Neutral Citation [2016] IEHC 477

THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 327 JR]

IN THE MATTER OF SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 2000 AS AMENDED

AND

IN THE MATTER OF AN APPLICATION

BETWEEN

ANGELA PEARCE

APPLICANT

AND

WESTMEATH COUNTY COUNCIL

RESPONDENT

AND

ANGELA BOYHAN (IN HER CAPACITY AS LEGAL PERSONAL REPRESENTATION OF SHAY BOYHAN DECEASED)

AND

AN BORD PLEANÁLA

NOTICE PARTIES

JUDGMENT of Mr. Justice McDermott delivered on the 26th day of July, 2016

1. This is an application for an order of *certiorari* quashing the decision of Westmeath County Council dated 22nd November, 2013 and/or later dates purporting to agree the submission of the first named notice party regarding a haul route survey and provision of lay-bys made pursuant to condition 16(1) of a planning permission granted by An Bord Pleanála (Ref. No. PL25 2221717) on appeal from a decision of Westmeath County Council (Planning Register Ref. No. 06/5362). Various related declarations are also sought but these, for the most part, embody the grounds upon which the order of *certiorari* is sought.

Background

2. The applicant, her husband and two children reside at Fearbranagh, Co. Westmeath. Their family home is situated approximately 300 metres from the entrance to a quarry which is the subject of these proceedings. They moved into their home in or about 2005. The notice party Ms. Boyhan is the widow of the late Mr. Shay Boyhan who was the owner and operator of the quarry. The applicant states that for approximately two years after moving into their family home there was hardly any activity in the quarry. In January 2005 she describes a dramatic intensification of quarrying at the site up to a heavy industrial level. There was a constant stream of heavy laden trucks drawing rock every day. Approximately 630,000 tonnes of material was extracted from the quarry throughout 2005 according to an environmental impact statement submitted in 2006 as part of a planning application. It is estimated that during 2005 there was an average of 150 loaded trucks emerging from the quarry every day (giving rise to approximately 300 return journeys).

3. The planning history of the quarry goes back to 2006. On the 19th April, 2006 Westmeath County Council decided to require the first notice party to apply for planning permission for the operation of the quarry and to submit an Environmental Impact Statement (EIS) under s. 261(7) of the Planning and Development Act 2000. The applicant took the view that this application was *ultra vires* the Council because the proposal did not comply with two mandatory conditions in the legislation. An application for judicial review was initiated (2006 No. 680 JR) on the 12th June, 2006. Prior to the hearing of the judicial review, the Council granted permission on the 5th February, 2007 for the continuation of quarrying on the site as a continuation of a pre-1964 development.

4. The High Court (Hanna J.) dismissed the judicial review proceedings. This decision was appealed to the Supreme Court on 26th March, 2009. However the appeal was withdrawn on the coming into operation of s. 261(A) of the Planning and Development Act 2000 because the applicant believed that the issues raised on the appeal would be the subject of a re-examination by the Council and An Bord Pleanála on review. An Bord Pleanála granted planning permission for the continuation of the quarry before the appeal was withdrawn.

5. The permission granted by An Bord Pleanála contained a number of compliance conditions and in particular condition 16(1). It related to matters which had been of great concern to the applicant since 2005 relating to the adequacy of the road access to the quarry via the existing road structure in the immediate area and its capacity to absorb the very heavy traffic generated. The haul route to the quarry passed through two villages, Multyfarnham and Crookedwood and consisted of eight kilometres of narrow winding country road varying in width between 4.5 and 5.5 metres with narrow verges. The planning permission allowed an unlimited run of truck movements along the route to remove 300,000 tonnes of rock per annum.

6. An Bord Pleanála granted permission subject to compliance with these conditions having determined that the proposed development "would be acceptable in terms of traffic safety and convenience, would not seriously injure the amenities of the area or property in the vicinity, would not be prejudicial to public health and would not be contrary to the planning and sustainable development of the area". The conditions restricted the time of the quarry's operation to between 7 a.m. and 6 p.m. Monday to Friday and 7 a.m. to 2

p.m. on Saturday. No activity was to take place outside these hours or on Sundays or bank holidays. No rock breaking activity was to be undertaken on any part of the quarry complex before 8am on any day. Conditions were also attached limiting blasting operations to between 11a.m. and 4 p.m. Monday to Friday and requiring vibration and dust monitoring.

7. In relation to the haul route to and from the quarry the following conditions applied:

> "15(1) The haulage route to and from the quarry shall be as stated in the documents submitted with the application.
>
> (2) The developer shall submit the haul route from Multyfarnham to the N4 to the planning authority for written agreement prior to commencement of development.
>
> Reason: In the interest of traffic safety.
>
> 16(1) The developer shall submit to the planning authority for written agreement a detailed survey of the entire one-way, haul route at 20 metre intervals, showing width, levels, verges and all other relevant features and identifying the number and location of all lay-bys to be provided by the developer.
>
> (2) The developer shall provide and complete all lay-bys agreed under paragraph (1) above within six months from the date of this order and shall comply with the requirements of the planning authority for such works and services.
>
> Reason: In the interest of traffic safety and orderly development."

8. On the 20th January, 2012 the applicant made a submission or observation to the respondent in relation to its re-examination of the circumstances of the quarry at Killintown, Multyfarnham (Ref. No. EUQY14) pursuant to s. 261A of the Planning and Development Act 2000 as amended. On the 13th August, 2012 the Council made a determination pursuant to s. 261A(2)(a) and a decision pursuant to s. 261A(3)(a) directing the first named notice party to apply to An Bord Pleanála for substitute consent with a remedial Natura Impact Statement (NIS) in respect of the quarry pursuant to s. 177E of the Act.

