THE HIGH COURT

[2024] IEHC 59

[Record No. 2022/818 JR]

BETWEEN

PETER MURPHY

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

FIONA CLEARY AND TONY O'BRIEN

NOTICE PARTIES

JUDGMENT of Ms Justice Marguerite Bolger delivered on the 6th day of February 2024

1. This is the applicant's challenge by way of judicial review to the decision of An Bord Pleanála (hereinafter referred to as "the Board") to grant planning permission to the notice parties. For the reasons set out below, I am refusing this application.

Background

2. By decision dated 21 March 2022, Kildare County Council granted planning permission to the notice parties for a development comprising the demolition of the side of an existing dwelling and the construction of a side extension to their family home. The applicant, who lives next door to the property, lodged an appeal. The notice parties responded and submitted a planning report, their architect's design statement and a daylight report. The applicant put in a further written response. A planning inspector carried out a site visit on 25 May 2022 and in his report dated 4 July 2022 recommended that permission be granted. The Board considered the application, the submissions and the inspector's report at a meeting and decided to grant planning permission generally in accordance with the inspector's recommendation by order dated 9 August 2022.

3. The notice parties' property is a site of c. 2,200 square metres, situated some 1.2 kilometres from the urban area of the town centre of Naas on which there is currently a detached, single-storey dwelling of c. 204 square metres. The applicant resides on an adjoining property in a house owned by his mother that is separated from the notice parties' property by a three metre high brick wall. The applicant describes his house as a "passive solar house" which is challenged by the Board and the notice parties as he has adduced no evidence to verify same. The applicant, in response to the Court's question about what a passive solar house is, referred to unidentified German standards which he said they thought about when building the house. He said the architect studied the shadows when designing the house in order to maximise sunshine. The house has a number of large, double-glazed windows facing south. There are no solar panels. He said the sunlight that comes into the house reduces energy costs but there was no documentation exhibited to verify that claim, and he said they were looking at improving the energy inefficiency in the house as what he referred to as "*our next stage*".

The applicant's challenge

4. The applicant accepted the burden of proof rested on him. In his eighteen-page statement of grounds, he set out seventeen separate grounds relying on a number of what he said were facts supporting each of the grounds. Many of the grounds on which he sought to rely came from his own response to the notice parties' daylight report submitted to the Board. The applicant also relied on guidelines, in particular BS 8206-2:2008 (British Standard Light for Buildings – Code of Practice for Daylighting) and BRE 209 – Site Layout Planning for Daylight and Sunlight – A Guide to Good Practice (2011), which were considered by the inspector. The applicant also relies on Ministerial guidelines for Sustainable Residential Development in Urban Areas (2009), the Kildare County Development Plan and the Naas Local Area Plan.

5. In his issue paper, the applicant consolidated his seventeen grounds of challenge into four, what he calls, *"central grounds"* as follows:-

(i) Views;

(ii) Location;

(iii) Passive solar;

(iv) Green infrastructure/natural heritage.

In relation to each, the applicant says that the Board's conclusions were unreasonable and/or material contraventions.

(i) Views

6. The inspector concluded that the visual impact will not be overbearing given the increase in floor space and size, but the applicant says this failed to take account of the fact that those increases were at the site's shared boundary facing his property. He claims, and repeatedly reiterated, that a six-storey building, 33 metres wide on the left side of the notice parties' current property, would produce the same visual impact as the notice parties' proposed development. The applicant says the inspector's conclusions are unsupported by evidence and should be condemned as unreasonable and/or irrational and a material contravention.

(ii) Location

7. The inspector found that, whilst the proposed development would move the notice parties' house closer to the applicant's property, the setback distance from the public road would be maintained and the established building line set by the row of three houses would be kept intact which the inspector considered to be a good design. The applicant criticised this as a material error and stated the conclusions drawn did not flow from the premise and described the visual impact as *"exceptional"*, changing from an aesthetic private view of the boundary wall and accompanying vegetation to seeing the equivalent of a four-storey apartment.

