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"Substantial Interest" Requirement for Judicial Review of Planning Decisions

Harding v Cork County Council and An Bord Pleanála and Xces Projects Ltd. now known as Kinsale Harbour Developments Ltd. [2008] IESC 27; [2008] 2 ILRM 251

Keywords: planning law – judicial review – "substantial interest" requirement – procedural error – interest in land or other financial interest – Århus Convention –public participation – access to justice

Introduction

The Supreme Court of Ireland recently considered the criteria by which a person may be said to have a "substantial interest" (which is the statutory requirement) in a planning matter which is sufficient to allow that person to bring judicial review proceedings. Although the Court went some way towards clarifying an important issue in Irish planning and development law, it did not spell out a detailed set of criteria for future applications and its approach to the issue indicates an overly restrictive view of the scope of *locus standi* in planning cases, raising concerns about the denial of relief where a procedural error occurs but no-one who is directly affected comes forward (although this may not be a common issue in practice).

Facts of the Case

Mr. Harding, the plaintiff and appellant, is a retired sailor and merchant seaman who has lived in the town of Kinsale, on the coast of County Cork, for his entire life. He grew up in the area of Ballymacus, and lives some three kilometres from it. Members of his family live there now. The notice party, Xces or Kinsale Harbour Developments (KHD), applied for planning permission to construct a substantial hotel, golf and leisure resort at Ballymacus Head and Preghane Point, at the entrance to Kinsale Harbour. Mr. Harding is opposed to this development and participated in the planning process, objecting to the application.

Planning permission was granted to Xces/KHD on 1 October 2005. Rather than apply to An Bord Pleanála, the statutory planning appeals board, for an appeal against this decision, Mr. Harding applied to the High Court for leave to apply for judicial review. This was refused by Clarke J. on 12 October 2006, finding that the applicant did not have the necessary "substantial interest" under section 50 of the Planning and Development Act 2000.

Relevant Law

Judicial review procedure in Ireland follows a two-step process: the applicant first applies for leave to apply, which is discretionary and decided following a short hearing, then (if successful) applies for full judicial review of the decision or matter in question. In most judicial review applications, an applicant must have a "sufficient interest".[1] This standard was applied in applications concerning planning decisions until the Planning and Development Act 2000 came into force. That Act (as amended by section 13 of the Planning and Development (Strategic Infrastructure) Act 2006) provides, in relevant part:

50.— …(2) A person shall not question the validity of any decision made or other act done by—

(a) a planning authority, a local authority or the Board in the performance or purported performance of a function under this Act

…

otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts … .

…

(4) (b) … leave [to apply for judicial review] shall not be granted unless the High Court is satisfied that there are substantial grounds for contending that the decision is invalid or ought to be quashed, and that the applicant has a substantial interest in the matter which is the subject of the application.

(c) Without prejudice to the generality of paragraph (b), leave shall not be granted to an applicant unless the applicant shows to the satisfaction of the High Court that—

(i) the applicant—

(I) in the case of a decision of a planning authority on an application for permission under this Part, was an applicant for permission or is a prescribed body or other person who made submissions or observations in relation to the proposed development,

…

(d) A substantial interest for the purposes of paragraph (b) is not limited to an interest in land or other financial interest.

…

(f) (i) The determination of the High Court of an application for leave to apply for judicial review, or of an application for judicial review, shall be final and no appeal shall lie from the decision of the High Court to the Supreme Court in either case, except with the leave of the High Court, which leave shall only be granted where the High Court certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court.

50A.— (3) The [High] Court shall not grant [leave to apply for judicial review under the Order in respect of a decision or other act to which section 50(2) applies] unless it is satisfied that—

(a) there are substantial grounds for contending that the decision or act concerned is invalid or ought to be quashed, and

(b) (i) the applicant has a substantial interest in the matter which is the subject of the application,

…

(4) A substantial interest for the purposes of sub-section (3)(b)(i) is not limited to an interest in land or other financial interest.

…

(7) The determination of the Court of an application for section 50 leave or of an application for judicial review on foot of such leave shall be final and no appeal shall lie from the decision of the Court to the Supreme Court in either case save with leave of the Court which leave shall only be granted where the Court certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court.

Therefore, an applicant for judicial review of a planning matter must have a "substantial interest". (Until the Strategic Infrastructure Act 2006, there was also a requirement that the applicant had participated in the process at the planning authority stage.)

