THE HIGH COURT
JUDICIAL REVIEW

[2021] IEHC 545
[2020 No. 761 JR]

BETWEEN:

PEMBROKE ROAD ASSOCIATION

APPLICANT

-AND-

AN BORD PLEANÁLA, THE MINISTER FOR HOUSING, LOCAL GOVERNMENT AND HERITAGE

RESPONDENTS

-AND-

DERRYROE LIMITED AND DUBLIN CITY COUNCIL

NOTICE PARTIES

JUDGMENT of The Hon. Mr. Justice Alexander Owens delivered on the 29 day of July, 2021.

1. This ruling is supplemental to my judgment of 16 June 2021.

2. On 21 July 2021 I heard submissions on the points adverted to at paras.15 and 16 of my judgment. In that judgment I concluded that the Board had relied on an inapplicable statutory provision in imposing an obligation on the developer to make a financial contribution in lieu of provision of public open space in the proposed development at Herbert Park. I also concluded that the Board would not have granted permission for the development without a condition requiring that the developer make a contribution to Dublin City Council in lieu of provision of public open space.

3. I referred in that judgment to ss.50A(9) and 146A of the 2000 Act.

4. Section 50A(9) of the 2000 Act provides as follows:

> "If an application is made for judicial review under the Order in respect of part only of a decision or other act to which section 50(2) applies, the Court may, if it thinks fit, declare to be invalid or quash the part concerned or any provision thereof without declaring invalid or quashing the remainder of the decision or other act or part of the decision or other act, and if the Court does so, it may make any consequential amendments to the remainder of the decision or other act or the part thereof that it considers appropriate."

5. Section 146A of the 2000 Act provides as follows:

"(1) Subject to subsection (2)-

(a) a planning authority or the Board, as may be appropriate, may amend a planning permission granted by it, or
(b) the Board may amend any decision made by it in performance of a function under or transferred by this Act or under any other enactment,

for the purposes of –

(i) correcting any clerical error therein,

(ii) facilitating the doing of any thing pursuant to the permission or decision where the doing of that thing may reasonably be regarded as having been contemplated by a particular provision of the permission or decision or the terms of the permission or decision taken as a whole but which was not expressly provided for in the permission or decision, or

(iii) otherwise facilitating the operation of the permission or decision.

(2) A planning authority or the Board shall not exercise the powers under subsection (1) if to do so would, in its opinion, result in a material alteration of the terms of the development, the subject of the permission or decision concerned.

(3) A planning authority or the Board, before it decides whether to exercise the powers under subsection (1) in a particular case, may invite submissions in relation to the matter to be made to it by any person who made submissions or observations to the planning authority or the Board in relation to the permission or other matter concerned, and shall have regard to any submissions made to it on foot of that invitation.

(4) In this section 'term' includes a condition."

6. The Board and Derryroe in written submissions invited me to adjourn these proceedings to enable the Board to process a request by Derryroe to "alter the terms of the development" under s.146B of the 2000 Act. This provision is not relevant. It allows the holder of a permission for a "strategic infrastructure development" (which is defined to include developments within the 2016 Act) to apply to make changes to a development which is already the subject of a permission granted directly by the Board without the necessity for a further planning application under either the 2000 Act or the 2016 Act in cases where the "alteration" proposed is not a "material alteration" of the terms or conditions of the development.

7. The Board and Derryroe are reluctant to suggest that s.50A(9) of the 2000 Act is applicable because the challenge of Pembroke Road Association was in respect of the whole of the permission. There is a concern that s.50A(9) does not give this Court power to declare invalid or quash part of the permission without declaring invalid or quashing the whole permission. What does the phrase "an application is made for judicial review…in respect of part only" in s.50A(9) mean?

8. Virtually every application for judicial review of a planning permission seeks that it be set aside as invalid. If a narrow view of the effect of s.50A(9) of the 2000 Act is correct, that provision does not give this Court any flexibility in dealing with consequences of rules which preclude severability of legally ineffective elements in most cases.

9. Flexibility in judicial remedies to allow for prospective effect of findings of invalidity of legal acts is already part of the jurisprudence of the Court of Justice of the European Union. This is also developing in Irish public law: see paras. 28-32 of the judgment of O'Donnell J. in *Balz and Another v. An Bord Pleanála and Others* [2020] IESC 22, cited to

me. A potential injustice which might arise from rigid application of judicial review remedies consequent on a finding that a planning condition is invalid and not severable was identified by Keane J. in his judgment in *Bord na Móna v. An Bord Pleanála and Galway County Council* [1985] I.R. 205 at pp. 211-212.

