

APRILE

49

THE HIGH COURT

1983/347S.S.

STATE SIDE

IN THE MATTER OF THE LOCAL GOVERNMENT (PLANNING AND DEVELOPMENT) ACTS,  
1963 AND 1976

AND IN THE MATTER OF AN APPLICATION FOR RETENTION OF AMUSEMENT CENTRE  
PREMISES AT SOUTH MAIN STREET, NAAS, COUNTY KILDARE

BETWEEN/



DINO APRILE

Prosecutor

-and-

THE COUNCIL OF THE URBAN DISTRICT OF NAAS

Respondent

---

Judgment delivered by O'Hanlon J. on the 22nd November, 1983.

The Prosecutor in this case is the proprietor of commercial premises at South Main Street, Naas, Co. Kildare, which have been used by him as a cafe and take-away, as an amusement centre, and for residential purposes. Some of these activities involved change of user for which the necessary permission had not been obtained by the Prosecutor under the provisions of the Local Government (Planning and Development) Acts, 1963 and 1976, and a series of applications have been brought by the Prosecutor in the last two years in an effort to remedy this situation.

The history of these applications has been as follows. On the 20th October, 1982, the Respondent decided to grant permission for retention of

cafe and take-away, with alteration to front elevation and residential usage of upper floor level at South Main Street, Naas. This is Order No. 10884, a copy of which is exhibited in the affidavit of Laurence Long, Town Clerk of the Respondent Council, filed herein the 19th August, 1983.

The Prosecutor avers, and the affidavit filed on behalf of the Respondent confirms, that by a further Order No. 10886, and also made on the 20th October, 1982, the Respondent decided to refuse to grant permission for retention of an amusement centre at South Main Street, Naas. The Prosecutor further avers that the ground of the said refusal was, that "the amusement centre, which is used mostly by young people, is located on Abbey Street, which is deficient in foot paths and has restricted visibility. Abbey Street is used as a "rat run" by dense traffic, hence the proposal would constitute a traffic hazard and as such would be contrary to the proper planning and development of the area." Neither side has elected to exhibit a copy of the said Order and I have to rely for its contents on the affidavit of the Prosecutor, which is, in parts, undecipherable.

The Prosecutor further refers to, but does not exhibit, the plans submitted with the said application for continuance of user as an amusement centre, and avers that the rear door of the premises gave onto Abbey Street; that having received this notification to refuse, he took steps to close

the said door permanently and to break another opening from the rear of the premises giving onto a car park, which was not used by through traffic, and that having taken these steps he made further application, dated the 19th November, 1982, "for the retention of the said amusement centre." It appears to me that such an application would be more correctly described as an application for the continuance of use of land for a particular purpose, as referred to in Sec. 28 of the Local Government (Planning and Development) Act, 1963. An application for "retention" would be appropriate in the case of an unauthorised structure. In the present case the conflict between the Prosecutor and the Respondent arises by reason of the Prosecutor's wish to continue the hitherto unauthorised user of the premises as an amusement centre.

By Order No. 10948, dated 17th January, 1983, the Respondent again decided to refuse to grant permission for the "Retention of Amusement Centre at South Main Street, Naas." On this occasion the refusal was stated to be based on four different grounds, which are as follows:-

- "1. The development proposed in this location would be contrary to the proper planning and development of the town centre and would conflict with the Town Development Plan where a stated objective is to ensure the development of shopping and commercial activity in the town centre.
2. The proposed development would conflict with the policy of Naas Urban District Council, who consider the provision of an amusement centre/arcade as a detraction from the amenities of the town and would, therefore, be contrary to the proper planning and development of the area.
3. The proposed development could lead to a further deterioration of shopping and commercial activity in the town centre and create a precedent for further such types of development and would, therefore,

be contrary to the proper planning and development of the area.

- 4. The proposed development would conflict with the present policy of Council, as stated in the Draft Development Plan, as adopted by the Council and placed on public display and would, therefore, be contrary to the proper planning and development of the area."

These grounds do not contain any express restatement of the objection previously taken to the possibility of a traffic hazard being created by the proposed user, but the Town Clerk in an affidavit filed herein on the 19th July, 1983, avers that the new exit from the rear of the premises does not give onto a car park as averred by the Prosecutor, but again gives directly onto Abbey Street, Naas, as was the case with the opening which has been closed off, and furthermore was constructed without the necessary planning permission.

