodology of considering what density would be appropriate particularly having regard to the step-down concept given the development's distance from the nearest transport hub which was slightly over 1km away. But it is not for the applicant to dictate the procedures to be adopted. The board considered the relevant matters and made a reasonable decision in relation to density. It is not obliged to conform to some form of additional procedure setting out its methodology that is dictated by an applicant for the purposes of judicial review. It can be reasonably inferred that the board considered that the step-down principle was not particularly decisive in terms of being an objection to the development given the inspector's assessment as to the proximity of the development to a transport hub.

Road safety

13. This issue arises because two options were raised regarding a cycle lane. One was option A, which was the one ultimately decided on, where the cycle lane passes behind existing trees, whereas in option B, the cycle lane would remain alongside the road requiring the removal of trees.

14. The applicants say that option A would be more dangerous for cyclists than option B, particularly if trees obscured the view of cyclists crossing a junction. It is perhaps fair to note that at least one objector favoured option A, whereas others favoured option B. While the inspector's report doesn't expressly deal with the safety issue, the problem for the applicants is that the inspector's view on that is clearly implied by para. 12.11.3 of his report which notes that option B is "*preferable in transport terms*", but that other considerations outweigh this, leading to a preference for option A. That clearly implies that any transport-related benefit such as in road safety terms is outweighed by planning and design considerations. That constitutes an adequate consideration of the point for present purposes.

Overshadowing

15. Overshadowing is pleaded in the statement of grounds under a number of headings. Firstly, as regards the point in relation to the development plan which I have rejected above (ground E39). Secondly, in terms of EU law (grounds E16, 18 and 20), and thirdly and most relevantly in terms of ground E35 which alleges that, "*[t]he Board erred in finding that there would be no overshadowing of existing homes to the north of the proposed development on the basis of an overshadowing report which used figures for 22 March. In the absence of any evidence as to the overshadowing situation between 22 September and 22 March, when the shadows are much longer, the Board had insufficient evidence before it to be capable of reaching that submission, and its conclusion was arbitrary, irrational, and contrary to right reason and common sense.*"

16. How overshadowing should be dealt with in assessing applications for development consent is outlined in two standards in particular. Firstly, British Standard BS 8206-2: 2008 "*Code of Practice for Daylighting*". It is not clear whether that is the current British Standard, but in any event it wasn't exhibited. Secondly, there is a guide published by a private group of British planning consultants, the BRE Group, *Site Layout Planning for Daylight and Sunlight: a guide to good practice (BR 209),* BRE 2011, a document edited by P.J. Littlefair, and now in its 2nd edition. These two standards are referred to in the Urban Development and Building Height Guidelines for Planning Authorities, published in 2018, a matter to which I will return. They are both also referred to in the Fingal County Development Plan at DMS30.

17. The developer's statement of response to the board's consultation opinion dated October 2019 referred to shadow measurements calculated on the basis of a reference date, but didn't clarify the date, which was in fact 21st March around the spring equinox. Two of the objectors, in a submission dated 20th December, 2019 suggested that the study would be flawed if undertaken in autumn or winter. I don't think too much can be read into that because that submission was at a relatively early stage and further information on overshadowing came in later.

18. A daylight overshadow assessment was prepared by expert consultants for the developer, which states at para. 6.3 that for the existing dwelling to the east of the site, overshadowing would be limited to a single hour on the test date and that there would be no overshadowing of houses to the north, that being the Cottonwood estate where the applicants live. That assessment report refers in particular to the 2011 guidelines.

19. In a submission by the residents' association, the applicants disputed the developer's analysis. That submission is dated 31st December, 2019 and says that the proposal involved "*totally obscuring winter sun from the Cottonwood estate*." That statement is contained on the very first page of the submission together with a photograph of the existing sunlight. The matter is further discussed on pp. 5, 6 and 7. The inspector in his report only includes very limited material on this issue at p. 45 of 76 as follows, "12.4.6 A *Daylight and Overshadow Assessment (dated 11th November 2019) has been submitted with the application. This considers inter alia potential overshadowing of neighbouring dwellings. It is concluded that there will be no impact on the dwellings to the north, and a very limited impact on the existing dwelling to the east of the site. 12.4.7 Given the orientation of the dwellings to the south of the site, relative to the proposed development, and having regard to the separation distance from these dwellings to the proposed development, there will be no loss of daylight or sunlight as a result of the proposals, or overshadowing of rear gardens."*

20. As noted above, the applicants complain that this is legally inadequate. The board's legal submission to the court states that "*In particular, as the Developer has set out the use of 21 March as the relevant study date is that same is equinox and in accordance with the Guidelines themselves adopted by the Development Plan. The Board was entitled to have regard to same as showing the average level of shadowing across the entire year*." But

that doesn't altogether reflect the actual decision. The inspector's report doesn't refer to an average level; it baldly claims there will be no impact. Nor has it been established that the guidelines identified 21st March as the only date to be studied or that this is because it provides an average date. For what it's worth, the board's deponents don't positively aver that the board had any regard to the 2008 and 2011 guidelines and as noted above, those guidelines are not exhibited which doesn't appear to comport with the principle that respondents in judicial review should place their cards face up on the table (see *R v. Lancashire County Council,* ex parte *Huddleston* [1986] 2 All E.R. 941 at 945; *Saleem v. Minister for Justice, Equality and Law Reform* [2011] IEHC 55 (Unreported, High Court, Cooke J., 4th February, 2011); and Mark de Blacam, *Judicial Review*, 3rd ed. (Dublin, Bloomsbury, 2017), p. 841, n. 53.

