[2020] IEHC 133

THE HIGH COURT

[2018 No. 929 JR]

IN THE MATTER OF SECTION 50 AND SECTION 50A OF THE PLANNING AND DEVELOPMENT ACT 2000 AS AMENDED

BETWEEN

LAURENCE BEHAN

APPLICANT

– AND –

AN BORD PLEANÁLA

RESPONDENTS

JUDGMENT of Mr Justice Max Barrett delivered on 12th March 2020.

1. These judicial review proceedings arise out of a deficient application for substitute consent and a related further development application in respect of a quarry at Rathcoole, Co. Dublin. It is useful to begin with a summary chronology of some key events:

1710 - Quarrying begins on applicant's lands at Windmill Hill, Rathcoole.

09.07.1968 - Permission granted for stone quarrying at Windmill Hill.

24.10.2013 - Application for substitute consent lodged with An Bord Pleanála ("Board").

16.04.2014 - Inspector issues memo. to Board identifying flawed nature of application.

11.05.2015 - Inspector carries out site inspection and prepares related report of 14.05.2015.

25.11.2015 - Application for continued development made under s.37L of the Planning and Development Act 2000 (as amended) ("PADA").

23.05.2018 - Board holds meeting to consider substitute consent and s.37L applications.

21.09.2018 - Board decides to refuse said applications.

16.11.2018 - Within proceedings commence.

2. Section 177E(2)-(3) of the PADA provide, inter alia, as follows:

"(2) An application to the Board for substitute consent shall - …

(c) in accordance with a direction of the planning authority under section 177B(2), section 261A(3)(c)…shall be accompanied by a remedial environmental impact assessment report or remedial Natura impact statement or both that report and that statement, as the case may be…

(f) comply with any requirements prescribed under section 177N…

(3) An application for substitute consent which does not comply with the requirements of subsection (2) shall be invalid."

3. Section 177N(1) of the PADA, as referred to in s.177E(2)(f) empowers the Minister "*by regulations* [to] *make provision for such matters of procedure and administration as appear to the Minister to be necessary or expedient in respect of this Part".*

4. The Planning and Development (Amendment) (No 3) Regulations 2011 ("2011 Regulations") were made, *inter alia,* under s.177N of the PADA. Article 227(2) of those regulations provides, *inter alia*, as follows:

> *"An application for substitute consent shall, in addition to the requirements of section 177E…(b) be accompanied by 6 copies of a location map…marked so as to identify clearly:*
>
> *(i) the land or structure to which the application relates and the boundaries thereof in red,*
>
> *(ii) any land which adjoins, abuts or is adjacent to the site the subject of the application and which is under the control of the applicant or the person who owns the land which is the subject of the application in blue…".*

5. Unfortunately, when one has regard to the foregoing there is a fundamental defect in the application in issue in these proceedings: the six copies of the location map presented redline the wrong lands or, more accurately, a parcel of land (40.875 hectares) that far exceeds the parcel of land (5.95 hectares) to which the application for substitute consent relates. This was not just a slip of the red pen; it was a serious and material defect. What presented, therefore, was, to borrow from s.177E(2)(f) of the PADA an application for substitute consent that did not comply with "*requirements prescribed under section 177N*" and hence, per s.177E(3) of the PADA an *invalid* application for substitute consent.

6. Article 228 of the 2011 Regulations provides, *inter alia*, as follows:

> *"(1) On receipt of an application, the Board shall consider whether the applicant has complied with the requirements of…*[Art. 227].
>
> *(2) Where the Board considers that an application for substitute consent complies with the requirements of section 177E(2) of the Act and…*[Art. 227] *it shall send to the applicant an acknowledgement of the application, stating the date of its receipt.*
>
> *(3) Where, following consideration of an application for substitute consent under sub-article (1), the Board considers that the application for does not comply with the requirements of s.177E(2) of the Act or…[*Art. 227], *and that such non-compliance constitutes a material defect in the application which cannot be readily rectified through the submission of additional documentation, the application for substitute consent shall be invalid and the Board shall return the application to the applicant with a notice stating that the application is invalid and stating the reason or reasons that the application is invalid and shall return to the applicant any fee paid with the application."*

