

Case review: challenging planning decisions in Ireland

Insights - 08/04/2021

Crekav. Trading GP Ltd v. an Bord Pleanála [2020] IEHC 400

In the Crekav case, the Developer applicant successfully challenged the decision of An Bord Pleanála (Ireland's planning authority) to refuse a strategic housing development (SHD) of 536 residential housing units on lands near St Anne's Park in Raheny.

Mr Justice Barniville held that the Board's reasons for its decision to refuse permission, were inadequate for various reasons.

Background

Planning permission for the propose development had been previously granted by the Board in 2018 but its decision was challenged in judicial review proceedings by a local residents' group and environmentalists. The Board conceded those proceedings after accepting there was an error on the face of its original decision. The High Court quashed the decision and remitted the planning application back to the Board for reconsideration.

Having reconsidered the matter, the Board then refused the permission for the proposed development. The above proceedings [*Crekav. Trading GP Ltd v. an Bord Pleanála [2020] IEHC 400*] challenged that decision of the Board to refuse permission.

The reasons given by the Board for refusing the permission related to various requirements under the EU Habitats Directive. The alleged deficiencies related to the screening for an appropriate assessment (AA) and a lack of adequate qualitative analysis in respect of Light-Bellied Brent Goose. The Board's refusal also went against the recommendation of an Inspector's Report prepared in 2018 to grant the permission and the Board's decision gave reasons for this.

Inadequate Reasons

Mr Justice Barniville concluded that the reasons given by the Board for refusing permission and for disagreeing with the inspector's recommendation to grant permission were inadequate on various grounds.

Application of statutory provisions

The Board is not obliged by statute to provide reasons for a decision to refuse a SHD where that decision differs from a recommendation made by an inspector appointed by the Board.

Barniville J acknowledged that this was a significant omission in the Planning and Development (Housing) and Residential Tenancies Act, 2016 (the "2016 Act") and a significant oversight on the part of the Oireachtas. However, in the proceedings the Board accepted that as a matter of practice it is obliged to provide reasons for its decision to refuse permission for a proposed SHD and to provide reasons for differing from a recommendation made by its inspector.

Application of legal principles

Barniville J took the view that the obligation on the Board to give reasons for refusing to grant permission in respect of a proposed SHD, despite a recommendation from its inspector that such permission should be granted, is equivalent to the obligations contained on the Board under ss. 34(10) (a) and 34(10) (b) of the Planning and Development Act, 2000.

In this regard, Barniville J referred to the case of *Grealish v. An Bord Pleanála* [2007] 2 IR 536 ("Grealish") and O'Neill J's reference that the Board's decision must "provide sufficient information to enable somebody in the position of the Applicant in this case to consider whether he has a reasonable chance of succeeding in judicially reviewing the decision; can arm himself for such a review; can know if the Respondent has directed its mind adequately to the issues it has to consider; and finally give sufficient information to enable the court to review the decision" (para. 40, p. 553). Kelly J in *Mullholland*.

Barniville J referred to *Connelly v. An Bord Pleanála* [2018] IESC 31 ("Connelly") as the "touchstone" to which the adequacy of reasons given by the Board must be assessed. In *Connelly*, the Supreme Court carefully considered the Board's obligations to give reasons for its decision to grant permission for a wind farm where the Board's inspector report had recommended that permission be refused.

The Supreme Court in *Connelly* set out legal principles which govern the extent of the reasoning required by the Board and set out three requirements to be met by the decision maker regarding the adequacy of the reasons given whereby:

- any person affected by a decision is at least entitled to know in general terms why the

decision was made.

- a person is entitled to have enough information to consider whether they can or should seek to avail of any appeal or to bring judicial review of a decision.
- the reasons provided for the decision must allow the court (or other body) hearing an appeal from the decision or conducting a judicial review of that decision, properly to do so.

