

DUBLIN e.c. v Brennan

IN THE MATTER OF SECTION 27 OF THE LOCAL GOVERNMENT
(PLANNING AND DEVELOPMENT) ACT 1976

AND

IN THE MATTER OF AN APPLICATION BY THE COUNTY COUNCIL OF
THE COUNTY OF DUBLIN

BETWEEN:-

THE COUNTY COUNCIL OF THE COUNTY OF
DUBLIN

Applicant

-and-

BRENNAN AND MCGOWAN LIMITED
AND
KILNAMANAGH ESTATES LIMITED

Respondents

The Respondents made an Application dated the 11th of August 1972 for Planning Permission to develop a site at Kilnamanagh, Tallaght as a residential community. The entire development was to comprise 1,504 houses, a shopping centre, a public house, a church, primary schools, community buildings and a filling station. At the date of the Application, there was already in existence an outline permission for the site which had been granted on the 5th of July 1971. This provided in effect for full permission to be obtained within one year and as



this had not been done it had lapsed.

The Application made on the 11th of August 1972 was accompanied by a letter from the Respondents' architect; a full report setting out all matters relevant to the Application; and the documents referred to at paragraph 14 of that report, which included a site layout and location map (number 7029/22A) headed "Kilnamanagh Residential Community." The permission was granted by the Applicant on the 31st of August 1972, but was appealed on behalf of objectors. It was granted on Appeal by the Minister on the 5th of March 1973.

The Permission grants permission for the development in accordance with the plans and particulars furnished by the Respondent subject to twenty-three conditions set out therein.

The conditions in so far as they are material to the present proceedings are as follows:

5. The land expected to be required by the said Council for proposed road improvements shall be reserved for that purpose. ... before the subsequent stages of development are commenced the road improvement lines for Belgard Road and the new major roads at the north and north-east of the site shall be set out and agreed with the Planning Authority

3.

or, failing agreement, shall be determined by the said Minister.

13. The areas shown as public open space on the lodged plans shall be reserved as public open space and shall be levelled, soiled, seeded and landscaped and shall be made available for use by the residents at the rate of 4.13 acres per thousand persons when each group of the development becomes occupied. Adequate and satisfactory footpaths shall be provided through the said open space.
15. Within one year after the development is commenced, detailed proposals for the landscaping of the entire site, including the treatment of primary distributor road boundaries, shall be submitted to the Planning Authority and shall be agreed with that Authority or, failing agreement, shall be determined by the said Minister.
16. Details of the new boundaries to the new Greenhills Road, to the new Belgard Road and to the new major routes at the north and north-east of the site, together with landscaping proposals for these areas, shall be submitted to the Planning Authority and agreed with that Authority or, failing agreement, shall be

determined by the said Minister.

17. Existing mature trees and landscape features on the site shall be retained save where their removal is required to facilitate the development.

Applications were subsequently made for revision of the layout of the site, but these do not affect the matter and issue before me.

The development has now been substantially completed. The proceedings are brought by the Applicant essentially to compel the Respondents to comply with the terms of the Planning Permission which they obtained. The issues raised by the proceedings are largely factual and it is possible that the parties will agree upon what requires to be done. However a fundamental question of law has also arisen and it is that question which I have been asked to deal with as a preliminary issue.

The question relates to the nature of the obligations, if any, imposed on the Respondents in relation to an area of 9½ acres on the north-eastern boundary of the site.

The Applicant maintains that this area was to be landscaped and to be provided as an amenity for the residential community. The Respondents contend that it was a reserved area, by which they mean that they were not obliged to develop it in any particular way and in

support of this argument point to the fact that it was similarly designated in the Application for outline permission. They further submit that the full permission did not refer to this area either by permitting its development or by imposing any condition in respect of it. The Respondents' contention in effect is that so far as this area is concerned it is not the subject matter of any Planning Permission.

The report accompanying the Application for Permission contained a number of provisions which are material to the present issue. They are as follows:

2. Location.

The site is located between Greenhills Road and Belgard Road and is bounded on the North by a proposed new motorway reservation and on the south by an industrial zoning line in Tallaght. See location map to scale 6 inches equals 1 mile.

The Application refers only to this site even though land ownership extends beyond these boundaries.

7. Proposed site use.

The proposed site use is residential and community services for the development of a residential community.

9. Site area.

The combined site area is 222.52 acres approximately, including reserved area at north east corner of site.

15. Planning considerations. Public open areas.

Allocation of 4.13 acres per two hundred and fifty houses for public open space. This open area has been so located that the major portion is centrally placed in the development, with minor portions stretching into the housing groups, giving adjacent recreation facilities to all the housing clusters. A landscape architect is being retained for the design and development of the public open areas and proposals will be submitted to the Planning Authority for approval at a later date.

16. Summary of Amenity areas.

Public open space 24.83 acres, School site Number 1 4.375 acres, School site Number 2 7 acres, Shopping centre, public house, and community buildings 6.50 acres, Service station 1.75 acres, reserved open space 9.50 acres.

