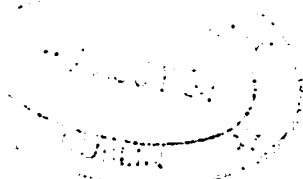


THE HIGH COURT

(STATE SIDE)

1983 No. 621 SS



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

Between/

THE STATE (AT THE PROSECUTION OF PATRICK J. McCOY)

Prosecutor

-and-

THE CORPORATION OF DUN LAOGHAIRE

Respondents

Judgment of Gannon J. delivered the 1st day of June 1984.

The respondents are a planning authority whose decision to refuse an application made pursuant to section 4 of the Local Government (Planning and Development) Act 1982 for an extension of the appropriate period as regards a particular planning permission is the subject of a conditional order of certiorari granted by McWilliam J. on the 28th of October 1983. The grounds upon which the order was made are stated

therein to be "the grounds set out in paragraph 16(1)" of the affidavit of the prosecutor Patrick J. McCoy sworn on the 27th of October 1983. That paragraph reads as follows:-

"16. I therefore pray this honourable court for: -

- (1) A conditional order of certiorari directing the above named respondents to produce their said decision dated the 1st September 1983 for the purpose of having the same quashed on the grounds that the reason specified therein is bad in law, and further on the ground that the reason specified therein is not a reason specified in the said section 4 and that the said decision is ultra vires and void."

The decision of the respondents was notified to the architects for the prosecutor by the town clerk by notice dated the 1st of September 1983 in the following terms:

"Re Local Government (Planning and Development) Acts 1963 to 1983. Application on behalf of Mr. P.J. McCoy, 21 Dundela Park, Sandycove, Co. Dublin, on 5th July 1983 for extension of the permission for 36 dwellings at Dundela Avenue, Sandycove, Co. Dublin granted on 15th

March 1962.

A decision to refuse your application to extend the appropriate period as regards the above mentioned permission was made on 1st September 1983 for the following reason:-

The permission for 36 semi-detached houses was superseded by permissions for a total of 18 detached houses on portion of the site. These detached houses have been constructed. Due to this development, development of the site for 36 semi-detached houses as provided for in reg. no. 330/62 cannot now be carried out."

The statutory provisions which prescribe that a permission granted shall cease to have effect were not referred to nor opened on this hearing, but it is agreed that because the permission identified as 330/62/15 March 1967 was granted under part IV of the Local Government (Planning and Development) Act 1963 before the 1st of November 1976 it would cease to have effect on the 31st of October 1983 as provided for in section 2 of the 1982 Act. That date is, for the purpose of this application, the end of "the appropriate period" which

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term, as used in section 4 of the 1982 Act, is defined in section 2 of that Act. Section 4 confers on the respondents power to extend the appropriate period. Whether the conditional order of certiorari should be made absolute as now sought by the prosecutor or cause shown be allowed as submitted by the respondents depends upon the construction and application of sub-section (1) of section 4 of the Local Government (Planning and Development) Act 1982 (hereafter referred to as the 1982 Act).

Section 4 (1) of the 1982 Act is as follows:

"4-(1) On an application being made to them in that behalf, a planning authority shall, as regards a particular permission, extend the appropriate period, by such additional period as the authority consider requisite to enable the development to which the permission relates to be completed, if, and only if, each of the following requirements is complied with:

(a) the application is in accordance with such regulations under this Act as apply to it;

(b) any requirements of, or made under, such regulations are complied with as regards the application,

and

(c) the authority are satisfied in relation to the permission that -

(i) the development to which such permission relates commenced before the expiration of the appropriate period sought to be extended, and

(ii) substantial works were carried out pursuant to such permission during such period, and

(iii) the development will be completed within a reasonable time."