Before the 2000 Act, the "sufficient interest" test had been given a generous interpretation by the courts, on the basis that

> it is not in the public interest that decisions by statutory bodies which are of at least questionable validity should wholly escape scrutiny because the person who seeks to invoke the jurisdiction of the court by way of judicial review cannot show that he is personally affected, in some sense peculiar to him, by the decision.[2]

This was particularly so in environmental and planning cases:

> Environmental issues by their very nature affect the community as a whole in a way a breach of an individual personal right does not. Thus the public interest element must carry some weight in considering the circumstances of environmental law cases and the *locus standi* of its parties.[3]

After the 2000 Act, the courts adopted a more restrictive approach to standing in planning cases. In *O'Shea v Kerry County Council*,[4] the owner of lands adjoining the lands which were the subject matter of the impugned planning permission, who claimed that she had not seen the site notice because it was not "erected or fixed in a conspicuous position on the land or structure so as to be easily visible and legible by persons outside the land or structure" (as required under the relevant regulations) was held not to have a substantial interest because she had "failed to show in what manner, if any, she will be affected by the proposed development".[5] In *Ryanair v An Bord Pleanála*,[6] being one of the main users of an airport was not enough to constitute a "substantial interest" to challenge a decision to permit the development of a new passenger aircraft pier. In *O'Brien v Dún Laoghaire Rathdown County Council*,[7] the High Court held that "[a]n interest even if it is a passionate interest in planning matters will not suffice to establish a substantial interest in the subject matter of a particular application."

However, in *Friends of the Curragh Environment Ltd. v An Bord Pleanála (No. 2)*,[8] Finlay Geoghegan J mentioned

> the need to construe and apply the stricter requirement of standing in s. 50 in the context of the overall legislative scheme for planning applications and appeals and

> the clear intention of the Oireachtas to limit the persons entitled to challenge planning decisions by Judicial Review

but went on to say that

> [i]n practical terms, [the "substantial interest" test] seems to require the court to have some regard to the grounds on which the decision is challenged when deciding whether the applicant has satisfied the standing requirement … The wording of the section so permits. What the applicant must have is a substantial interest in "the matter which is the subject of the application". In a judicial review application such as this, "the matter which is the subject of the application" is the challenge to the validity of the decision on specified grounds.[9]

In this context, the High Court was willing to consider whether a limited company with no direct proprietary interest in the application might have standing (although it finally ruled against it).

In the *Harding* case, Clarke J in the High Court ruled that the applicant's personal association with the headland was probably enough to constitute a "sufficient interest" but that "the test of 'substantial interest' requires something more than a familial connection with an area coupled with a pattern of visiting the area as a former native and as a sea faring person." However, he did grant a certificate for leave to appeal to the Supreme Court with regard to a point of law of exceptional public importance, *viz.*

> What are the criteria by reference to which a person may be said to have a 'substantial interest' even though they do not have a financial or property interest within the meaning of s. 50 of the Planning and Development Act, 2000 and has this court properly applied such criteria to the instant case?

Conclusion of the Supreme Court

Decision of Murray CJ

The Chief Justice, Murray CJ, agreed with the approach adopted in the Supreme Court by Kearns J- on the meaning of "substantial interest", which is detailed below. He reviewed the statutory regime outlined above and concluded that

> there is a stark contrast between the range of persons who have a statutory right to participate in the planning process … and the range of persons who have *locus standi* to apply for leave to bring judicial review …. In the former instance any person who wishes to object to a proposed development, however remote, insignificant or absent their interest in it, may make submissions and observations to that effect … but only those which make such observations or submissions and have a "substantial interest" have the standing to apply for leave.[10]

The applicant had argued a "substantial interest" under two headings: environmental and denial of due process. Murray CJ agreed with the approach of Kearns J to the first heading, and approved of Clarke J's judgment, although he was critical of "the test laid down by the Oireachtas [as] vague and lacking in precision", noting that "[this] legislation seeking to limit litigation … is … likely to generate further litigation rather than less for courts which are already heavily burdened."[11]

The applicant had alleged that "he must be considered to have a sufficient 'substantial interest' to bring the judicial review proceedings because he had been 'substantially denied an opportunity to involve himself in the process.'"[12] On this issue, Murray CJ felt that

> [i]f an individual is denied … a statutory right [to participate in the planning process] he or she has, potentially, a "substantial interest" in seeking a judicial remedy including by way of judicial review, with a view to impugning a decision made in breach of that right.
>
> To hold that such a person could not have a "substantial interest" in a statutory planning decision taken in breach of his or her statutory rights would, it seems to me, render the right ineffective and deprive the Statutory Instrument of the quality of a law. That would simply undermine the rule of law by depriving the person of a remedy in circumstances where no other remedy is available.[13]

In particular, the applicant claimed that communication from the planning authority to him regarding the re-opening of consultation on further information and/or revised plans was delayed, which denied him the right to participate and, in addition, that many aspects of the authority's handling of the application were procedurally defective.

