

**MINUTES OF SPECIAL MEETING OF WICKLOW COUNTY COUNCIL HELD IN
THE COUNCIL CHAMBER, COUNTY BUILDINGS, WICKLOW ON MONDAY 27TH
JULY 2015, COMMENCING 2.00 P.M.**

PRESENT:

COUNCILLOR P. FITZGERALD, LEAS CATHAOIRLEACH, COUNCILLORS T. ANNESELY, J. BEHAN, V. BLAKE, P. CASEY, S. CULLEN, T. CULLEN, P. DORAN, T. FORTUNE, P. KAVANAGH, N. LAWLESS, S. MATTHEWS, G. MCLOUGHLIN, D. MITCHELL, D. NOLAN, D. O BRIEN, G. ONEILL, B. THORNHILL, G. WALSH AND I. WINTERS

APOLOGIES:

CLLRS: S. BOURKE, J. BRADY, C. FOX, P. KENNEDY, M. MCDONALD, M. MURPHY, J. RUTTLE, J. RYAN (CATHAOIRLEACH) , J. SNELL, E. TIMMINS, P. VANCE AND J. WHITMORE.

IN ATTENDANCE:

**MR. B. DOYLE, CHIEF EXECUTIVE
MR. T. MURPHY, DIRECTOR OF SERVICES
MR. M. GEANEY, A/DIRECTOR OF SERVICES
MS. L. GALLAGHER, SENIOR EXECUTIVE OFFICER/MEETINGS ADMINISTRATOR
MR. F. KEOGH, A/DRIECTOR OF SERVICES
MR. D. SWEETMAN, LAW AGENT
MR. D. FORDE, BRAY MUNICIPAL DISTRICT ADMINSTRATOR**

In the absence of the Cathaoirleach the leas Cathaoirleach, Cllr. P. Fitzgerald, chaired the meeting.

At the request of the Leas Cathaoirleach, it was proposed by Cllr. J. Behan, seconded by Cllr. I Winters and agreed to delay the commencement of the meeting for five minutes to allow time for the elected members of west Wicklow attending another meeting to arrive.

The Leas Cathaoirleach advised that the Cathaoirleach had called the meeting the purpose of which was to discuss:-

'The assignment by Wicklow County Council of its freehold interest in the Barracuda Bray'

Cllr. T. Fortune asked for it to be put on record that not all of the elected members were familiar with the background in the matter and requested that the members be informed on the issue at today's meeting and that a special meeting be called to thereafter to discuss the matter further.

Report emailed to the elected members of Bray Municipal District on the 17th of July, 2015 was circulated to the elected members of Wicklow County Council prior to the meeting. Mr. David Forde, MD Administrator reported to the meeting in relation to same.

17th July, 2015

Following representations from several members, please see outlined below the current situation regarding the Barracuda/Sealife Aquarium Premises.

On the 14th July an application by the lessee to purchase the freehold of the premises at the Barracuda/Sealife Aquarium Premises came before the County Registrar.

The County Registrar determined that the lessee had a right to purchase the Fee Simple.

The County Registrar's Order is an Order of Court and must be complied with by the Council as a Body Corporate or risk contempt of Proceedings.

Therefore it will not be necessary to bring this matter to the full Council under Section 183 of the Local Government Act 2001.

Background;

The property was held under a lease for 65 years from the 1st July 1991 at an annual rent of £100. The lease was granted in consideration of a payment by the lessee of the then sum of £75,000 and covenant on their part to construct the aquarium premises in accordance with a planning permission which had been granted by Bray UDC in 1990.

In 2004 the term of the lease was extended to a total of 250 years from 1991 at the request of the then lessees and at the same time the user clause in the lease was amended to permit the lessees to apply for and obtain a Special Restaurant Licence which would enable them to serve alcoholic drink with meals being provided in the Barracuda Restaurant itself.