7. The court respectfully does not see that the Board could properly have concluded that it had before it an application that complied with Art. 227, for the simple reason that the application patently did not so comply. As it happens, the Board was advised of the difficulties presenting in a memorandum of 16 April 2014 from a planning inspector. The court accepts that the Board is not bound by the inspector and that an inspector's report is but one piece of evidence before the Board which falls to be taken into account by the Board (see, *e.g., M & F Quirke & Sons v. An Bord Pleanála* [2009] IEHC 426; *Craig v. An Bord Pleanála* [2013] IEHC 402). However, the court does not see that it is open to the Board to conclude that it has an application before it which complies with Art. 227 when such application (pursuant to Art. 227(2)(b)) includes six copies of a location map which is, on its face, patently and materially defective, referring to a parcel of land (40.875 hectares) that far exceeds the parcel of land (5.95 hectares) to which the application for substitute consent relates. Discretion in decision-making does not entitle a decisionmaker to decide that night is day; deference to expert decisionmakers does not require a court engaged in judicial review to defer to the utterly wrong; in any administrative or judicial proceedings certain undeniable and unalterable facts present; here one such fact is that, when it came to the six location maps supplied in purported compliance with Art. 227(2), to borrow a colloquialism, the Board was confronted with such a 'mess' as to place the applicant in the type of terrain anticipated by, *e.g., R. v. Rochdale MBC*, ex parte *Tew* [2000] Env. LR 1.

8. The result of all the foregoing is, again, that under s.177E(3) of the PADA the Board had before it an application for substitute consent that was invalid and pursuant to which a substitute consent could not lawfully issue.

9. Art. 228(4) of the 2011 Regulations provides, *inter alia*, as follows:

> *"Where, on inspection of the land to which the application for substitute consent relates, the Board considers that…the information submitted in the application is substantially incorrect…the application shall notwithstanding the fact that an acknowledgement has been sent to an applicant in accordance with sub-article (2) be invalid and the Board shall return the application to the applicant with a notice stating that the application is invalid and stating the reason or reasons that the application is invalid and shall return to the applicant any fee paid with the application."*

10. The court respectfully does not see that the Board could properly have concluded, after the doing of the inspector's site inspection, that it had before it an application that was other than substantially incorrect, for the simple reason that the said application was patently and substantially incorrect. Again, the court accepts that the Board is not bound by the inspector and that an inspector's input is but one piece of evidence before the Board which falls to be taken into account by the Board. However, in all the circumstances presenting, the court does not see that the Board could properly conclude that it had before it an application that was other than substantially incorrect: rather, it had before it an application which, in purported compliance with Art. 227(2), included six

copies of a map that on its face, was patently substantially incorrect, referring to a parcel of land (40.875 hectares) that far exceeded the parcel of land (5.95 hectares) to which the application for substitute consent related (and where, as it happens the patent/glaring material deficiency had expressly been drawn to the Board's attention).

11. In passing, the court notes that it is contended by the applicant, and rightly accepted by the Board, that all of the above-quoted provisions are mandatory in substance and effect. That this is so is clear, *e.g.*, from *Sweetman v. An Bord Pleanála* [2020] IEHC 39; however, the point is conceded and does not require to be decided.