Subsection (2) of section 4 contains provision for the circumstance of failure or omission on the part of the planning authority to whom application for an extension of the appropriate period has been made to give notice of its decision to the applicant within a period of two months. In such circumstances, provided all the requirements of statute and regulation have been complied with a decision to extend the appropriate period "shall be regarded as having been granted by the planning authority". Sub-section (4) of section 4 provides for the recording in the register of

particulars of any such application for extension of the appropriate period and of the decision of the planning authority. The remaining sub-sections (3), (5) and (6) do not contain provisions affecting a decision to not extend the appropriate period.

Sub-section (1) of section 4 of the 1982 Act is expressed in mandatory terms bearing both positive and negative aspects. It confers on a planning authority not merely the power but rather the obligation to extend the duration of a planning permission in relation to uncompleted development upon which a developer has embarked. The "appropriate period" is a limitation created by section 2 of the 1982 Act on the duration of a planning permission, the existence of which and the relaxation of which are in the interests of good control and supervision of planning and development. The negative aspect of the mandatory nature of this sub-section is in the use of the expression "if, but only if," as controlling the obligation to extend the duration of the permission to enable the development to be completed. Clearly the planning authority must not extend the duration

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of the particular permission save upon compliance with all of the conditions set out in sub-paragraphs (a), (b) and (c) (i), (ii) and (iii). The sub-section refers to the permission as "a particular permission" thus ensuring that in considering any application the planning authority will deal with it on its own facts and circumstances and not as being governed by considerations given to another or a group of other development provisions. The qualified description "a particular permission" gives recognition also to the facts that there may be more than one contemporaneous permission granted to one developer for development of the same structure or other lands and that there may be more than one developer to whom permissions have been granted in relation to the same structure or other lands. The expression "particular permission" has significance also for the developer or applicant for a decision under section 4. It signifies that the permission must be distinguished from other permissions whether relating to the development of the same structures or other land or relating to other developments. To give this expression its proper meaning in the context of

development it must mean that the entire development, and all the conditions (if any) the subject matter of the permission, and all the material statements or matters in relation to which the permission was granted are comprehended within the term "particular permission" with none omitted and no others included.

Section 11 of the 1982 Act empowers the Minister to make regulations providing for any matter of procedure in relation to applications under section 4 of the Act, and also enumerates particular aspects of such applications for which special requirements may be made by such regulations. It follows that in relation to compliance with conditions indicated at sub-paragraphs (a) and (b) of section 4 (1) of the 1982 Act the onus is on the applicant to clear the negative aspect and make way for the positive aspect of the decision imposed as mandatory on the planning authority. Compliance with the terms of sub-paragraph (c) of section 4 (1) requires that the planning authority "be satisfied" on all of the matters under three sub-headings in relation to the particular permission. These are factual matters in

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relation to the performance of works of development within the control of the developer upon which the planning authority is required to make an assessment or evaluation. These matters of their nature are such that the onus must lie on the developer to furnish the planning authority with information or evidence verifying such facts sufficient to support a decision as to the accuracy of the facts at (i) and (ii) and the probability in relation to (iii). The expression that the planning authority "are satisfied" used in paragraph (c) is an expression commonly used in reference to a verdict, or judgment or decision.

The particularity of the provisions of sub-section (1) of section 4 of the 1982 Act and the fact that they are included in a section imposing a mandatory function precludes consideration of any other matters. The sub-section is explicit on what it requires, and consequently the exercise of the power to extend the appropriate period as regards a particular permission or to not extend that period must comply in all respects with the terms of section 4(1) and may not be exercised in any other manner or upon any other consideration.

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A decision therefore of a planning authority as to whether or not to extend the appropriate period as regards a particular permission which is arrived at without considering all the matters set out in sub-paragraphs (a), (b) and (c), (i), (ii) and (iii) or upon consideration of other matters not coming within these sub-paragraphs would be ultra vires.