The Prosecutor claims that the Respondent is not entitled to go outside the grounds relied upon by it in refusing permission for the proposed user in its first Order dated the 20th October, 1982; that he has dealt adequately with those grounds for refusal and has incurred expense in so doing, and that in these circumstances the Respondent is estopped by the application of the principle of res judicata, from raising new grounds for refusal against a subsequent application for permission. He therefore brought a fresh application for permission to continue the user of the premises as an amusement centre, dated the 17th May, 1983, and followed it up with the

present application for an Order of Mandamus to compel the granting of the required permission.

In addition to taking these steps, the Prosecutor has also appealed to An Bord Pleanála against the decision of the Respondent to refuse permission made on the 20th October, 1982, and against the further decision to the same effect, dated the 17th January, 1983. In relation to the third application, which was submitted on the 17th May, 1983 a Conditional Order of Mandamus was granted by Barron J. on the 13th June, 1983, to compel the granting of the permission sought therein, but the Respondent having regard to the time limits imposed on it for the exercise of its powers under the provisions of the Act of 1963, made an Order No. 11107 on the 15th July, 1983, deciding to refuse permission on the same four grounds which were referred to in its earlier Order of the 17th January, 1983. No appeal to An Bord Pleanála appears to have been lodged against that Order, nor has An Bord Pleanála as yet given any decision in relation to either of the two appeals against the earlier Orders.

Two legal issues arise for consideration in relation to the present application for relief by way of mandamus. The first concerns the Prosecutor's claim that a planning authority which has committed itself to particular grounds for refusing an application for development permission under the

Planning Acts cannot resort to other grounds for refusing a similar application which is made after the applicant has incurred expense in eliminating the original grounds for objection to his proposal. Secondly, the Respondent, while disputing this contention, makes the further submission that relief by way of mandamus should not, in any event, be granted in a case like the present where a statutory right of appeal to An Bord Pleanala is available to the Prosecutor - an alternative remedy which may be regarded as being as convenient, beneficial and effective as the remedy by way of mandamus.

With reference to the first of these two legal issues, the Prosecutor relied strongly on the decision of Gavan Duffy J. in Athlone Wollen Mills Co. Ltd. v. Athlone UDC, (1950) IR 1, which involved an examination of the provisions of the Town and Regional Planning Acts, 1934 and 1939. In that case the developer having made an application for planning permission which was granted in turn by the UDC and by the Minister, on appeal, but in each case subject to conditions which the developer claimed gave rise to a right to compensation under the Acts, sought to enforce this right of compensation. Having allowed the statutory period to go by without asserting this claim, the developer sought to revive it by resubmitting an identical claim for planning permission, which was rejected as being invalid by the planning

authority and by the Minister. Gavan Duffy J. held that they were correct in coming to this conclusion, and stated the law as follows (at p.9):

"In my opinion, the grant of a special permission (with or without conditions) by a planning authority, or its grant as passed by the Minister on appeal, involves the exercise of limited powers of a judicial nature, so that the decision is properly described as a judicial decision pronounced by a judicial tribunal, as those terms are understood in relation to the doctrine of res judicata. I am of opinion that the doctrine of res judicata with the consequent estoppel applies."

I am unwilling to extend the application of that decision beyond the type of situation covered by the facts of that particular case. In the later case of O'Dea v. Minister for Local Government and Dublin Co. Council, 91 ILTR 169, Dixon J. distinguished it and declined to follow it in relation to a case where he held that the two planning applications could not be regarded as identical, and the prior refusal of special permission (under the former Planning Acts) was in respect of an application which was different in kind and not merely the same application in a different guise. Accordingly, he held that the doctrine of res judicata did not apply to the facts of that case.

Sec. 26 of the Local Government (Planning and Development) Act, 1963, deals with the obligations which are imposed on the planning authority where an application is made for permission for the development of land or for an approval required by the permission regulations. The authority must reach a decision which is based upon a consideration of the proper planning and

development of the area of the authority, regard being had to a number of special matters referred to in sub-section (1) of that Section.

