

THE HIGH COURT

[2024] IEHC 328

[Record No. 2022/1074JR]

BETWEEN

CHRISTIAN MORRIS

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

**FINGAL COUNTY COUNCIL AND
TRAFALGAR CAPITAL LIMITED**

NOTICE PARTIES

JUDGMENT of Mr Justice Barr delivered electronically on the 31st day of May 2024.

Introduction.

1. In this application, the applicant challenges the decision of the respondent made on 21 October 2022, to grant permission for a development at Dungriffin Road, Howth, County Dublin. The development involved the demolition of an existing building on the site, and the construction of an apartment block containing 32 units thereon.

2. This application was heard in conjunction with an identical challenge that was brought by Graymount House Action Group and others. At the hearing of the application, Mr Morris, who is a lay litigant, allowed counsel for Graymount House Action Group to go first in relation to the grounds of challenge to the Board's decision. In his submission to the court, Mr Morris adopted all the arguments that had been put forward by counsel for the applicants in that case. He also relied on his written submissions, as constituting his additional grounds of challenge to the decision.

3. The court has delivered judgment in the action, Graymount House Action Group & Ors. v An Bord Pleanála & Ors. (Record No. 2022/1107JR). The grounds of challenge which were relied upon by the applicants in that case, and which were adopted by Mr Morris as part of his challenge to the decision of the respondent, have been dealt with *in extenso* in that judgment. The court will not repeat its reasons herein. This judgment should be read in conjunction with the judgment already delivered in the proceedings brought by Graymount House Action Group. This judgment will solely focus on the additional grounds of challenge as set out by the applicant in his statement of grounds and in his written submissions.

Grounds of Challenge to the Board's Decision.

4. At ground E9 in the statement of grounds, the applicant stated that the decision of the respondent should be set aside because it seemed to ignore the statutory restriction upon new building within a certain distance of an area where a structure already exists, or shall already be allowed to exist by way of an existing and uncontested grant of planning permission. He stated that there appeared to have been "a want of curiosity, or, indeed, diligence" on the part of the Board in arriving at the decision to grant planning permission for the development.

5. This ground of challenge is not specific. The applicant does not specify in relation to what buildings the Board may have ignored the statutory restriction upon new building within a particular distance of where a structure already exists. In his grounding affidavit, he appears to adopt the grounds of appeal that had been lodged by a Mr & Mrs Dillon to An Bord Pleanála in relation to the proximity of the proposed block of apartments to their property. Insofar as they appealed to the first respondent, they appear to have accepted the decision of the respondent on this issue, as they do not appear to be a party to any of the judicial review proceedings brought against the decision of the first respondent.

6. The gravamen of the applicant's complaint in this regard is that there appears to have been a want of curiosity or diligence on the part of the Board in arriving at its decision to grant permission for the development. Want of curiosity and lack of diligence are not legal errors that can justify the grant of relief in an application for judicial review. A general opinion on the part of a member of the public that an administrative decisionmaker lacked curiosity or diligence, does not have the consequence that the decision given, was invalid. The court is satisfied that this ground of challenge to the decision of the first respondent is unfounded.

7. The applicant's second ground of challenge to the Board's decision, was to the effect that the Board had not even approached a proper threshold of showing sufficient regard to the overall circumstances and specific requirements pertaining to waste disposal in general, and in the specific circumstances of the relatively high density of the housing proposed in the development.

8. In his grounding affidavit, the applicant stated that waste disposal was a serious matter, which required exhaustive attention to detail by a decisionmaker. He asserted that neither the respondent, nor the first named notice party, had had due regard to all factors present in the case. He asserted that their approach to the issue of waste disposal, appeared

to be a “let’s talk about it later” approach, which he asserted was not good enough. He stated that that was particularly lacking in the specific environment of narrow, hilly roads and a development on a relatively cramped site.

9. In relation to this ground of challenge, the respondent raised the objection that the applicant was not entitled to raise this issue in the course of his judicial review proceedings, because he had not raised the issue in the process leading to the decision which had been issued by the respondent. In this regard the respondent relied on the decision in *Ballyboden Tidy Towns Group v ABP* [2021] IEHC 648, where the applicant had tried to assert that some developments had not been considered for “in combination effect” with the proposed development. He had not raised that issue before the Board. Humphreys J held that he could not do so in his subsequent judicial review proceedings: see para. 15.

10. The respondent also relied on the decision in *Reid v ABP* [2021] IEHC 230, where Humphreys J held that for an applicant to raise a complaint of substantive illegality for the first time in judicial review proceedings in court, would be a form of gaslighting of the decisionmaker, by seeking to condemn a decision on a point that was never put before the decisionmaker.