The Court in Connolly also noted the following points for consideration by a decision maker: -

- Relevant and Irrelevant considerations – it is necessary for a decision maker to take into account all relevant factors and to exclude from consideration all irrelevant factors.
- Legal Certainty - the reasons given have to be "*ascertainable and capable of being determined*".
- Materials – In reference to *Christian v. Dublin City Council* [2012] IEHC 163 ("*Christian*") , materials can be relied on as being a source for relevant reasons subject to it being reasonably clear that the materials to be relied on actually provide the reasons which led to the decision.

The Court in Connolly concluded that an interested party must have sufficient information:

- to inform itself as to why the Board ultimately came to the conclusions which it did; and
- to consider whether there was any basis for challenging the conclusions reached by the Board.

The Court's assessment of the adequacy of the Board's reasons for refusal

Barniville J summarised that the extent of the Board's obligations to provide adequate reasons was as follows:

"The Board was required to set out the reasons for its decision and, in particular, for differing from the recommendation of its inspector, in sufficient detail to enable a person affected (in the widest sense of that term) to know why the Board differed from the inspector and to determine whether there was any basis for forming the view that the decision of the Board was not sustainable. The level of reasoning required must be such as to provide an interested party with reasonable information as to why the particular decision was made and whether there are grounds for challenging it. However, it was not necessary for the reasoning to go beyond that."

He determined that "the adequacy of the reasoning must be assessed from the viewpoint of a reasonable observer carrying out a reasonable enquiry".

Applying these principles, Barniville J acknowledged that although the Board did not have an

obligation to provide a lengthy judgment explaining its refusal, he concluded that the reasons provided did not adequately explain why the Board had disagreed with the inspector's report and it could, and should, have provided more extensive reasoning in order to explain the deficiencies it had identified. In circumstances where the Board had previously accepted the inspector's report when deciding to grant planning permission to the applicant in 2018 (which was subsequently quashed and remitted), its divergence from this previous position impacted on the extent of reasoning. Barniville J expected the Board to provide in subsequently refusing the application.

Similarly, in considering the second reason for refusal i.e. the alleged inadequacy of an appropriate assessment, Barniville J concluded that the Board's explanation for refusal did not provide sufficient detail to enable the Applicant (and the Court) to know why the Board had differed from the inspector's recommendation and to determine whether there was a basis for forming the view that the Board's decision on that issue was not sustainable.

Conclusion

For the reasons set out above, Barniville J granted an order of *certiorari* quashing the Board's decision to refuse the SHD application.

In reaching his judgment, Barniville J largely relied on the legal principles determined in *Connolly to assess the adequacy* of reasons given by the Board. However, as indicated in the judgment, *Connolly* emphasized that the application of the principles identified would vary greatly from case to case as reasons which be adequate in one particular case could be determined inadequate in another case due to the circumstances. In this respect, Barniville J notes that in assessing the adequacy of reasoning implemented by the Board, ultimately the type of decision and the circumstances of the case will dictate the extent of reasoning required.

Accordingly, any refusal by the Board should be carefully considered to determine whether the reasons provided for its decision are adequate in the circumstances of the application. A failing by the Board in this regard could provide grounds to challenge its decision by way of judicial review.

If you would like to discuss Judicial Review further, please contact Maria Edgeworth by emailing maria.edgeworth@ogier.com

About Ogier

Ogier is a professional services firm with the knowledge and expertise to handle the most demanding and complex transactions and provide expert, efficient and cost-effective services to all our clients. We regularly win awards for the quality of our client service, our work and our people.

Disclaimer

This client briefing has been prepared for clients and professional associates of Ogier. The information and expressions of opinion which it contains are not intended to be a comprehensive study or to provide legal advice and should not be treated as a substitute for specific advice concerning individual situations.

Regulatory information can be found under [Legal Notice](#)

Meet the Author



[Maria Edgeworth](#)

Partner

[Ireland](#)

E: maria.edgeworth@ogier.com