

Griffin J.
Hederman J.
McCarthy J.

THE SUPREME COURT

(76/84)

IN THE MATTER OF THE LOCAL GOVERNMENT (PLANNING
AND DEVELOPMENT) ACTS 1963-1982

BETWEEN:

THE STATE (AT THE PROSECUTION OF
JAMES F. KENNY AND DERMOT HUSSEY)

AND

AN BORD PLEANALA

AND

PATRICK B. MEENAN

JUDGMENT delivered on the 20th day of December 1984 by

MCCARTHY J.

(Nem diss.)

This is a further example of the disputes that unfortunately arise between neighbours through the operation of the Planning Acts. On the eastern side of Temple Road, Rathmines at the junction with Richmond Avenue South there are three substantial detached houses - No. 27. (Mr. Kenny), No. 29 (Mr. Hussey) and No. 31 "Thorndale" (Mr. Meenan). On the 21st September 1979, Mrs. Sally Eustace, then occupying Thorndale, applied to Dublin Corporation for outline

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permission to erect a new single storey house of 1,500 sq. feet floor area on a site of about $\frac{1}{6}$ acre at the rear of the house, and notification of grant of outline permission for this development was issued on the 14th January 1980. Neither Mr. Kenny nor Mr. Hussey was aware of the making of the application or of the grant of outline permission; no objection was lodged nor any appeal brought.

In October 1980, Mr. Meenan bought the site clearly with the benefit of the permission (see s. 28(5) of the Act of 1963). He sought and obtained planning permission for a two storey building; Messrs Kenny and Hussey appealed to An Bord Pleanala ("the Board") which by order of the 9th June 1981, allowed the appeal. He tried again and, on the 25th September 1981, Dublin Corporation decided to grant, subject to conditions, permission for the erection of a single storey dwelling on the site; Mr. Kenny appealed and on the 25th February 1982, the Board refused permission for the following reason:

"The proposed (emphasis added) single storey house would, by reason of its visual obtrusiveness and proximity to No. 31 Temple Road, be out of character with houses on Temple Road and seriously injurious to existing residential amenity."

Mr. Meenan tried again - he applied for approval for a single

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storey house in accordance with plans that were lodged with the Corporation which decided to grant such approval. Mr. Kenny appealed (Mr. Hussey through oversight failing to do so but being permitted to have his objection taken into account). This appeal was determined on the 20th May 1983 and the decision was made to grant the approval sought subject to conditions set out in the decision of that date, the third, fourth and fifth conditions being related to visual and residential amenity. The Board, as it was bound to do under s. 26(8) of the Act of 1963 (substituted for the original s. 26(8) by s. 39(g) of the 1976 Act) stated its reasons:

"It is considered that, subject to compliance with the conditions set out in the Second Schedule hereto, the proposed (emphasis added) development would not be contrary to the proper planning and development of the area or otherwise be injurious to the amenities thereof."

On the 27th June 1983, Messrs Kenny and Hussey (the prosecutors) sought and obtained in the High Court (Barron J.) a conditional order of certiorari "to issue directing An Bord Pleanala to send before the Court here for the purpose of being quashed the said order and all records and entries relating thereto on the grounds that the making of the said order was in excess of jurisdiction and was

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contrary to the principles of natural justice in that An Bord Pleanála failed to be consistent in the discharge of its statutory duties." Cause was shown by the Board and Mr. Meenan and, following her judgment of the 23rd February 1984, by order of Miss Justice Carroll, the cause shown was allowed and the conditional order discharged. The prosecutors' appeal, in effect, upon the following grounds as detailed in the notice of appeal:-

"(1) The learned trial Judge erred in law in holding that the first-named respondent was not entitled to refuse the application for planning approval." I pause to observe that the learned trial Judge made no such finding - she held that a grant of outline permission sets the parameters within which the planning authority or the Board must consider application for approval .

"(4) The trial Judge erred in law in holding that the first-named respondent was not obliged to give reasons for its decision to grant planning approval.