10. Section 50A(9) of the 2000 Act gives procedural powers to this Court which allow it, in appropriate cases, to disregard the conceptual position in judicial review that an invalid decision must be treated as void *ab initio* for all purposes or which usually prevent such a decision from ever being treated like the curate's egg; "good in parts". This provision may apply in cases where, prior to enactment of s.50A(9), the normal consequence of a finding of any legal error in judicial review is retrospective nullification.

11. In order to give effect to the statutory intent of s.50A(9) of the 2000 Act, it is necessary to examine the grounds on which a decision or other relevant act is being challenged and treat each ground as a separate challenge. Some grounds of challenge may be sustained on matters which invalidate the process in the sense that each and every step within that process from the point where the legal error was made must be deprived of legal effect. Examples would be failure to give due consideration to a particular matter relevant to the decision to grant permission, or a defect of legally mandated procedure of sufficient seriousness to deprive the deciding body of jurisdiction.

12. Other grounds of challenge may be properly regarded as only relating to a discrete element of the overall decision or other act, even if a consequence of invalidity relating to that part would, but for s.50A(9) of the 2000 Act, be that the decision would be set aside as invalid. If a discrete element of a decision can be identified as legally ineffective on grounds which only relate to that element of the decision, it may be possible to remit that part to the deciding tribunal. Also, in appropriate circumstances, this Court can make consequential amendments to the decision or other act.

13. Pembroke Road Association contends that the consequence of my judgment is that the decision and order of the Board to grant permission for the development must be treated as a nullity. Reliance is placed on judgments in *Bord na Móna v. An Bord Pleanála and Galway County Council* [1985] I.R. 205 and *State (F.P.H Properties S.A.) v. An Bord Pleanála* [1987] I.R. 698 which state that unless it is clear that a permission would have been granted by the competent authority without the particular provision which has been held to be invalid, the whole decision must be treated as invalid. The appropriate order which should follow as a matter of course is that the permission should be set aside and remitted to the Board for a rehearing.

14. Pembroke Road Association submits that s.146(A) does not permit the Board to revisit condition 26 and that the substitution of a new condition 26 would result in "a material alteration of the terms of the development". Reliance is placed on the comment of O'Donnell J. at para.32 of his judgment in *Balz and Another v. An Bord Pleanála and Others* [2020] IESC 22 as indicating that because the "void ab initio" concept underpins a finding of legal invalidity in judicial review proceedings, an order setting aside the invalid decision should result in all cases other than exceptional ones.

15. The courts are careful not to give judicial review remedies in a form which allow benefits of permissions, shorn of invalid provisions intrinsic to those permissions. The courts cannot rewrite planning permissions, except to the limited extent permitted by s.50A(9) of the 2000 Act.

16. The situation here is different. There is no issue that the permission should be regarded as capable of existing independently of a condition imposing an obligation to make a financial contribution to the planning authority in lieu of provision of public open space as part of the proposed development.

17. It was always clear that a condition of the permission which Derryroe applied for would require an additional financial contribution in lieu of provision of public open space. This was acceptable to Dublin City Council and to Derryroe. The obligation to make an additional financial contribution can be validly imposed by the Board for reasons which are not tied in with the "exceptional costs" rationale applicable to special contributions under s.48(2)(c) of the 2000 Act.

18. Judicial review is a discretionary remedy. It is sometimes granted in order to ensure that an administrative body revisits some aspect of a decision and makes a determination in accordance with law. Sometimes, the issue raised relates to the basis on which the administrative body assumed jurisdiction or whether mandatory procedural requirements were complied with. Sometimes, the issue is whether a decision includes some provision which is legally ineffective. Whether it is necessary to treat the procedure which led to an impugned decision as a complete nullity or to remit a matter back for decision in accordance with law on a particular point will depend on the nature of the defect which has been identified and whether it can be remedied.

19. An administrative body may have powers to review its own decisions and alter them. In such cases, that body may correct itself where it has made some legal mistake in performance of functions without any necessity to resort to judicial review.

20. The public interest in proper and efficient administration requires that if procedures are available to administrative bodies to enable them to correct an error, they should exercise these powers. The error might relate to something in a licence or permission which is legally ineffective. The effect of such an error, if uncorrected, may be to render the whole licence or permission ineffective. This is all the more reason why a public administrative body should exercise any powers given to it to put things right. The supervisory jurisdiction of the courts need not be exercised in cases where such errors have been corrected.

