

**THE HIGH COURT
JUDICIAL REVIEW**

[2021] IEHC 708
[2021 No. 189 JR]

BETWEEN

CORK COUNTY COUNCIL

APPLICANT

AND

**(BY ORDER) THE MINISTER FOR HOUSING, LOCAL GOVERNMENT AND HERITAGE,
IRELAND AND THE ATTORNEY GENERAL**

RESPONDENTS

AND

THE OFFICE OF THE PLANNING REGULATOR

NOTICE PARTY

(No. 2)

JUDGMENT of Humphreys J. delivered on Thursday the 18th day of November, 2021

1. In *Cork County Council v. Minister for Housing, Local Government and Heritage (No. 1)* [2021] IEHC 683 (Unreported, High Court, 5th November, 2021), I granted *certiorari* of a ministerial direction of 23rd December, 2020 cancelling variation No. 2 to the Cork County Development Plan, and adjourned the question of any further orders for supplementary submissions. Having received such submissions, and having allowed an amendment to the statement of grounds (that order implying the grant of leave to seek the relief thereby permitted) and, insofar as it was necessary (which I don't think it was) an extension of time for that purpose, I now deal with those orders.

Matters agreed

2. It is agreed that consequential relief should follow in the form of the declaration sought in the amended statement of grounds that the ministerial notice of 5th March, 2020 is invalid. The notice had the effect under s. 31(6)(a) of the Planning and Development Act 2000 that the variation ceased to operate, so declaring that notice invalid will cause variation No. 2 to spring back into life, absent a stay.
3. It is also agreed that the relief regarding the unconstitutionality of the 2000 Act would be adjourned generally with liberty to re-enter.
4. Costs are to follow in favour of the applicant on a 50/50 basis each as against the board and the OPR, and it seems to be accepted there would be a stay on costs on the usual terms.

Whether there should be a stay on the declaration

5. The one matter that was not agreed was whether there should be a stay on the declaratory relief; in particular, a stay limited to regard being had to the variation for the purposes of considering any individual planning applications. The State and OPR didn't seem to be strongly pressing for a stay for other purposes (such as treating the variation as part of the existing development plan for the purpose of the preparation of a new plan).
6. The most pertinent case is *Okunade v. Minister for Justice, Equality and Law Reform* [2012] IESC 49 [2012] 3 I.R. 152 *per* Clarke J. at 193, to the effect that in considering whether to

grant a stay or an interlocutory injunction in the context of judicial review proceedings the court should apply a number of considerations.

7. The court should first determine whether the applicant has established an arguable case; if not the application must be refused. "Applicant" here means applicant for a stay. One can say that the State/OPR position is arguable, but that isn't saying much.
8. The court should consider where the greatest risk of injustice would lie, and in doing so the court should give weight to a number of factors.
9. Firstly, give all appropriate weight to the orderly implementation of measures which are *prima facie* valid. Admittedly the variation is *prima facie* valid; but so would the direction have been but for the proceedings. So this heading doesn't really determine much. Unlike *Okunade*, a clash between public bodies making conflicting decisions doesn't raise quite the same presumption in favour of a single public law decision challenged by a private law actor.
10. Secondly, give such weight as may be appropriate (if any) to any public interest in the orderly operation of the particular scheme in which the measure under challenge was made. That adds something to the council's position, but maybe not a whole lot. Is it crucially in the public interest for a planning permission to be considered under variation No. 2 in the dying months of the old plan, while a new plan is on the brink of being enacted? While of some weight, I am not certain that that is a matter of decisive weight. Of relevance under this heading is the State's argument that a stay would not prejudice the council because the council says it does not intend to grant individual planning permissions based on variation No. 2 given that the variation doesn't identify a specific area for development, more a broad general location. The council seems to accept that premise but not the conclusion, although I am not sure why, and indeed more generally I had the impression that neither side had entirely shared their wargaming with the court. I'm not suggesting they should have, but all I can do is work with what I have been given. It was also submitted that a stay would deprive the council of the fruits of the judgment, but that assumes that the grant of a permission under the variation at this point, without further policy work, would be a "fruit" of the judgment, which is debatable for the reasons stated above. Even if it was, the grant of a stay in the sort of terms discussed would mean that the variation would be part of the plan and would be considered as such for the purposes of the new plan process, but it would not be the basis of the grant of a specific planning permission for a temporary period. That seems only a limited deprivation, although that conclusion in itself isn't an argument for a stay, just a factor to be noted.
11. It was further submitted that the council's decision-making process would be prejudiced and left open to judicial review, but I don't accept that because an explicit stay by order of the court protects the council in that situation.
12. It was also submitted that a stay carries the implication that there is something wrong with the variation, but I don't accept that. I don't see anything legally wrong with the variation,

but a stay factors in the possibility that the Court of Appeal might disagree with me on that, and I will return to that point later.