21. The 2008 and 2011 guidelines don't seem to have been before the board and certainly there is no evidence that they were on the board's file. The 2008 guidance is not quoted in the affidavit for the developer on this issue by Mr. Geraghty. That affidavit only quotes two small fragments of the 2011 guidance and neither of those fragments say that 21st March is the only date to which regard should be had. Paragraph 10 of Mr. Geraghty's affidavit quotes para. 3.3.17 of the 2011 guidance to the effect that, "*[i]t is recommended that for it to appear adequately sunlit throughout the year, at least half of a garden or amenity area should receive at least two hours of sunlight on 21 March*". Paragraph 11 quotes para. 3.3.14 of the 2011 guidance that, *"[i]f a space is used all year round, the equinox (21 March) is the best date for which to prepare shadow plots as it gives an average level of shadowing."*

22. No real inference could be properly be drawn from two snippets carefully selected for the purposes of litigation by one side from part of a wider document that isn't produced. But even taking the snippets on their face, they are a long way from the idea that the board could draw valid conclusions on no impact on a property on the basis of an estimate for one day alone. Indeed, Mr. Geraghty acknowledges at para. 14 of his affidavit that "*overshadowing during summer can be more noticeable in some circumstances*", although he goes on to argue why that wouldn't be an issue here. But that is a point not made in the expert report and clearly is a potential material fact from the applicant's point of view that wasn't taken into account because it wasn't so included even with such an explanation.

23. The 2008 and 2011 guidance is not expressly referred to in the inspector's report. It only comes in indirectly because the guidance is referred to in the developer's report, which is in turn referred to. The ministerial guidelines on Urban Development and Building Heights of December 2018 to which I have referred, are mandatory guidelines under s. 28 of the Planning and Development Act 2000. They require *"[a]ppropriate and reasonable regard*" (p. 14), to be taken of the 2008 and 2011 guidance, but those documents are not referenced in the inspector's report or needless to say the board's decision.

24. A duty to have regard to something (let alone appropriate and reasonable regard), can't seriously be complied with if one does not consult the document or if one only consults a

secondary document that makes some passing reference to one of those documents. There is no evidence that the board applied its mind to the original documents concerned, the 2008 and 2011 guidelines.

25. Mr. Foley submits that the inspector was aware of the layout of the site, and the fact that there were trees and hedges in between the proposed development and the Cottonwood estate as well as gable walls of Cottonwood itself; and says that the methodology was established and that is where planning expertise comes in and that everyone is aware that sunlight is different on other days.

26. But those are essentially evidential propositions which are not backed up by evidence. It certainly hasn't been demonstrated in the evidence what the precise "*established methodology*" is or that that was complied with here. It would be an assumption too far to speculate that the inspector intended to make an assessment by reference to the 2008 and 2011 guidelines and in terms of what, if anything, they say about a reference date (about which one can't be too precise because the documents are not exhibited). Even without access to the actual guidance documents it is clear one reference date couldn't support a definitive statement of no impact on all possible dates. So the inspector's conclusion of no impact is just far too definite given the limited evidence base available to the board.

27. Mr. Mulcahy submitted that there was no evidence that other material would have led to a different conclusion, but that misses the point that the main issue here is whether the board had sufficient evidence for the very definitive statement made. Furthermore, the response to the applicant's point does not totally make sense in that it is obvious that shadows would be longer for a substantial portion of the year. Mr. Mulcahy calls the developer's material "*uncontested expert evidence*" which the board was entitled to accept. That is a bit over-simplistic for at least two reasons:

    (i). the conclusions of the report were contested by the applicants in submissions for clearly identifiable cogent reasons - it is not the position that an expert report can only ever be contested by another expert report even though that may frequently be the case in many contexts; and

    (ii). even more fundamentally this is not a case where the board followed the uncontested expert evidence; it went beyond that and said there was no impact.

28. The report of course did say there was no impact, but that was on the basis of clear qualifications in that it referred to only to a stated reference day. But those qualifications are shorn off in the inspector's report. On that basis the inspector's definitive conclusions in paras. 12.4.6 and 12.4.7 that "*there will be no impact on the dwellings to the north*", a limited impact to the east and no impact to the south are just too definite. On its face, the inspector's report reads straight from the developer's report to a conclusion of no impact.

29. On the particular facts here, this is inadequately supported by evidence or alternatively it must be viewed as irrational. So I would, therefore, uphold both limbs of ground E35. In those circumstances the EU law points don't arise.

Order

30. Accordingly, the order made on 29th October, 2020 was:

(i). the applicant's case on domestic law points was dismissed save as to the issue of overshadowing set out in ground E35 (to clarify, that was intended to be without prejudice to revisiting any such issues from an EU perspective);

(ii). I granted the relief of *certiorari* sought at D1 on ground E35;

(iii). I dismissed the proceedings against the State respondents as being moot; and

(iv). I indicated that subject to hearing counsel I was minded to remit the matter to the board with a direction to reconsider the matter in accordance with the judgment of the court, although that has not yet been ordered because the applicants requested that I adjourn the question of the form of the order for further submissions.