(iii) Passive solar

8. The notice parties' daylight report was considered by the inspector who had particular regard for the shadow diagrams for 3.00pm on 21 March which he described as *"the required test date according to the guidance"*. The inspector also did a physical inspection and viewed the technical drawings and concluded that there would be no significant overshadowing incurred by the adjoining property, its associated amenity(s), or solar panels and that the impacts arising would be negligible. He was incorrect in referring to solar panels, but I can understand why he might have had that misunderstanding given the reliance the applicant placed on what he calls his passive solar house. The applicant criticises the use of the date of 21 March and claims that the proposed development is capable of obstructing the sunlight to all windows in his house as there will no longer be any direct sunlight between November and January and restricted sunlight in October and

February. He says there is, therefore, no evidence to support the inspector's conclusions which he says are unreasonable and constitute a material contravention.

(iv) Green infrastructure/natural heritage

9. The inspector's views on the appropriate assessment are set out at para. 7.6 of his report as follows:-

> *"Having regard to the nature and small scale of the proposed development; which is for a residential dwelling extension and ancillary site works, and the distance from the nearest European site; no Appropriate Assessment issues arise. Therefore, it is not considered that the proposed development would be likely to have a significant effect, individually, or in combination with other plans or projects, on a European site."*

The applicant contends that the view of the proposed development from a local bridge along with damage to the boundary wall, damage to the environment and his claim that there were bat roosts present on the property, meant that the Board erred in not requiring a site-specific ecology survey and an ecological assessment for protected species and habitats.

The respondent's case

10. The Board criticised the applicant's statement of grounds for failing to particularise or identify the basis on which its decision is challenged, contrary to O. 84, r. 20(3). They say the applicant's challenge is essentially an inappropriate challenge on the merits of the decision and that the assessment of the evidence is a matter for it alone. In relation to each of the four grounds set out above, the Board says the evidence before it supported the findings which related to matters of expert planning judgment uniquely within its jurisdiction. The Board relies on the notice parties' daylight report from an independent expert. The Board criticised the reliance the applicant placed on a number of authorities as involving different planning contexts where the BRE guidelines had an elevated status which does not arise here and where the Board was merely obliged to have regard to them where relevant and applicable – which they were not here as the proposed development is a single-storey extension that does not exceed the height of the existing dwelling, or any height limit in the County Development Plan or Local Area Plan. The Board says there is no basis to the applicant's claim that ecological surveys or assessments were required.

Discussion

11. The applicant's case was presented in a very lengthy, detailed and, on occasions, unnecessarily complex manner. There is a basis for taking issue with his failure to properly particularise his grounds in a statement of grounds that contains an amount of repetition and presents the applicant's opinions as statements of fact. Nevertheless, the applicant did consolidate his seventeen grounds into four general grounds in his issue paper, which was helpful.

12. The applicant clearly feels very strongly about his neighbours' proposed development and he has challenged the planning permission for it at every juncture, as he is entitled to do. However, a challenge by way of judicial review cannot be to the merits of the Board's decision and certainly cannot seek to rely on what an applicant says would have been a better decision, as this applicant sought to do, particularly in identifying better locations on the notice parties' site (in his view) for the proposed development. Once there is material to support a decision of the Board, in principle it should stand as its correctness is not a matter for this court. There is ample authority that a decision as to whether a development is in accordance with proper planning and sustainable development is a matter exclusively for the planning authority, and, on appeal, for the Board.