The site layout map distinguishes between public open space and open green area. (References to the former include underneath on each occasion where the words are inserted the word "landscaped"). No such addition

occurs under the words "open green area."

A review of these matters indicates that the Application was drawing a distinction between public open space which it was intended to landscape and green open area which it was not intended to landscape. What was not indicated was what the Applicant intended to do with this latter area. It was clearly part of the site and as such its use was to be either residential or for community services. Since it was included in paragraph 16 of the report as an amenity area, it was clearly being put forward as available for such use. It may well have been that the Respondents were not fully alive to the distinction. For example in paragraph 15 of the report the landscape architect being retained by the Respondents was being retained for the design and development not apparently of the public open spaces but of the public open areas.

What has given rise to the present issue is in large part the conduct of the parties since the Planning Permission was granted. The proposed new roads to the north and north-east of the site are still proposed roads. There is no actual boundary between the proposed carriageways on the site and the present appearance and use of the land reserved for such new roads and the green open area is roughly the same.

So far as the public open spaces are concerned, it is common case that the Applicant has agreed to take over these areas from the Respondents and has agreed to develop them in the manner required by the Planning Permission for payment of the sum of £40,000. Unfortunately, the deed of transfer has never been executed because the map to be annexed thereto has not yet been agreed. This is unfortunate because it gives rise to uncertainty as to the exact meaning of the agreement which the parties made in relation to landscaping.

Two distinct questions have been argued. The first is whether or not the green open area is open space within the meaning of Section 25 of Local Government (Planning and Development) Act 1976 and to which the provisions of that Section apply; the second is the extent, if any, to which the green open area is controlled by the Planning Permission granted on the 5th of March 1973. If it is open space within the meaning of Section 25 in the sense that the provisions of that Section apply to it, then it follows that it is subject to the Planning Permission and the question then remaining is, in what manner and to what extent?

The Applicant submits that the open green area is open space within the meaning of Section 25 because it is not described as private open space and, because it is referred to in the report accompanying the Application for Planning Permission as being an amenity area, it is

explicit in the Application for such permission that that area would be provided as open space.

The Respondents submit that, since the permission under which the development of the site was carried out has attached to it a condition requiring the provision of land as open space, the terms of Section 25 (b) (i) have been complied with and that accordingly Section 25 (b) (ii) is not applicable.

I do not accept this latter contention. So far as the area is designated public open space on the site layout and location plan are concerned, they are covered by Section 25 inter alia because a condition requiring the provision of maintenance of that land is attached to the permission. However, the green open area is different land. It is in respect of that different land that the question arises whether or not it is covered by Section 25.

This land is not described as private open space nor is it described in terms indicating that it is not intended that members of the public are to have resort thereto without restriction. On the contrary in the report accompanying the Application for Planning Permission it is described as an amenity area for the scheme as a whole. It is therefore open space to which the section applies. Although there is no condition

attached to the permission requiring it to be provided or maintained as open space, it is explicit in the Application for the permission that the land would be provided as open space and at least implicit that it would be maintained as such. In my view, this land is covered by the provisions of Section 25.

The next question is in what manner and to what extent is it governed by the Planning Permission? The Respondents submit that there is nothing in the permission dealing with this area. It is correct that there is no permission to develop this area. However, the conditions attached to the permission do not ignore it entirely. Condition 15 provides for the landscaping of the whole site including the treatment of primary distributor road boundaries. A part of the green open area bounding the primary distributor road is affected by this condition. Condition 16 provides for the landscaping proposals for inter alia the boundary between the site and the new major route to the north-east of the site. A part of the green open area bounding the proposed carriageway for this route is affected by this condition. Condition 17 provides that existing mature trees and landscape features on the site shall be retained save where their removal is required to facilitate the development. In so far as the green open area contains such features,

it is affected by this condition.

In my view, the nature of the Application for Planning Permission has imposed obligations upon the Respondents in relation to the green open area. The conditions attached to the Planning Permission have also imposed obligations upon the Respondents in relation to the green open area.

The nature of these obligations today does not rest only upon the terms of the Application for Planning Permission and of the conditions attached to that permission. It is necessary to construe the agreement entered into between the parties whereby the Respondents paid the sum of £40,000 to the Applicant in consideration of the latter taking over responsibility for all the open spaces and verges on the estate. As I have already indicated, the true construction of the basic term of this agreement as contained in the Respondents letter dated the 23rd of February 1978 has been handicapped by the absence of agreement as to the lands to be included in the relevant deed of transfer. For the present, it is a matter upon which evidence has yet to be adduced.

Affidavits have been sworn by four residents deposing as to the nature of statements made to them as to the intended use by the Respondents of the open green area. In my view, these statements cannot

bear on the proper construction of the planning documents and I have not had any regard to them.

Henry Barron
7/2/82.