If the planning authority sees fit to confine its grounds for refusal of an application to a single ground (as happened in the present case in relation to the first application), it does not, in my opinion, tie its hands and preclude itself from relying on other grounds if a similar application is made to it in relation to the same lands, after that first ground of objection has been successfully disposed of. I do not regard the Statement of grounds in refusing an application for planning permission as amounting to a representation by the planning authority to the developer that these are the only grounds upon which the proposed development conflicts with the proper planning and development of the area, and if a fresh application is later made in relation to the development of the same lands, there is an obligation on the planning authority, whenever it is called upon to deal with the new application, to consider it de novo and to have regard to all aspects of the proper planning and development of the area as of that time, in granting or refusing the application.

This may seem to be calculated to work hardship on developers who incur expense in meeting objections raised to their first application, only to be confronted with new grounds when they have done so and renewed their



application for permission. This difficulty can be surmounted quite readily, however, by a process of consultation between developers and the officials of the planning authorities and I believe that this is the course which is usually adopted in such circumstances.

I conclude, therefore, that the doctrine of res judicata does not apply in the present case, and that a situation has not arisen which would justify the granting of an order of mandamus to compel the Respondent to grant the permission sought by the Prosecutor for the continuance of the use of his premises as an Amusement Centre.

I would also support the view put forward on behalf of the Respondents that relief by way of Mandamus should, in any event, be refused, having regard to the alternative remedy of the right of appeal to An Bord Pleanala which is available under the Planning Acts.

"Mandamus has always been regarded as an extraordinary, residuary and 'suppletory' remedy, to be granted only when there is no other means of obtaining justice. Even though all the other requirements for securing the remedy have been satisfied by the applicant, the court will decline to exercise its discretion in his favour if a specific alternative remedy "equally convenient, beneficial and effectual" is available."

(de Smith, Judicial Review of Administrative Action, 1st edn. p.452).

In The State (Carmey) v. McCarthy DJ, 75 ILTR 224, these principles were applied by a Divisional Court in refusing an application for mandamus to compel a District Justice to state and sign a case for the opinion of the High Court in a case where the prosecutor wished to appeal by way

of case stated against the dismissal of two civil processes brought against a defendant in the District Court. Maguire P., delivering the judgment of the Court, held that the relief that was available to the prosecutor by way of an appeal to the Circuit Court was equally convenient, beneficial and effective with that sought by him in the mandamus proceedings, and held that relief by way of mandamus should be refused.

However the High Court, and on appeal, the Supreme Court, did not hesitate to grant mandamus in a similar case of The State (Turley) v. O Floinn DJ, (1968) IR 245, where the District Justice refused to state a case for the opinion of the High Court where the prosecutor had been convicted of a criminal offence, nor was it argued in that case that the right of appeal to the Circuit Court would necessarily defeat the right to mandamus.

It was suggested in the present case that relief by order of mandamus would be much more expeditious than the prosecution of an appeal to An Bord Pleanala and it was pointed out that the appeals already lodged by the prosecutor against previous refusals of permission had not yet been processed, notwithstanding the lapse of about one year since the lodgment of notice of appeal. There was no evidence put before the Court, however, to indicate that this delay was a constant and inevitable feature of appeals brought before An Bord Pleanala, and as a specific machinery is provided by the

Planning Acts for testing the correctness of decisions made by the planning authorities, I am of opinion that this should generally be resorted to in preference to mandamus proceedings unless there has been an actual failure or refusal of the planning authorities to carry out their obligations under the Acts.

For the reasons already stated in the course of this judgment, I propose to refuse the application to make absolute the Conditional Order of Mandamus already granted and I discharge the Conditional Order.

*Roderick J. O'Hanlon*

R.J. O'Hanlon.

22nd November, 1983.

Counsel for the Prosecutor - Adrian Hardiman, BL (instructed by  
Frank Ward & Co., Solicitors)

Counsel for the Respondent - David Byrne, BL (instructed by Brown  
& McCann, Solicitors).

Cases and Materials cited:-

Athlone Wollen Mills v Athlone UDC (1950) IR p.1.

Abenglen Properties v. Dublin Corporation (1982) ILRM 590

State (Kenny) v. O hUadhaigh DJ

Orr v Owen (1907) 72 JP 60.

Short and Mellor - Crown Proceedings.

E.M. Walsh - The Planning Acts pp.27/42

The State (Cagney) v McCarthy DJ, 75 ILTR 224.

---