On the first issue, the delay arose because the letter was sent by registered post and the applicant was not at the address he had provided. The letter was redirected to a boat, leaving the applicant with only two working days to formulate a response. However, Murray CJ held that the planning authority could not be faulted for sending the letter by registered post, particularly where the statute authorises the use of ordinary prepaid registered post.

On the other procedural issues, Murray CJ held that these were "not issues which involve an interest which are peculiar or personal to [the applicant]" and thus did not constitute a "substantial interest" by or of themselves. Therefore, no "substantial interest" arose under the heading of procedure.[14] He also held that no broad constitutional issues arose in this case, as the rights at issue were procedural rather than personal.

Judgement of Kearns J

Kearns J underlined the purpose of the statutory provisions governing judicial review of planning decisions as

> to restrict the entitlement to bring court proceedings to challenge decisions of planning authorities. There is an obvious public policy consideration driving this restrictive statutory code. Where court proceedings are permitted to be brought, they may have amongst their outcomes not merely the quashing or upholding of decisions of planning authorities but also the undesirable consequences of expense and delay for all concerned in the development project as the court process works its way to resolution.[15]

He dismissed an argument by the applicant's counsel that the substantial grounds and substantial interests tests should be seen as "two aspects of the same thing", preferring a statement by Keane J in *Lancefort Ltd. v An Bord Pleanála* that

> since the [legislation then in force] expressly requires that the applicant should have

> 'a sufficient interest' in the matter, it must be presumed that the Oireachtas intended that an applicant, in addition to establishing substantial grounds for contending that the decision was invalid, must also show that he or she has such an interest.[16]

He also noted that the 2000 Act imposes clear requirements and that every applicant will have some interest in their own proceedings; if this interest was enough to meet the legislative test, the test would be superfluous. He approved of Clarke J's approach of considering "substantial interest" before "substantial grounds". To do otherwise would allow an unconnected objector to delay the entire process.

He then considered the meaning of "matter" in this particular context. To him, it must

> be taken as meaning the development project itself and the outcome of the planning process in relation to it. It can not mean the legal proceedings themselves, not only because of the way in which "substantial interest" is contextualised by s.50(4)(d), but also because it would be a trite and superfluous use of a statutory provision to make it a requirement that a litigant have a substantial interest in their own litigation when this is so obviously the fact in every case.[17]

As to "substantial interest",

> it does not necessarily follow that, because an applicant has an interest in land or financial interest which is affected by the development, such applicant will have a substantial interest, although this may often be the case in a particular set of facts. Equally, … other types of interest can count towards whether a person has a substantial interest.[18]

He then approvingly reviewed the High Court case law on "substantial interest" and stated that "the interest must be weighty and personal to the applicant in the sense that he has a demonstrable stake in the project, perhaps shared with others, deriving from the proximity and connectedness of his interest to the proposed development and its likely or probable effects." However, he declined to set out a definitive test for identifying this type of interest as "undesirable and probably impossible at this point". He approved of the conclusion of Clarke J and held that the applicant did not meet the "substantial interest" test. In response to the question certified for the appeal, his answer was

> … in order to enjoy a substantial interest within the meaning of s. 50 of the Act of 2000, it is necessary for an applicant to establish the following criteria:-
>
> (a) That he has an interest in the development the subject of the proceedings which is "peculiar and personal" to him.
>
> (b) That the nature and level of his interest is significant or weighty
>
> (c) That his interest is affected by or connected with the proposed development
>
> The calculation as to whether the interests of a particular applicant fulfil those requirements is obviously a matter dependent upon all of the circumstances of a particular case.[19]

Kearns J went on to deal with an argument that "substantial interest" should be given a more expansive interpretation in light of the amendments to planning law introduced in

order to give effect to the Århus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. He felt that the Act was clear and that therefore no issue of community law arose.[20]

