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1983 No. 363 s.s.

STATE (K)

THE HIGH COURT

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



BETWEEN:-

THE STATE AT THE PROSECUTION OF JAMES F. KENNY

FIRST NAMED PROSECUTOR

AND

DERMOT HUSSEY



SECOND NAMED PROSECUTOR

AND

AN BORD PLEANALA

FIRST RESPONDENT

AND BY ORDER      PATRICK B. NEEMAN      SECOND RESPONDENT

Judgment delivered by Miss Justice Carroll on the 23<sup>rd</sup> day of  
February 1984

This is a Motion to make absolute a Conditional Order of Certiorari granted on the 27th of June 1983 in respect of an Order of an Bord Pleanala (herein referred to as the Board) dated the 20th of May, 1983 granting planning approval for development at the rear of No. 31 Temple Road Dublin 6. The grounds on which

the order was granted were that it was made in excess of jurisdiction and was contrary to the principles of natural justice in that the Board failed to be consistent in the discharge of its statutory duty.

The background to the matter is as follows. On the 15th of November, 1979 outline planning permission was granted by the Planning Authority for a single storey detached residence of 1,500 square metres at the rear of No. 31 Temple Road, which is a corner house situate on the corner of Temple Road and Richmond Hill. The outline planning permission was subject to five conditions. This outline permission was not appealed by the Prosecutors who live in the two houses next door to No. 31, the reason being they did not know of it in time.

On the 22nd of January 1981 planning approval was granted by the Planning Authority for a two storey dwelling at the rear of No. 31, Temple Road. This was appealed by the Respondents to the Board.

By order dated the 9th of June 1981 the Board allowed the appeal for the following reasons:-

"(1) Approval is sought for a two storey house and the

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proposed development is therefore inconsistent with the outline permission granted on the 15th November 1979 which related to a single storey dwelling.

- (2) The proposed two storey house would by reason of its visual obtrusiveness height and proximity to No. 31, Temple Road so reduce the amenity of that existing house as to render it out of character with the character of houses on Temple Road and the proposed development would therefore be contrary to the proper planning and development of the area."

On the 25th of October, 1981 planning permission was granted by the planning authority for a single storey dwelling on the site. This was appealed by one of the Respondents, Mr. Kenny, to the Board.

By order dated the 25th of February, 1982 the Board allowed that appeal and refused planning permission for the following reason:-

"The proposed 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

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injurious to existing residential amenity."

On the 15th of October, 1982 planning approval was granted by the Planning Authority for a single storey dwelling on the site, subject to five conditions. The Respondents appealed to the Board and by order dated the 20th of May 1983 the Board disallowed the appeal and granted planning approval subject to five conditions for the following reason:-

"It is considered that subject to compliance with the conditions set out in the second schedule hereto the proposed development would not be contrary to the proper planning and development of the area or otherwise be injurious to the amenities thereof."

The Board considered itself bound by the outline planning permission granted on the 15th of November, 1979 and dealt with the appeal against the planning approval dated the 15th of October 1982 on the basis that the provision of a single storey dwelling on that site was in accordance with an outline planning permission and therefore confined itself solely to considering whether the proposed house in outline, design etc. was in accordance with proper planning and development.

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It was not contested (as claimed on behalf of the second Respondent) that the dwelling house in respect of which planning permission was refused on the 25th of February 1982 (herein referred to as "house A") had an internal floor area of 1,788 sq. ft. while that of the house in respect of which planning approval was granted on the 20th of May 1983 (herein referred to as "house B") was 1,200 sq. ft.; that the roof height of house A was 6.3 metres and that of house B, 5.75 metres; and that house A was a "unique modern styled dwelling with high roof line and clear storey roof lights" and that house B was "a traditional form domestic house type."

On behalf of the Prosecutors it was claimed that house B was more proximate to No. 31 Temple Road than house A by one metre. This was not contested.

It was also claimed on their behalf that the visual impact or obtrusiveness of any single storey dwelling at the rear of No. 31, Temple Road is essentially the same and that the effect on the residential amenity of No. 31 Temple Road and the locality in general of any single storey dwelling is essentially the same. This was contested by the second Respondent, Mr. Meenan.