The decision of the respondents made on the 1st of September 1983 as set out in the notice thereof of that date is challenged by the prosecutor upon such grounds. The prosecutor also contends that notice of such an invalid decision as alleged is not a notice given within the two month periods such as is required for the purposes of sub-section (2) of section 4 of the 1982 Act with the result that an extension of the appropriate period as regards the particular permission as specified in their application of 1st July 1983 shall be regarded as having been given. The decision of the planning authority insofar as it is given in response to an application made to them is governed by the information furnished to them by the applicant. The regulations made by the Minister under section 11 of the 1982

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Act are contained in S.I. No. 342 of 1982, and these include in Article 7 thereof the authorisation of inquiry by the planning authority as provided for in section 11(2) of the 1982 Act requiring further information or evidence in relation to the application.

Such authorisation does not however preclude the planning authority from making their own inspection of the register and of the site. The respondents did not request further information following receipt of the application to extend the appropriate period dated 1st of July 1983 but did inspect the register and the site.

The application to which the decision which is now challenged refers comprised a letter of the 22nd of June 1983 and a completed form dated the 1st of July 1983 accompanied by a letter of the same date. The letter of the 22nd of June is as follows

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"The Town Clerk,
Corporation of Dun Laoghaire,
Gresham House,
Marine Road,
Dun Laoghaire,
Co. Dublin.

Re Development at Dundela Avenue, Sandycove -
36 semi-detached houses.
Plan Reg. No. 330/62.

Dear Sir,

We have been instructed by my client Mr. P.J. McCoy to apply for an extension of the appropriate period under section 4 of the Local Government (P. & D.) Act 1982. The existing valid planning permission given by order dated 15/3/1967 is in respect of 36 dwellings. Development of half the estate, i.e. 18 dwellings, have been completed and that part of the estate taken in charge. The completion of the remainder of the estate, i.e. 18 dwellings has been held up for some years past due to litigation in regard to ownership of part of the undeveloped lands. This matter was finally amicably settled between the parties in or about November 1982. Our client's Solicitors, Croskerrys and Son can verify same. Hence the unavoidable delay by our client in proceeding with the completion of his estate per the aforementioned valid planning permission. Our client hopes to have the development works for the balance of the estate put in hand immediately and the erection of the houses also.

We submit therefore:-

- (a) The development to which the permission dated 15/3/1967 relates commenced before the expiration of the period now sought to be extended.
- (b) Substantial works were carried out pursuant to such permission during such period, and
- (c) The development will be completed within a reasonable time.

We attach copy of the planning permission. Copies of the relevant drawings i.e. layout, house plans etc. will be on your files. We request that favourable consideration be given to our application as soon as possible so that the development can be completed.

Yours faithfully,

John T. Gibbons.

J.T. Gibbons and Associates."

The form which was obtained from the planning authority in response to that letter was completed and the particulars as set out on the form are as follows

"(a) Name and address of applicant:

Mr. P.J. McCoy, 21 Dundela Park, Sandycove, Co. Dublin.

(b) Location of other land to which the permission relates:

Dundela Avenue, Sandycove, Co. Dublin.

(c) Development to which the permission relates:

36 dwellings at Dundela Avenue, Sandycove, Co. Dublin.

(d) Particulars of the interest held in the relevant other land by the applicant:

Freehold owner.

(e) Plan register number/date of decision:

330/62/15 March 1967.

(f) In the case of outline permission:

N/A.

(g) Date on which the permission will cease to have effect:

31st October 1983.

(h) Date of commencement of development to which the permission relates:

Mid 1968."

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The letter which accompanied that completed form was addressed to the Town Clerk of the Planning Department. It is dated the 1st July 1983 and is as follows:

"Re development at Dundela Avenue, 36 houses
Plan Reg. No. 330/62.

Dear Sirs,

Further to your letter of the 29th ultimo. We enclose herewith the completed application form and cheque in the amount of £108.

Our client has commenced the development works i.e. roads, sewers, water mains etc. and anticipates that six of the dwellings plus about a third of the houses will be substantially completed by the 31st October 1983 in accordance with the existing valid planning permission. We would refer you to our letter of the 22nd ultimo which explains the legal hold-up which prevented our client from completing the development.

We would be obliged to have the planning authority's decision as soon as possible.