In order for a person who holds property under a lease, the law prescribes that where a person holds a property under a lease and the following conditions are complied with, he is entitled to acquire the fee simple;

- That there are permanent buildings on the land and that the portion of the land not covered by those buildings is subsidiary and ancillary to them. In this case the restaurant covers the entire area, the subject of the lease.
- That the permanent buildings are not an improvement within the meaning of the legislation. An improvement is any addition to or alteration of the buildings which is ancillary or subsidiary to those buildings but does not include any alteration or reconstruction of the buildings so that they lose their original identity. In this case, the lease required the then tenants to build the Barracuda premises which they did in the early 1990's.
- That the permanent buildings were not erected in contravention of a covenant in the lease. In this case there was a covenant requiring the tenants to erect the buildings on the land and thus this condition is fulfilled also.
- The lessee must then fulfill one of the alternative conditions set out in Section 10 of the relevant act which is the Landlord and Tenant (Ground Rents) (No.2) Act 1978. There are a total of 7 alternative conditions but the first provides 'that the permanent buildings were erected by the person who at the time of their erection was entitled to the lessee's interest under the lease or were erected in pursuance of an agreement for the grant of the lease upon the erection of the permanent buildings. In this case the lease was granted lessees and it was they who constructed the original buildings on site and as such, they were the persons entitled to the lessee's interest at the time that the buildings were constructed and thus the condition is fulfilled.

Elected members made the following contributions:-

Cllr. J. Behan expressed concern in relation to the information contained within the report of 17th July, 2015, circulated and the implications there may be for other Council owned property, particularly the Carlisle grounds. He asked for the Chief Executive to set out the full sequence of events that lead to the Council agreeing to sell the freehold of public property without reference to

the elected members. He asked to be provided with full details of the meeting which had taken place, the phone calls made and the emails sent and received leading to this decision. He asked what legal option the Council had at this point in time, what are the possible implications for other properties in the ownership of the Council and what are the planning and licencing implications for the premises having regard to the fact that there is no public ownership vested in the property.

Elected made the following contributions:-

- What are the legal options open to the Council to prevent the matter proceeding? What legal options are open to the Council to retain the Council's interest in the land?
- Did the Council contest the application to the County Registrar and if not why?
- Request for the elected members to be provided with a list of properties that the Council has an interest in and the current legal status of same. Also a request for a list of properties that have been disposed of in the past which the elected members may not have been informed of.
- Reference made to the extension of the Luas to Bray and query as to whether there is sufficient space within the Carlisle Grounds for park and ride facilities and for an interchange for the Dart and the Luas. Request put forward for provision to be made in the planning regulations for the Carlisle grounds to provide for an interchange and park and ride site.
- Proposal put forward that the Council appeal the decision of the County Registrar's record that an order of the court be complied with as it is considered to have legal implications for other local authorities in the Country.
- Request for a full list of assets disposed of by the Council's over the last 11 years that were not brought to the attention of the elected members.
- Query as to whether this outcome was envisaged when the lease was first written?
- Information requested as to when officials became aware that the lessees had applied to the County Registrar? why were the elected members not made aware of this and did the Council seek legal opinion to oppose the application?
- Did the Council seek an order of stay on the judgement until the matter could be dealt with at a special meeting

Cllr. T. Fortune proposed that *'Wicklow County Council put an order of stay by way of legal challenge and write to the Minister and look for legal opinion from the Attorney General'*. This was seconded by Cllr. P. Kavanagh.

Mr. B. Doyle, CE, responded to the queries raised as follows:-

- The Council will provide the elected members with a full and detailed report of the sequence of events in the matter as requested.
- If there are similar leases it is envisaged that the same will apply, however it is understood that this is not the situation in relation to the Carlisle grounds. This matter can be discussed by the Bray Municipal District Members and the information can be obtained and made available.
- The strong legal advice to the Council is that the Council had no option but to proceed as it did.
- With regard to the request for a list of all disposals where management may not have reverted to the Council, this will be examined, and the information made available, however it may take a certain amount of time.
- Under legislation, the power to dispose of property lies with the Council, however, in this particular lease the Landlord and Tenant Act provided that the purchasers had a right to purchase the fee simple and that the Law Agent will cover this in more detail as well as why it was not necessary to bring the matter to the full council.

Fergal Keogh, A/DOS, Planning and Economic Development, advised that S34 of the Planning and Development Act provides that a person cannot develop land on foot of a planning permission if they do not have sufficient legal interest in the property and that the rumoured suggested use would

require a material change of use. If this is so this will entail a planning application to Wicklow County Council.