11. However, the judge also pointed out that the rule prohibiting raising issues for the first time in judicial review proceedings, rather than at the time of the appeal leading to the decision the subject matter of the challenge, was not a rule of universal application. There are exceptions to the operation of the rule; for example, where the illegality is jurisdictional, there was a less absolute need to raise the point expressly before the decisionmaker, because a decisionmaker cannot go beyond his jurisdiction merely due to the silence of an applicant. Similarly, where the party who becomes the applicant in a judicial review proceedings, is not the applicant in the administrative process, but was, for example, an objector, it was not the function of the objector to correct the other party’s homework, or to point out omissions, the correction of which during the process, would enable the application (which is being opposed) to be corrected and improved. Humphreys J noted that an objector was entitled to rely on the decisionmaker to identify such gaps or omissions. He retained an entitlement to complain to the court (for the first time) if that was not done: see paras. 15-24.

12. Humphreys J also noted that where a case was being made under the EIA Directive, or arguably under the Habitats Directive, it was arguable that a challenge could be made for the first time in judicial review proceedings: see para. 25.

13. In *North Great George's Street Preservation Society v ABP* [2023] IEHC 241, Humphreys J again looked at the gaslighting issue. He held that where the point is one that has to be considered by the decisionmaker autonomously, the decision could be challenged subsequently in judicial review proceedings, even though the issue had not been raised as an objection before the decisionmaker. Whereas, if the point was one which had to be considered only if and to the extent that it was raised in the process, then it must be raised before the decisionmaker, if it was to be part of a subsequent judicial review challenge to the decision: see paras. 29 *et seq.*

14. The court is satisfied that while there is some substance to the argument raised by the respondent, that as the issue of the inadequacy of the provisions in the proposal for waste disposal, had not been raised as an issue before the Board, it could not be raised in the applicant's subsequent judicial review proceedings; nevertheless, having regard to the fact that the applicant in these proceedings is a lay litigant, the court has decided that it will deal with the issue *de bene ese*.

15. The applicant has not been specific in relation to the assertion that the respondent did not have due regard to the issue of waste disposal. The court is satisfied that when one reads the Inspector's report as a whole, on which the Board proceeded to grant the permission, it is clear that the issue of wastewater disposal was considered in some detail. The court is also entitled to have regard to the documents that were before the Inspector relating to waste disposal, where this issue was considered in detail. In addition, the court notes that the issue of waste disposal was specifically addressed in condition 15 attaching to the permission.

16. The court is satisfied that the issue of waste disposal was given adequate consideration by the respondent. There is no substance in this ground of challenge to the decision.

17. The third substantive ground of challenge raised by the applicant was that set out at E11 in the statement of grounds, wherein it was alleged the respondent had not given due consideration to a balance of factors, or specific recognition of the fact that the development as proposed, was a very significant and fundamental departure from building

already in the vicinity. In his submissions, the applicant stated, "the Board ignores the overall impact of such development in such an area".

18. The court is satisfied that this ground of challenge, as articulated, both in the applicant's statement of grounds and in his submissions, are in such generalised terms that they cannot be characterised as a legal error on the part of the decisionmaker. It is not sufficient merely to make a vague assertion that the Board had not adequately considered the nature of a proposed development, having regard to the overall character of an area. In order to pursue a challenge along these lines, it is necessary to provide much more specific information and to point out where the Board made an error of law in reaching its decision.

19. While an applicant is entitled to hold views on the nature, appearance and appropriateness of the proposed development, a difference of opinion between him and the Board in this regard, does not constitute a legal error. The court is satisfied that this ground of challenge is unfounded.

20. The applicant's next ground of challenge was set out at E12, which asserted that the overall approach of the respondent in the matter of "injury" was excessively subjective. This assertion is so generalised as to be almost unintelligible. There is no indication as to what "injury" the applicant is referring. Nor is there any basis on which it could be held that the approach of the Board was "excessively subjective", much less that such approach constituted an error of law on the part of the decisionmaker. Accordingly, this ground is without substance.

21. At E13 of the statement of grounds, the applicant asserted that the Board had not seemed to have given thought to "certain ever evolving extenuating circumstances". This too, is so vague as to be unintelligible. It does not amount to an assertion that there was any specific error of law made by the decisionmaker. Accordingly, I find this ground of challenge to be unfounded.

22. For the reasons set out herein, the court refuses all of the reliefs sought by the applicant in his amended statement of grounds.

23. As this judgment is being delivered electronically, the parties shall have two weeks within which to file brief written submissions in relation to the issue of costs and on any ancillary matters that may arise.

24. The matter will be listed for mention by way of remote hearing, at 10.30 hours on 19th June 2024 for the purpose of making final orders.