Yours faithfully,

John T. Gibbons."

The planning permission therein referred to, being the "particular permission" to which the decision of the respondents under section 4 of the 1982 Act relates is identified by the Plan Register Number and date of decision as "330/62/15 March 1967". That permission was granted by the Minister for Local Government pursuant to section 26 of the Local Government (Planning and Development) Act 1963 upon

an appeal by the prosecutor from a refusal by the respondents in relation to a development comprising the erection of 36 semi-detached houses on a site at Dundela Avenue in Dun Laoghaire in accordance with plans and particulars then submitted on behalf of the prosecutor by a different architect. Those plans showed a lay-out with Dundela Road leading west from Dundela Park to end in a southerly extension of Dundela Avenue. It provided for 6 pairs of semi-detached houses on the northern side of Dundela Road and 4 pairs of semi-detached houses on the southern side of that road. It also provided for 2 pairs of semi-detached houses on the Dundela Avenue extension to the south of the junction with Dundela Road and facing west with one pair of semi-detached houses facing west on the north of the same junction in Dundela Avenue extension. Opposite the western end of Dundela Road and facing east 5 pairs of semi-detached houses were to be built on Dundela Avenue extension.

As is evident from the affidavit of the prosecutor herein an inspection of the register would have revealed that in respect of portion of the site for the development of which the "particular permission" was granted on 15th March, 1967 a further permission identified as Plan Reg. No. 1272/68 dated the 14th June, 1968 was granted to the prosecutor for

erection of 10 detached houses at Dundela Avenue subject to a condition to be complied with before development commenced. The plan relating to this permission shows 10 detached houses of different shape and design to, but on the same sites as, the 5 pairs of semi-detached houses on Dundela Avenue extension facing east towards Dundela Road with drain and sewage connections indicated only for such 10 houses. The prosecutor's affidavit also shows that inspection of the register would have revealed that in respect of another portion of the site for the development of which the "particular permission" was granted on the 15th March, 1967 a further permission identified as Plan Reg. 1981/70 dated 20th April, 1970 was granted to the prosecutor for the erection of 8 detached houses at Dundela Avenue. The plan relating to this permission shows 8 detached houses of different shape and design to, but on similar sites to, the 3 pairs of semi-detached houses on Dundela Avenue extension facing west, but without indication of drain or sewage connections. In his affidavit the prosecutor swears that all these houses have been built but does not say when

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commenced nor when completed. These two permissions were sought by the prosecutor and obtained for two separate developments which he swears have been completed. As is evident from the affidavit on behalf of the respondents showing cause an inspection of the register would also reveal that in respect of the remaining portion of the site for the development of which the particular permission was granted on the 15th March, 1967 the prosecutor submitted an application on the 20th of April, 1978 as freehold owner of the land for permission for the erection of 18 detached houses at Dundela Road with plans showing layout of intended water and sewage services. The prosecutor proposed to erect 8 of these houses of different shape and design on sites similar to those of the 4 pairs of semi-detached houses on the southern side of Dundela Road and the remaining 10 detached houses of different shape and design but on sites similar to those of the 5 pairs of semi-detached houses on the northern side of Dundela Road. Permission for this development, limited to 6 detached houses on each side of Dundela Road on slightly varying sites and subject to other conditions, was

granted to the prosecutor on the 3rd of February 1982 by An Bord Pleanala on appeal from a refusal of the planning authority. This permission is identified on the register as Plan No. Reg. No. 11797/81 dated 3rd of February 1982. This development has not yet commenced. The houses erected pursuant to the permissions 1272/68 and 1981/70 appear to be of similar style and design to each other and to those the subject of the proposed development under permission 11797/81. At the time of the application for extension of the appropriate period to which the challenged decision relates the prosecutor had two permissions for the erection of houses on land fronting Dundela Road on the north and south sides thereof which are inconsistent with each other. The inspection of the site on behalf of the planning authority deposed to in the affidavit showing cause refers to development works done on the undeveloped portion of land as being consistent with either of these two permissions subject to further work necessary to relate them to one or other permission. The prosecutor also then had completed two developments in accordance with permissions obtained by him over portions of the lands for the

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development of which the "particular permission" had been granted, each of which, as a development, was inconsistent with the development for which "particular permission" was granted.