"(6) The learned trial Judge erred in law in failing to hold that the principles of res judicata applied to the first-named respondent's decision of 20th May 1983 having regard to its earlier decision of 25th February 1982 in that both decisions involved a common

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central issue, namely the developmental, environmental and town planning consequences of permitting the erection of a single storey dwelling in a garden at the rear of a house in Temple Road, Dublin."

A further ground, not apparently in the notice of appeal, argued to the effect that the original outline permission was abandoned by bringing the other applications for detailed planning permission. As I understand the contention, it was that where an individual has obtained outline permission, and does not pursue the standard course in respect of it - application for planning approval within the outline permission, but a different form of permission in a more detailed or, indeed, in another way, he "abandons" his existing permission. This argument is inconsistent with the wording of s. 29, subs. 1 of the Act of 1976 and s. 2 of the Act of 1982 which sets time limits on the duration of planning permissions - that relevant to the present case providing that permissions granted on or after November 1st 1976 and before October 31st 1983 expire on October 31st 1987 or seven years after the granting of the permission whichever is the earlier; in this case, the outline permission would not expire until September 1986. No authority has been cited in this jurisdiction to

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support the proposition that there can be some form of extra-statutory abandonment of a permission in a manner which the prosecutors contend. Reference was made in argument to Slough Estates Limited v. Slough Borough Council (No. 2) 1969 2 A.E.R. 988 and, 1970 2 A.E.R. 216. The Slough case was considered by the House of Lords in England in Pioneer Aggregates Limited v. Secretary of State (1984) 2 A.E.R. 58 where Lord Scarman expressly condemned the view of the Court of Appeal in the Slough case so far as it concerned a general rule of abandonment - in this case there is no question of abandonment.

Ground 1. Effect of outline permission - the learned trial Judge cited with approval the observations of Barrington J. in The State (Pine Valley Developments) Limited v. Dublin County Council (1982)

I.L.R.M. 169 where he held that the planning authority in considering an application for approval were confined "within the four walls of the outline permission granted in respect of the same lands." In my opinion, this view is correct. It may be that different considerations would apply if in the interval between the grant of outline permission and the application for approval there had been a significant change of circumstances in the area of the

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planning authority, relevant to the application for approval.

Ground 4. The Board has a statutory duty to state its reasons and did so; Ground 5 is that the decision of the Board was contrary to natural justice in failing to give any adequate reasons. No authority has been cited to support the proposition that it is a principle of natural justice that reasons for their decisions should be given by administrative bodies. As I understand the principles of natural justice, there are but two:-

1. Not to be a judge in one's own cause.
2. To hear both sides of the case.

Neither of these rules has been breached; no doubt there is a constitutional requirement of fair procedures in quasi judicial matters; I see no infringement of fair procedures here. The basic answer is that the Board did give such reasons as it was bound to do, when the approval was being granted.

Ground 6. The learned trial Judge expressed her opinion that the principle of res judicata can be applied to a decision of the Board citing with approval the views of Gavan Duffy P. in Athlone Woollen Mills Limited v. Athlone Urban District Council (1950 I.R. 1 at 9).

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I.R. 1 at 9). On the facts she rejected the application of the principle so as to benefit the prosecutors. In my view, she was correct in that conclusion. I do not find it necessary to express a view as to whether an application of res judicata in respect of such decisions although I find it difficult to see how a planning authority can be permitted to come to a new or different view when circumstances do not change.

In the result I reject the several grounds of appeal advanced. The root of the prosecutors' complaint, in reality, is that they never learned of the original application for outline permission brought, in accordance, with the appropriate regulations. It seems to me that their complaint lies, not against the Board as it granted approval not, indeed, against Dublin Corporation as it granted outline permission but rather, against those responsible for the initiation and maintenance of the system of advertising or other publicity for planning permission.

I would dismiss this appeal.

Approved 4.1.83
William L. Conley