13. The applicant is not an independent expert. He seems to have qualifications and experience in physics, solar energy and sustainable development. However, he is far from independent in these proceedings and cannot present his analysis of the proposed development and how it impacts on the sunlight coming into his house, as independent expert evidence, as he sought to do particularly where his views diverged from those of the independent expert engaged by their notice parties to prepare a daylight report on their proposed development and how it could be expected to impact on the applicant's property. I follow the approach adopted in *Environmental Trust Ireland v. An Bord Pleanála* [2022] IEHC 540, where the court said at para. 96:-

> *"It does seem clear to me that the purported expert evidence of a party to the proceedings is so fundamentally lacking in independence as to, at least in the very great majority of cases, be inadmissible in evidence. See, for example, Freeney v HSE and Sheeran v Meehan. Excluding the opinion evidence of Ms Hayes is no criticism of her, nor does it impugn her honesty. It is simply a function of her being, in substance, a litigant in this action."*

14. Many of the technical points made by the applicant in making his case were essentially assertions. That cannot be sufficient for him to discharge the burden of rebutting the presumption of validity in relation to the Board's decision. I was particularly concerned at the applicant's heavy reliance on his house as a passive solar house. The applicant was unable to identify an objective and accepted definition of exactly what is required for a house to be accepted as passive solar and, thereby, entitled to the sort of protection from adjoining developments as the applicant sought to assert here. Whatever a passive solar house is, the applicant made a decision to build a house facing south and include a large number of big, double-glazed windows in order to maximise sunlight. Optimum sunlight is a feature that might well be sought after by many people when building a house, particularly on a site as large as the applicant's site, similar to that of the notice parties' at approximately 2,200 square metres. However, such a decision does not, in itself, place the house into a protected category for the protection of solar energy in place of less environmentally friendly energy sources. This is the category into which the applicant sought to fit his house and, from there, to ground a challenge to his neighbours' wish to extend their property closer to their shared boundary wall. The applicant relied on nothing other than a bare assertion that the manner in which his house was designed had a tangible effect on the energy use therein. There was no evidence of the use of solar panels, or any other tangible addition to a house beyond lots of large south-facing double-glazed windows that maximise sunlight. Neither was there any evidence of how this design reduced energy costs or how the proposed development might adversely affect the applicant's current energy usage. The applicant's challenge by reference to what he termed as his passive solar house, fell well short of discharging the burden of proof on him to establish that the decision of the Board was unreasonable and/or irrational, not grounded on evidence or a material contravention. It was, essentially, an attempt to re-appeal the decision on its merits.

15. I am satisfied that the Board, particularly via the inspector's report, properly assessed the issues that the applicant had raised, including in respect of the four general grounds on which he now relies. The inspector properly summarised the issues for the Board which included the issues the applicant raised in his submissions. The Board's conclusions, recorded both in its Order and its Direction, that the notice parties' proposed development would not seriously injure the visual or residential amenities of the area or of property in the vicinity and would, therefore, be in accordance with the proper planning and sustainable

development of the area, was properly supported by the evidence before it. It was open to the Board to draw the conclusions that they did, which included noting, as the inspector did, the features of the notice parties' proposed development such as the existence of a three metre shared boundary wall, the one-storey height of the extension, the absence of windows on the gable-end facing the applicant's property and the preservation of a one-metre separation distance from the boundary wall with a site separation distance of approximately eight metres between the notice parties' proposed development and the applicant's house. In making his findings (at para. 7.3.12) that there would be no significant overshadowing, the inspector pointed to his site visit and the technical drawings that he had viewed.

16. The inspector also confirmed that he had regard to the County Development Plan and the Naas Area Plan. The Board did not consider the proposed development would contravene either the County Development Plan or the Naas Area Plan. This aspect of the applicant's challenge seemed to fit into his claims relating to green infrastructure and that certain requirements of the County Development Plan and/or the Naas Area Plan had not been complied with. The applicant has not satisfied me of any unreasonableness or irrationality in the Board's decision insofar as he contends any failure to comply with the provisions of either plan.