The disparity between the information given in the application form with the accompanying two letters and the information disclosed by inspection of the register and the sites is remarkable. The information conveyed by the form and the letters is that the developments to which the "particular permission" 330/62/15 March, 1967 relates for the erection of 36 semi-detached houses was commenced in mid 1968 and that 18 of such dwellings were completed and that the development works of providing public services required for such houses in conformity with that "particular permission" were completed and taken in charge by the local authority. It was also represented that the continuance of that development was about to be undertaken by further development works and by the erection of a further 18 such semi-detached dwellings, thus completing the development "in accordance with the existing valid planning permission". That such information

offered in support of the application was inaccurate and misleading must have been obvious from inspection of the register even without inspecting the site. Had the planning authority relied upon the information as conveyed by the application form and letters and had they not had available the true information from the register they would have been obliged to, and no doubt would have, made a decision to extend the appropriate period "to enable the development to which the permission relates to be completed". But the register disclosed the inaccuracy of the information submitted and the planning authority were not misled. They would have been entitled to refuse the application, stating, as they could have done, as their reasons that they were "not satisfied" and then quoting each of the three sub-paragraphs of section 4 (1) (c) of the 1982 Act. Such decision could have been justified on the grounds that:-

- (1) the development which was commenced before the expiration of the appropriate period was not the development to which the particular permission relates,
- (2) the substantial works carried out during that period

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were not in pursuance of that particular permission, and
(3) the completion works proposed would not effect
completion of the development to which the particular
permission relates.

But a refusal quoting simply the words of the statute
might have conveyed, that the planning authority considered
the inaccuracy of the information was knowingly conveyed but
might not convey that the application as stated might have
been founded upon an erroneous legal interpretation of the
statute and the events. The decision as conveyed in the notice
of the 1st of September, 1983 does convey the reason why the
planning authority thought the application was based upon a
legal misconception.

The decision as expressed conveys that the planning
authority considered that the development which would be
completed if the appropriate period were to be extended would
not be the development to which the "particular permission"
relates, but in the notice they merely give the reason for
that conclusion. That reason supports a negative finding
under paragraph (c) of sub-section (1) of Section 4 of the

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1982 Act. It may correctly be said that the decision as expressed in the notice does not state that the planning authority considered each or any of the matters set out in sections 4 (1) (a), (b), or (c), (i), (ii) or (iii), and in that sense, it may appear to be defective. However, it cannot be said that in the process of reaching a decision the planning authority took into account matters not proper for their consideration. They had to consider whether or not the development to which the "particular permission" relates had been commenced to the extent of substantial work done but not completed and whether or not it could be completed within a reasonable time. These are prescribed factors to be taken into account for the purpose of the primary object of section 4 of the 1982 Act namely the enabling of the development already commenced to be continued and to be completed in accordance with the permission as granted without excessive delay. If, as the facts disclose in this case, a substantial portion of the development to which the particular permission relates no longer could be done in accordance with that permission, by reason of the completion of two other

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developments on two portions of the same property under two other permissions, it would not be possible to give real and adequate consideration to the primary objective of section 4 and the factors described under sub-section (c) of sub-section (1) without taking such facts into consideration. The decision as expressed in the notice dated the 1st of December, 1983 as given for the reason "the permission for 36 semi-detached houses was superseded by permissions for a total of 18 detached houses on portions of the site" is consistent with the consideration of the factors set out in sub-paragraph (c) of section 4 (1) of the 1982 Act and does not indicate the taking into consideration of matters which do not come within the scope of that section.

Accordingly this decision which has been challenged is not ultra vires the planning authority and is a valid effective decision. The cause shown will be allowed and the conditional order of certiorari discharged.

S.G.
8/15/84