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I did not allow either Mr. Joyce or Mr. McCabe, the two architects, to give oral evidence as to their opinion on the comparative visual obtrusiveness of house A. and house B, as I considered it was outside the competence of the Court to come to any conclusion on this question.

It was submitted on behalf of the Prosecutors :-

1. That the decision of the Board dated the 25th of February 1982 effectively held that any single storey house at the rear of No. 31, Temple Road was visually obtrusive, too proximate to No. 31 and seriously injurious to existing residential amenity and therefore the matter of any single storey residence at the rear of No. 31 was res judicata.
2. That the Board was not bound by the outline permission dated the 15th of November 1979 granted by the Planning Authority.
3. That the Board was in breach of natural justice by its order of the 20th of May, 1983 in giving a decision in a matter which was res judicata or alternatively inconsistent with its previous decision dated the 25th of February, 1982 refusing permission for another single storey house.

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4. That the Board was in breach of natural justice in that it failed to give reasons.

In order for the doctrine of res judicata to apply it must be shown that the following elements are present:-

- 1. That the decision is a judicial decision;
- 2. That the decision was pronounced as alleged;
- 3. That the Court or tribunal had competent jurisdiction;
- 4. That the decision is final;
- 5. That there was determination of the same question as that in the matter in which the estoppel is raised, and
- 6. That the parties (or their privies) are the same.

(See Spencer Bower and Turner: Res Judicata (2nd Edition) at pages 18 and 19.)

I accept that a decision of the Planning Bord is a judicial decision to which the doctrine of res judicata can apply.

In Athlone Woollen Mills Company Limited .v. Athlone Urban

District Council (1950 I.R. 1 at page 9) Gavan Duffy P. says:

"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, involve the exercise of limited powers

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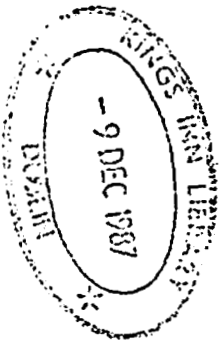
of a judicial nature so that the decision is properly described as a judicial decision pronounced by a Judicial Tribunal, as those terms are understood in relation to the doctrine of res judicata. I am of opinion that the doctrine of res judicata with the consequent estoppel applies."

That decision related to the earlier Planning Acts but in my opinion the same principle holds good for the present planning code.

It is not disputed that the decision was pronounced as alleged, that the Tribunal had competent jurisdiction, that the decision is final, and that the parties are the same. But I am not satisfied that the Order of the 25th of February, 1982 concerned the same matter as the order of the 20th of May, 1983. (See O'Dea .v. Minister for Local Government, 91 ILTR 169)

The determination is not in respect of the same house. This is not a question of the house being substantially the same with a few minimal changes. The decision made on the 20th of May 1983 concerns a completely different style of house.

The decision of the 25th of February 1982 refers to "the proposed single storey house" not to any single storey house.





The decision of the 20th of May 1983 concerns "a house at rear of 31, Temple Road, Dublin in accordance with plans and particulars lodged with Dublin Corporation". This is a different house in conception and design.

I cannot accept the argument that the refusal of planning permission on the 25th of February 1982 was a refusal for all single storey houses for as long as the character and amenity of Temple Road remained the same.

To look at the matter another way, leaving aside any complications which might arise from the prior grant of outline planning permission and assuming that both orders concerned an application for full planning permission, I could not hold that the refusal of permission for a particular single storey house on the 25th of February, 1982 was a refusal covering all single storey houses.

Therefore in my opinion the doctrine of res judicata does not apply.

The next argument is that outline planning permission granted by the Planning Authority is not binding on the Board when it comes to consider an appeal in relation to Planning Approval.

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The decision of Barrington J. in The State (Pine Valley Developments Limited) .v. Dublin County Council (delivered the 24th of May, 1981) held that outline planning permission granted on appeal was binding on the Planning Authority. The decision of the Learned Trial Judge was reversed on other grounds in the Supreme Court but it seems to me that the principles enunciated in the judgement in relation to the effect of outline planning permission hold good.

The Prosecutors attempted to distinguish that judgement by saying that while outline planning permission granted on appeal by the Board was binding on the Planning Authority, the reverse was not true and outline planning permission granted by the Planning Authority was not binding on the Board on a subsequent application for approval.