13. The third *Okunade* consideration is to give appropriate weight (if any) to any additional factors arising on the facts of the individual case which would heighten the risk to the public interest of the specific measure under challenge not being implemented pending resolution of the proceedings. It is hard to see any such major factors here that haven't already been referenced above.
14. Fourthly, give all due weight to the consequences for the applicant of being required to comply with the measure under challenge in circumstances where that measure may be found to be unlawful. This is the State's main point – they say that if a permission is granted under an immediately effective variation No. 2, but they later progress their appeal, the appeal will be rendered nugatory or moot. This seems to depend on a number of questionable assumptions – that a planning application implementing the variation would be made at this point, that it would be decided very rapidly, that it would be granted notwithstanding the very general nature of variation No. 2, that if the State succeeds in the Court of Appeal after the planning application was launched but before it was decided, the new legal situation couldn't be factored in by the planning decision-maker before a final decision (that is clearly incorrect – a decision has to be made on the basis of the law at the time of the decision, not as it may have been understood when the application was made), and that any permission ultimately granted would not be judicially reviewed (because if it was so challenged and if the variation was later to fall, the permission could then be quashed as a necessary consequence). One might, perhaps unfairly, find oneself having the fleeting thought as to whether the State is just trying to run down the clock on the existing development plan, which will expire in 2022 on the commencement of the new plan, thus rendering variation No. 2 in its current form moot. So mootness possibly works both ways here.
15. The next point is that in addition the court should, in those limited cases where it may be relevant, have regard to whether damages are available and would be an adequate remedy and also whether damages could be an adequate remedy arising from an undertaking as to damages. That isn't really relevant here.
16. The final criterion is that subject to the issues arising on the judicial review not involving detailed investigation of fact or complex questions of law, the court can place all due weight on the strength or weakness of the applicant's case. That is particularly relevant for a post-judgment stay where the court *has* evaluated the case. My own assessment, with which the Court of Appeal may obviously disagree, is that the prospects for the State/OPR are not that great, given a number of elements:
 - (i). The rejection of the State/OPR arguments on all four independent grounds of the decision.
 - (ii). My assessment that this was not a borderline case, a decision on points or a line call. It was a win in straight sets. The State/OPR case, while understandable in policy

terms, was thin in legal terms throughout (in the sense of lacking merit, although their lawyers did their best with the material they had). What did for them was the combination of poorly worded documentation, a restrictive statutory framework and unfavourable precedents. Perhaps one could struggle through one or maybe two of those headwinds, but all three in combination were crushing.

- (iii). The fact that the State will have to win under all four independent headings in order to get any further.
 - (iv). And the fact that even then, they will have to surmount the council's other points which I didn't have to decide, and the constitutional challenge.
17. Admittedly, I haven't evaluated the strengths and weaknesses of the parties' positions regarding those other points or the constitutional issue, but overall there are so many ifs and buts to the State ultimately winning that it seems unlikely to me. However an appellate court may disagree. We will come back to that presently.
18. Having regard to an application of the *Okunade* test, it seems to me that there isn't a whole lot that really stands out either way, and ultimately the real argument for a stay is the longshot possibility that a planning application might sneak under the wire before the State manages to progress its appeal. However, given that I see the State case as itself something of a longshot, what all this really comes down to is the possibility that the Court of Appeal, seized with grounds of appeal that I don't have sight of because they haven't yet been formulated, might think that there is a case for a stay.
19. The logical conclusion is that it would seem proper to preserve the *status quo* for such strictly limited period as will enable the Court of Appeal to consider that matter if requested to do so. It seems to me that a stay for 28 days and, if an appeal is lodged in that time, for a further period of 28 days, will allow a stay application to be brought in an orderly manner to the Court of Appeal if thought appropriate.

Order

20. For those reasons the order will be as follows:

- (i). I will make the agreed orders as set out above in addition to the order of *certiorari* of the direction of 23rd December, 2020 already granted;
 - (a). a declaration that the notice and draft direction of 5th March, 2020 is invalid;
 - (b). the reliefs in relation to the constitutionality of the 2000 Act to be adjourned generally with liberty to re-enter; and
 - (c). costs to the applicant including reserved costs and the costs of written submissions to be paid by the respondents and notice party on a 50/50 basis each, with a stay on that order for 28 days, and if an appeal is brought to the Court of Appeal within that period, until the final determination of such appeal; and

- (ii). I will grant a stay on the substantive relief which will be limited in a number of ways as follows:
- (a). it is limited to the declaratory relief regarding the ministerial notice only, not to *certiorari* of the ministerial direction;
 - (b). it is limited in duration for a period of for 28 days from the perfection of the order, and, if an appeal is brought to the Court of Appeal within that period, for a further period of 28 days;
 - (c). it is limited to being a stay on regard being had to variation No. 2 for the purposes of performing statutory functions in relation to individual planning applications;
 - (d). it does not otherwise affect the timelines or procedures for such council's statutory functions;
 - (e). it does not affect variation No. 2 being treated as valid and in force for any other purpose, such as statutory functions relating to the preparation of the 2022 Development Plan (thus, for the avoidance of doubt, variation No. 2 comes back into force with effect from the perfection of the order, save that for the defined period of the stay, it cannot be taken into account in performing statutory functions regarding individual planning applications).