Guidelines

17. Section 28(2) of the Planning and Development Act 2000 obliges the Board to have regard to the guidelines, where applicable. The inspector's report identifies the guidelines that were considered applicable. The applicant seemed to claim that the Board was required to strictly comply with the guidelines. However he has not satisfied me that the guidelines on which he sought to rely actually applied here. Neither did I find the applicant's criticism of the use of 3.00pm on 21 March to be convincing, particularly given that the BRE guidelines themselves identify this (at 3.3.17) as a suitable date to be used and identified two hours as the minimum required period of sunlight. The authorities on which the applicant sought to rely related to developments that were different from the single-storey extension at issue here where the height of the extension does not exceed the height of the existing dwelling.

18. An obligation to have regard to something is not an obligation to comply with it (*Cork County Council v. Minister for Housing, Local Government and Heritage & Ors (No. 1)* [2021] IEHC 683) and the applicant has failed to establish that any such obligation to comply existed here or that the Board acted improperly in that regard.

Green infrastructure/natural heritage

19. The planning authority, who were the authors of the County Development Plan, raised no issue about the green infrastructure or any issue with the location of the proposed development. The applicant sought to rely on what he said would be an obstructive bulking look, *"not an aesthetic type view for the public to behold in moving to and from Tandy's Bridge within the pNHA"*. This seemed to relate to the impact he said the proposed development would have on the view from the local bridge. This was in spite of the inspector's finding that he examined the views of the site from Tandy's Bridge, which is a protected structure, and found no direct or unimpeded views of the properties on that protected structure.

20. The applicant condemns the decision for failing to give reasons for not addressing the impact on other amenities in the area. This double negative makes little sense and falls well short of satisfying the burden of proof that rests on the applicant.

21. Similarly devoid of any basis is the applicant's bare assertion that there were bat roosts present at the location, which he claimed gave rise to an obligation to submit an Ecological Impact Assessment and an Appropriate Assessment. Those assessments may be required where a development is likely to have a significant effect on a European site. No such finding or decision was ever made here and no assessment was deemed necessary by the planning authority. Kildare County Council gave planning permission without expressing any concern about requiring either assessment and they did not raise any concern about Habitat Screening or Environmental Assessment.

22. It is inappropriate that the applicant would seek to challenge the decision of the Board by way of judicial review by referring only to his bare assertion that he had seen two bats on his own property last year, as he asserted in his oral submissions to the court. Bats are a strictly protected species and evidence of potential disturbance on them may require to be addressed by the Board, but there was no such evidence before the Board. Even if the applicant's evidence of having seen two bats was accepted, it does not constitute evidence of any adverse impact on or potential disturbance of bats by the notice parties' proposed development. I do not believe the applicant had any *bona fide* environmental concerns as his real concern was to prevent the notice parties from building an extension closer to his boundary wall and create overshadow (of an amount found by the inspector to

be insignificant). That does not seem to me to equate to a *bona fide* concern in relation to environmental issues or sustainable development.

The Board's reasons

23. The applicant claims that the Board failed to give adequate reasons for its decision. In *Connolly v. An Bord Pleanála* [2018] 2 ILRM 453, the Supreme Court confirmed that the reasons for a decision can be gathered from other documents, even if they are not expressly referred to in the decision. The reasons for the Board's decisions are identified in the documentation here, in particular, in the inspector's report. The applicant was able to set out seventeen separate, detailed grounds of challenge to the Board's decision in his lengthy statement of grounds. He does not present, in any way, as someone who has been denied a sufficient understanding of the reasons for the decision that prevented him from constructing a challenge to it.

Conclusion

24. I reject the applicant's challenge as he has not discharged the burden of proof on him to establish a reviewable issue with the Board's decision.

25. I will put the matter in before me at 10.30am on 15 February 2024 to hear the parties in relation to final orders including costs. If either party wishes to rely on further written submissions, they should be filed with the court at least 48 hours before the matter is back before me.

The applicant appeared for himself.

Counsel for the respondent: Stephen Hughes BL

Counsel for the notice parties: Vincent Nolan BL