He also dismissed an argument that "the possibility that in a given case there may be an error in process which can not be addressed in the context of an appeal to An Bord Pleanála [could] convert a non-substantial interest into a substantial interest." In other words, "persons who do not have a substantial interest in the matter the subject of the decision to grant or refuse an application for planning permission do not have *locus standi* to seek judicial review of the actual decision."[21] If there was some procedural error in the handling of the application, "the objector has his appeal to An Bord Pleanála".[22]

Judgment of Finnegan J

Finnegan J gave a short judgement in which he agreed with the decisions of Murray CJ and Kearns J and left for a future case the issue of whether a breach of the procedural requirements of the planning process could constitute a substantial interest in a particular case. He was,

> however, satisfied that mere participation in the planning process of itself is insufficient to constitute such an interest. If such participation could constitute an interest for the purposes of section 50 the interest identified of necessity would have to be one peculiar or personal to the applicant for judicial review to meet the requirement of being substantial.[23]

Commentary

"Not limited to an interest in land or other financial interest"?

The Supreme Court's interpretation of "substantial interest" is a restrictive one. This is both to be expected and surprising. The general trend of the High Court jurisprudence since the 2000 Act, Finlay Geoghegan J's comments in *Friends of the Curragh Environment* notwithstanding, has been towards limited *locus standi* in judicial review of planning decisions, and it was likely that the Supreme Court would follow it. However, section 50A (4) clearly states that "a substantial interest … is not limited to an interest in land or other financial interest", which points towards some preservation of the pre-2000 approach.[24] Does the Supreme Court's approach run counter to this explicit legislative provision and, as has been argued,[25] implicitly limit a substantial interest to an interest in land or other financial interest? It seems likely that it does, although we will have to await further rulings from the High Court to be certain.

However, it may be that this will not matter a great deal in practice, as section 50A (3) (a) (iii) gives *locus standi* in planning cases to *bona fide* environmental non-governmental organisations[26] and although Article 10a of the Århus Convention requires only a "sufficient interest" from those who seek to challenges decisions subject to Environmental Impact Assessment,[27] the High Court in *Sweetman v An Bord Pleanála*[28] held that an Irish court could read the phrase "substantial interest" (in the PDA 2000) in a wide fashion so as to give effect to the objective of the Directive in appropriate cases.[29]

Procedural Error and Substantial Interest

The Court left for another day the question of whether an applicant without a substantial interest on environmental or other grounds may have such an interest if there is a procedural error in the handling of the case which denies their statutory rights to participate. Murray CJ clearly states that he would; Kearns J is equally clear that he must be satisfied with an appeal to An Bord Pleanála. Finnegan J reserves the matter to a future case where the point is at issue.

Kearns J's logic has support in other jurisdictions. The Supreme Court of the United States has taken a more restrictive approach to standing in environmental cases since the 1990s.[30] In order to have standing, an applicant must be able to demonstrate a personal and particular "narrowly tailored localized harm that is fairly traceable to the government action or inaction for which the court can provide a remedy."[31] If the harm is procedural, the procedural right must protect the applicant's concrete interests, which are protected by the statute.[32] This standard is quite close to the test articulated by Kearns J in *Harding*, and can shut out those who rely solely on procedural grounds. For example, although environmentalists had standing to challenge delay in the production of a statutorily required research plan into global change,[33] and an environmentalist had standing to challenge the exemption of a timber sale decision from an appeals process,[34] all had to show some specific, personalised harm. In land use decisions, users of a swamp[35] and a harbour[36] had to show direct connections to the areas involved.

However, in Ireland, although not all procedural errors will affect the jurisdiction of An Bord Pleanála, in *Hynes v An Bord Pleanála (No. 2)*,[37] the High Court has concluded that some (such as the fact that the applicant does not have the required interest in the lands in question) will render the original planning application, and thus any appeal, invalid. In such a situation, there is a general public interest in upholding the legislative procedure. In *Harrington v An Bord Pleanála*,[38] Macken J noted that

> the legislation [must not be] applied in such a restrictive manner that no serious legal issue legitimately raised by an applicant could be ventilated, or which would have as its effect the inability of the courts to check a clear and serious abuse of process by the relevant authorities, such that either event might thereby remain outside the supervisory scrutiny of the Courts.[39]

With respect, if Kearns J's approach is followed, this could well lead to the realisation of the concerns of Keane J in *Lancefort v An Bord Pleanála*[40] that "the enactment of invalid legislation or the adoption of unlawful practices by public bodies do not escape scrutiny by the courts because of the absence of indisputably qualified objectors".[41] The tension between the policy objectives of ensuring accountability and avoiding frivolous challenges arises in any judicial review; in planning cases, there is also the clear legislative intention to shorten and streamline the planning process. Nonetheless, the latter should not be achieved at the expense of the rule of law, at least not without the use of clear language by the legislature.[42] To read into the loose wording of the 2000 Act, of which Murray CJ is so critical, a denial of procedural rights is not sound judicial policy whatever precedents may exist elsewhere.