21. If a power to correct an error can be exercised by an administrative body, there may be no necessity to grant an order of *certiorari.* The power can be exercised before judicial review proceedings have commenced or at any time during the currency of those proceedings. Such proceedings may be adjourned, even after judgment, to permit this to happen.

22. I see no reason why this corrective exercise should not happen in this case. I am not persuaded that I must or should set aside this planning permission at this stage. Only a small part of the process has miscarried as a result of an error by the Board. The Board relied on an inappropriate statutory provision to impose a condition requiring a financial contribution.

23. The policy of s.50A(9) of the 2000 Act, if that provision is to mean anything at all, does not support the course urged on me by Pembroke Road Association. Even if I were to disregard my view of the purpose and effect s.50A(9), I consider that it is within my discretion to decline to set aside this planning permission without giving the Board an opportunity to revisit condition 26. The circumstances of this case are bordering on those which would entitle me to amend condition 26 of the permission myself in exercise of powers under s.50A(9) by excluding references to s.48(2)(c) of the 2000 Act.

24. The reality is that only one course of action was open to the Board in relation to imposition of this contribution obligation. This was the decision to impose the contribution obligation in lieu of provision of public open space as envisaged by the Dublin City development plan. This decision has already been taken. We are only concerned now with mechanics of implementation which give legal effect to this decision.

25. The wording of s.146A(1)(iii) of the 2000 Act is wide enough to permit the Board to correct the mistake in condition 26 in its decision and order granting permission for this development. The "operation" of the permission will be "otherwise facilitat[ed]" within the statutory language if the Board amends its decision and order by removing condition 26 and replacing it with something legally effective which implements its decision that the developer should make a financial contribution to Dublin City Council in lieu of provision of public open space. The Board has indicated that it is prepared to utilise s.146A(1)(iii) to correct condition 26 and I propose to give it an opportunity to do so. This correction will not involve "a material alteration of the terms of the development".

26. No useful purpose would be served by setting aside the permission at this stage. The most that I would be prepared to do is to make a declaration at some stage that condition 26 in its current form is legally ineffective and in the meantime give the Board an opportunity to amend it by either setting aside the part of its decision and order which relates to that condition and remitting that matter back for a further decision, or by adjourning these proceedings to enable the Board to correct the error by exercising its power under s.146A(1)(iii) of the 2000 Act.

27. As there is a lack of enthusiasm by the Board and Derryroe for the former option, I will adjourn these proceedings to enable the Board to cure the legal defect by exercising its power under s.146A(1)(iii) of the 2000 Act. This matter will be re-listed before me at 10.00 a.m. on 11 October 2021. I will decide on any final orders at that stage.

28. I am not persuaded that the matters raised by Pembroke Road Association relating to demolition of the house at 40 Herbert Park should prevent me from exercising discretion

in the manner which I propose. The issue of whether this action involved unauthorised development is not something which I can decide in these proceedings.

29. No issue arose during the application for permission which could have enabled the Board to refuse permission on grounds of misconduct by Derryroe, even if s.35 of the 2000 Act was applicable. The Board is not a "planning authority" within that section. The conduct of the applicant for permission would not be a relevant factor if the merits of this planning application were reconsidered now.

30. The house at 40 Herbert Park was not a protected structure when the Board decided on the merits of this application. As the house no longer exists it cannot now be designated as a protected structure by Dublin City Council and it is unlikely that this will change. It is not a sensible or realistic course to remit the entire decision for reconsideration on the off chance that protected structure status might somehow become relevant if the Board were to give fresh consideration to whether it should grant permission at this stage.

31. Furthermore, the view I have taken that it is within my discretion to allow limited reconsideration, confined to the discrete element of the permission which is legally ineffective, means that other matters which were not relevant at the time when the Board made its initial decision do not become relevant now. The rule that where a matter is remitted for a fresh decision, the deciding authority must have regard to any new relevant material which may be properly placed before it, cannot apply here.

32. Any manoeuvrings of interested persons with a view to either securing or preventing the inclusion of the building at 40 Herbert Park on the record of protected structures under s.55 of the 2000 Act during the currency of the planning application are not relevant to the exercise of my discretion. I am rejecting the submission by Pembroke Road Association which sought to rely on these matters as part of the basis on which I should set aside the decision of the Board.