At page 11 of his judgment Barrington J. deals with outline permission vis-a-vis the Planning Authority. He says:-

"It therefore appears to me that a developer having got his outline permission has gone a certain length of the road and that when he applies subsequently for an approval the Planning Authority is only concerned with the detail whereby

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the developer proposes to complete the development already approved in principle by the planning authority.

" It appears to me to follow from this that the outline permission sets the parameters within which the Planning Authority must consider the application for an approval and that it is not open to the Planning Authority, at the approval stage, to re-open matter which have already been permitted under the general terms of the outline permission.

At page 13 he says:-

"It appears to me that under the provisions of Section 26 the Minister was in effect the Appeal Court from the Planning Authority and that if the Minister has granted an outline permission, that decision is binding on the Planning Authority and it is not open to the Planning Authority to re-consider whether the development is acceptable in principle. It may indeed in certain circumstances revoke the planning permission but as long as the outline planning permission stands it appears to me that the Planning Authority is as much bound by it as if it had granted the permission itself. Any other conclusion would, in my

opinion, have chaotic consequences.

" That being so it appears to me that a Planning Authority considering an application for approval, must consider it within the parameters of the outline permission. An application, within those parameters is the only application it is called on to consider at that stage. If therefore it attempts to re-open matters decided by the outline permission it is not considering the application which is before it. In the present case it is quite clear that the Planning Authority attempted to re-consider matters which had been decided by the Minister when he granted the outline permission. It appears to me therefore that they failed to consider the only application which was before them which was an application for an approval within the parameters of the Minister's outline permission."

It appears to me that the same principles enunciated by Barrington J. in respect of outline permission granted by the Minister being binding on the planning authority apply equally to the case where outline permission is granted by the Planning Authority and is not appealed. In my opinion in those

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circumstances the un-appealed outline permission is binding on the Board and sets the parameters within which the Board must consider any appeal in respect of a subsequent application for approval.

The Prosecutors also allege that there is a lack of natural justice in that no reasons are given to show why the visual obtrusiveness or impact of house B is any different to that of house A, or why proximity to No. 31 Temple Road is no longer a factor or why the effect of house B on the amenities of the locality is different to that of house A.

The only reason given in the order is that subject to compliance with the conditions, the proposed development would not be contrary to the proper planning and development of the area or otherwise injurious to the amenities thereof.

In my opinion it must first be established that there is a duty on the Board to give reasons or explain why reasons for a prior decision do not apply. In Wade on Administrative Law, Fifth Edition, at page 486, it is stated:

"It has never been a principle of natural justice that reasons should be given for decisions. Since there is no

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such rule even in the Courts of Law themselves it has not been thought suitable to create one for administrative bodies."

And later in the same page it is stated:

"Although there is no general rule of law requiring the giving of reasons, an administrative authority may be unable to show that it has acted lawfully unless it explains itself"

In my opinion in a case such as this, it is not open to the Court to go behind the reason stated (i.e. that the approval sought is not contrary to proper planning and development or injurious to the amenities of the area) and seek an explanation of why reasons given for an earlier decision do not equally apply to this. There is a statutory obligation under Sections 26 (8) and 27 (5) of the Local Government (Planning and Development) Act 1963 to specify reasons for the refusal of any permission or approval or for the imposition of conditions. There does not appear to be any statutory obligation to specify reasons for granting any permission or approval.

In my opinion this is not a case where the Board is unable to show it acted lawfully unless it explains its decision. The

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Board is the Tribunal competent to decide whether a development is contrary to proper planning and development or not. It has made such a decision. I have already stated that in my opinion the prior decision of the 25th of February 1982 was not a decision on an identical matter to the order which is now challenged.

Therefore in my opinion there is no basis for the contention that the Planning Board must on the face of the Order show why the reasons which they were obliged to give under Statute for refusing permission were not applicable in a case where they granted permission.

The cause shown should be allowed and the conditional Order discharged.

*Mella Canoll.*  
28-7-84.

*Approved,*

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Glover .v. B.L.N. 1973 I.R. 338

The State (Abenglen) .v. Dublin Corporation 1982 I.L.R.M. 596



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Second Respondent

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