Conclusion

Harding provided the Supreme Court with an opportunity to clarify the "substantial interest" requirement in planning judicial reviews, but while it did spell out a short list of criteria to use in future cases, it declined to give a detailed set of indicia. A full exposition would have been too much to expect, but the Court's approach to the matter also raises troubling questions regarding whether "substantial interest" is indeed "not limited to an interest in land or other financial interest" in practice and to what extent an applicant without such substantial interest but affected by some procedural error may be able to avail of judicial review. Clear answers to these questions will have to await further High Court decisions, and perhaps future Supreme Court appeals, but the irony is that as *Harding* clearly limits the scope of judicial review of planning decisions, it will itself delay a resolution to the issues which it raises.

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[1] Order 84 r. 20(4) of the Rules of the Superior Courts.

[2] *Per* Keane CJ in *Mulcreevy v Minister for the Environment, Heritage and Local Government* [2004] 1 IR 72 at 78.

[3] *Per* Denham J in *Lancefort Ltd. v An Bord Pleanála* [1999] 2 IR 270 at 292.

[4] [2003] IEHC 51; [2003] 4 IR 143.

[5] [2003] 4 IR 143 at 161.

[6] [2004] 2 IR 334.

[7] [2006] IEHC 177.

[8] [2006] IEHC 390; [2007] 1 ILRM 386.

[9] [2007] 1 ILRM 386 at 393.

[10] [2008] 2 ILRM 251 at 257.

[11] Ibid. at 259.

[12] Ibid. at 260.

[13] Ibid. at 262.

[14] Ibid.

[15] Ibid. at 268.

[16] [1999] 2 IR 270 at 318.

[17] [2008] 2 ILRM 251 at 272-73.

[18] Ibid. at 273.

[19] Ibid. at 278.

[20] Ibid. at 279.

[21] Ibid. at 280.

[22] Ibid. at 281.

[23] Ibid. at 282.

[24] See B. Conroy, '*Harding v Cork County Council*: No Room in Public Interest Environmental Litigation?', (2008) 15(3) *Irish Planning and Environmental Law Journal* 95, 98, and G. Simons, *Planning and Development Law* (Thomson Round Hall: Dublin 2007) 565-567.

[25] Conroy, ibid. at 99.

[26] Ibid. at 99-100.

[27] Simons, above n.24 at 559.

[28] [2007] 2 ILRM 328.

[29] See R. Kennedy, 'Access to Justice under the Århus Convention and Irish Judicial Review', (2008) 10(2) *Environmental Law Review* 139.

[30] See A. Long, 'Standing & Consensus: Globalism in *Massachusetts v. EPA*', (2008) 23 *Journal of Environmental Law & Litigation*, 73, 86-98.

[31] R. Abate, 'Massachusetts v. EPA and the Future of Environmental Standing in Climate Change Litigation and Beyond", (2008) 33 *William and Mary Environmental Law and Policy Review* 121, 156.

[32] Ibid. at 164, citing *Center for Biological Diversity v Brennan* No. C 06-7062 SBA, 2007 U.S. Dist. LEXIS 65456, at *2-3 (N.D. Cal. Aug. 21, 2007).

[33] *Center for Biological Diversity v. Brennan* No. C 06-7062 SBA, 2007 U.S. Dist. LEXIS 65456, at *2-3 (N.D. Cal. Aug. 21, 2007).

[34] *Earth Island Institute v Ruthenbeck* 490 F.3d 687 (9th Cir. 2007).

[35] *South Carolina Wildlife Federation v South Carolina Department of Transportation* 485 F. Supp. 2d 661, 667 (D.S.C. 2007).

[36] *Sierra Club v Department of Transportation* 167 P.3d 292, 297 (Haw. 2007).

[37] High Court, unreported, McGuinness J., July 30 1998.

[38] [2006] 1 IR 388.

[39] Ibid. at 402.

[40] [1999] 2 IR 270.

[41] Ibid. at 308. See H.Delaney, '"Substantial Grounds" and "Substantial Interest" – A Restrictive Interpretation' (2008) 26 *Irish Law Times* 246.

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[42] See Simons above n.24 at 565.

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