Mr. David Sweetman, Law Agent advised the Council as follows:-

- He outlined the background to the leases advising of the initial lease granted back in 1991 for a payment of £75,000 for the construction of the building now generally known as the Barracuda on the Esplanade in Bray.
- The current tenant applied, through solicitors, to purchase the freehold and a formal application was made to the Country Registrar in June, 2015
- Both the Law Agent and the Council's barrister were of the view that the tenant had an entitlement to purchase the fee simple under the relevant landlord and tenant legislation having regard to the conditions therein, which he explained in detail.
- The Council engaged valuers and some eighty years purchase for the freehold was extracted which was slightly more than would have been awarded by the Country Registrar having regard to precedent available in other areas such as Dublin and Cork cities.
- The matter was dealt with by the County Registrar on 14th of July and having regard to the advice received the application was not contested as it was clear that the lease entitled the lessee to purchase the fee simple and the same view was formed by the County Registrar.
- The Landlord and Tenant Acts provide that where a person has an entitlement, his landlord, whether it be a local authority or otherwise, is obliged to dispose of the freehold to that person, and having regard to the terms of the lease and the facts, any disputing of the matter before the County Registrar could have resulted in an award of costs against the Council.
- The matter can be appealed to the circuit court, however in view of the clear entitlement of the tenant this would be urged against, as it is likely that a circuit court judge would award the costs of the proceedings against the Council which would be considerably costly.
- Most matters come before the Council by way of disposal resolution under the relevant legislation with the exception of tenant purchase disposals which do not require a disposal resolution. The relevant legislation covering this is section 6 of the Landlord and Tenant Ground Rents Act 1967 which is the basic legislation that grounds the right of the tenant to purchase the fee simple from his ground landlord.
- An entitlement to purchase the fee simple is a statutory entitlement and all public bodies, including County Councils, are obliged to comply with this provision

Elected members made expressed the following views:-

- The matter is one of principle in that public representatives hold the legal power to dispose of property and in this case, elected members were bypassed.
- How much did the Council receive for the fee simple?
- Is it the role of the County Registrar to suggest that the application not be objected to and what exactly was said by the County registrar?
- Were the rights of the public representatives considered in any of these matters and at the very least should the elected members have been informed?
- Do the terms of the 2004 lease supercede the terms of the 1991 lease and does non compliance with the terms of the lease provide reasonable ground to revisit the lease?
- What can the Council can do to prevent this from happening again?
- Concern expressed that this matter was relevant to the County and all of the elected members should have been informed.

In response to the queries raised the Law Agent advised that the valuers advice is that determination of the fee simple is done by way of a multiplier of the ground rent and the figure received in this case was €10,000. The 2004 lease was a variation of the 1991 lease and the 1991 lease remains. The Country Registrar having read the papers advised that had the Council

contested the matter, she would have determined that the tenant had the statutory right to purchase the fee simple.

In response to a request from Cllr. J. Behan that the Chief Executive facilitate the elected members obtain alternative legal advice on the matter the Chief Executive advised that it was open to the elected members to obtain independent legal advice and if the elected members wished to nominate Counsel, this can be arranged.

Mr. Fergal Keogh, A/DOS referenced a previous similar case where An Bord Pleanala returned that the use of the first floor as a public bar over a bar and restaurant down stairs constituted an intensification of use which had material consequences in terms of proper planning and sustainable development which was therefore not exempted development. He also advised of the areas that would be taken into account in assessing a planning application such as zoning, uses, policies, etc and that any decision made by the Council could be appealed to An Bord Pleanala.

Cllr. T. Fortune requested a copy of the legal opinion, valuation and site map of the property in addition to the documentation requested earlier.

Cllr. J. Behan advised that he was satisfied for the Chief Executive to facilitate the seeking of alternative independent legal advice based on a minute of the meeting and the issues raised, and in particular the question of whether the rights of members of the Council to be consulted and to give approval on the issue would be examined. He said to receive this information would be a good outcome.

In addition to the documents requested Cllr. T. Cullen requested a copy of the 1991 and 2004 disposal resolutions and copies of the 1991 and 2004 leases.

Cllr. T. Fortune indicated he was happy to await receipt of the documents requested, by end end of the week, prior to proceeding with his proposal.

THIS CONCLUDED THE BUSINESS OF THE MEETING

**CLLR. JOHN RYAN
CATHAOIRLEACH
WICKLOW COUNTY COUNCIL**

**MS. LORRAINE GALLAGHER
SENIOR EXECUTIVE OFFICER/
MEETINGS ADMINISTRATOR**