12. Section 126(1) of the PADA provides, *inter alia*, that *"[i]t shall be the duty of the Board to ensure that appeals and referrals are disposed of as expeditiously as may be and…to take all such steps as are open to it to ensure that, in so far as is practicable, there are no avoidable delays"*. Section 177P states that "*Section 126 shall apply in relation to the duty of the Board to dispose of applications for substitute consent*". Mr Behan submitted his (invalid) substitute consent on 24.10.2013. From late-April 2014 it should have been obvious to the Board (it was patently obvious from the documentation submitted) that it had before it an invalid substitute application. Yet it was not until 21 September 2018 that the Board decided the (invalid) substitute consent application. Even if matters were otherwise, even if there was no legal issue presenting (and the court is of the view that there is legal issue presenting) in the fact that An Bord Pleanála proceeded with the (invalid) substitute consent application despite the mandatory provisions referred to above, there was in any event a 17-month period from 22 December 2016 to 23 May 2018 when the Board did nothing to progress the (invalid) application, with no final decision being made until 21 September 2018. So, no matter how one looks at matters, a delay presents (in the court's view from sometime around late-April 2014 – when what presented was, by virtue of 177E(3) of the PADA, an invalid substitute consent application – to May 2018; and in the Board's best-case scenario – which the court does not accept to be the scenario presenting – from December 2016 to May 2018) that is in breach of s.126(1), that violates Mr Behan's constitutional right to fair procedures and which contravenes Art. 41 of the Charter of Fundamental Rights of the European Union and/or the right to good administration that was recognised as a general principle of European Union law in *H.N. v. Minister for Justice, Equality and Law Reform (Case C-604/12)* [ECLI:EU:C:2014:302]. The court respectfully does not see it as a mitigant, certainly not much of a mitigant, that there was a shortage of Board members for a while sometime around mid-2017; and there is no rule of law that staffing issues within an administrative body must inexorably rebound to the detriment of a person making application to same, even if that detriment is 'but' that that person must wait an inordinate/unreasonable time for a decision on such application (here on a patently invalid application).

13. The court does not see that the decision on the s.37 application can stand if the substitute consent decision falls (and it must fall in light of the foregoing findings of the court). The whole concept of further development rests on there being at some point a substitute consent in respect of a related quarry substitute application. Here, a refusal of further development followed (as in truth it had to) once the substitute consent was refused

(though as has become clear in these proceedings, the whole process was infected by the fact that what went before the Board was an invalid substitute consent application which could never lawfully have been successful).

14. So far in the within judgment, the court has largely (and respectfully) agreed with the submissions made by the applicant. However, there are also certain elements of the submissions of the respondent with which the court respectfully agrees, *viz*:

    (1) the applicant claims that a further deficiency which presented in his substitute consent application was a breach of Art. 224(c)(ii) of the 2011 Regulations in that it failed to mention that the application related "*to development consisting of or comprising the carrying out of works to a protected structure*…." However, the application on its own terms did not relate to any carrying out of any works to a protected structure (here a ruined windmill). With the benefit of hindsight, it may now appear arguable that perhaps some of the land that was the subject of the substitute consent process was within the curtilage of the ruined windmill (if one makes the assumption that an entire field comprises the curtilage of the ruined windmill). However, An Bord Pleanála can only ever determine such applications as are before it, not such applications as might be before it;

    (2) much the same point can be made in relation to the applicant's suggestion that his own site notice was deficient, by reference to Art. 223(1)(b)/225. An image/copy of the site notice, as displayed, has not been placed in evidence. However, the evidence that is before the court suggests that what went into that site notice was that what was proposed were quarrying works, with no mention of development of the windmill or its curtilage. There is, however, good reason why the site notice would have been worded so, if it was worded so (again there is a slight lacuna in the evidence in this regard), in that what the applicant understood himself to be proposing was quarrying works, not development of the ruined windmill or its curtilage. Neither An Bord Pleanála nor the court can determine matters by reference to an application that might have been made; they can only proceed by reference to such application as was made.

    (3) the court does not accept that where a party purporting to act pursuant to a s.177E(2) submits a remedial Environmental Impact Statement ("rEIS") that is later found to be deficient, it follows that what was initially submitted was not a rEIS: what was submitted in such a scenario is a rEIS that has later been found to be possessed of one or more deficiencies. In a situation where one or more serious deficiencies was found to present, the Board would presumably refuse the substitute consent by reference (*inter alia* or otherwise) to same.

Conclusion

15. Having regard to the foregoing, the court will grant reliefs (i), (iii), (iv), (vii) (save that it proposes to add the words 'and also in breach of s.126 of the Planning and Development Act 2000, as amended' to the end of the text in the notice of motion, though it will hear the parties in this regard) and (viii) (save that it proposes to add the words 'and also in

breach of the right to good administration, a general principle of European Union law' to the end of the text in the notice of motion, though it will hear the parties in this regard). As to proposed relief (vi), given what was before the Board was an invalid substitute consent application that could never have been successful, it seems more appropriate for the court simply to grant an order of *certiorari* in respect of the decision refusing permission for continued development at the site having An Bord Pleanála Reference No. PL 06S.QD.0003.