9. The Council failed to notify the applicant of this determination within the statutory time period allowed to enable her to apply to An Bord Pleanála for a review of either or both of the determinations. In further judicial review proceedings between the applicant and Westmeath County Council (2012/828 JR) a consent order dated the 19th May, 2013 was made by the High Court remitting the matter to the Council to remake its decision and to notify her of it within time to allow her to seek a review by An Bord Pleanála.

10. A fresh decision dated 5th June, 2013 was made by the Council and issued to the first named notice party. The applicant sought a review of this decision by An Bord Pleanála as did the quarry owner. An Bord Pleanála notified the applicant of its decision dated 26th March, 2014. On the 19th May, 2014 the applicant was granted leave to apply for judicial review of this decision against An Bord Pleanála.

11. Meanwhile the first notice party purported to comply with condition 16 of the planning permission as originally framed which required a survey at 20 metre intervals to be carried out within six months of the date of the order to grant planning permission. The purpose of the survey was to identify all of the multiple points on the road where a traffic hazard and/or nuisance to road users and those living along the road might arise.

12. On the 4th January, 2010 the first named notice party made a submission to the County Council identifying the 27 kilometre one way haul route in order to comply with condition 15 of the planning permission and proposing the location of lay-bys in accordance with condition 16. It was submitted that condition 16 required the applicant to submit a detailed survey of the entire one way haul route at 20 metre intervals showing width, levels, verges and all other relevant features identifying the number and locations of all lay-bys to be provided by the developer. It noted that the entire one way haul route was approximately 27 kilometres in length. The submission indicated that a site visit to the existing quarry had been carried out and that the haul route had been travelled many times in order to identify the number and location of lay-bys required. A photographic survey and aerial mapping were provided identifying the proposed location of lay-bys along the haul route.

13. The submission also included a review of the L1618 which was said to have a good standard of road surfacing with appropriate signage and road markings in place. It was said that the relevant section of the L1618 was of a sufficient width to currently accommodate the two-way passing of heavy vehicles along the route and that there was no need to provide lay-bys between the village of Multyfarnham and the junction of the L1618 with the N4.14. The section of the R398 between the N4 and the village of Crookedwood was also deemed to be of a sufficient width and standard to accommodate the passing of two-way heavy vehicles and did not require lay-bys.

15. The authors identified locations between the villages of Crookedwood and Multyfarnham where lay-bys could be provided to enable two heavy vehicles to pass without affecting the operation of this section of the L1618. These proposed locations were shown in the schedule of photographs and maps and would be located at various points along the L1618 to enable the two-way passing of heavy vehicles along the road. Sample details of the proposed lay-bys were included together with general specification for the widening of the lay-bys and construction methodology. The authors considered and submitted that this technical information was sufficient to comply with condition 16 in the planning permission. It noted that the final design and location of the proposed lay-bys could be discussed with the Council at detail design stage. Confirmation was sought that the submission addressed conditions 15 and 16 satisfactorily.

16. Westmeath County Council replied by letter dated 2nd February, 2010 stating that it was satisfied that condition 15 had been compiled with. However, it stated:

> "With regard to condition number 16, the details submitted are not adequate to assess proposals. Layout drawings and alignment drawings with changes and specific lay-by details need to be submitted. It appears that the developer does not intend to carry out the full topographic survey, please clarify."

17. Following further consultations between the planners and the first notice party's experts and a request made to the Council "to have the 20 metre interval survey of the haul route omitted" Mr. PJ Carey the area engineer wrote in an e-mail to the applicant's consultants on the 18th March 2010 that condition 16

> "… is specific and does not allow the LA (Local Authority) any discretion in the matter – i.e. ABP (An Bord Pleanála) have not stated *or as may be agreed by the planning authority*, allowing the LA to vary the terms of the details to allow the

applicant to submit only the agreed lay-bys to LA.

Given that ABP are the higher authority on this case as they made the final decision on the planning application, we should be abiding by the ABP decision.

Under s. 146A of the Planning and Development Act 2006 you can ask ABP to reconsider this condition. It may well be that the Board will tell us to consider your request but we would need this response in writing from ABP before we can agree to it".

18. Sean Lucy and Associates, town planning consultants to the first notice party applied to An Bord Pleanála under s. 146(A) of the 2006 Act to amend condition 16 to read as follows:

> "1. The developer shall submit to the Planning Authority for agreement the number and location of all lay-bys to be provided by the developer on route L1618 between Crookedwood and Multyfarnham.
>
> 2. The developer shall provide and complete all lay-bys agreed under paragraph (1) above within three months of the recommencement of quarrying on the site on which quarrying has currently ceased."

This amendment was said to be necessary to facilitate the operation of the decision of An Bord Pleanála. It was noted that the cost and logistics of the detailed survey required by condition number 16(1) were excessive and wholly unnecessary for the purpose of establishing the number of lay-bys required. The Board made a decision on the 23rd July, 2010 by which it agreed to amend the condition but not in the terms sought on behalf of the first named notice party. It accepted that it was appropriate to amend the condition in order to facilitate the operation of the permission. It concluded that the amendment would not result in a material alteration of the terms of the development. Having taken into account the issues involved and submissions from interested parties it amended condition 16 to read as follows:

> "16(1) The developer shall submit to the Planning Authority for written agreement, a detailed survey of the entire one way, haul route showing width, levels, verges and all other relevant features and identifying the number and location of all lay-bys to be provided by the developer."

The only change made was to delete the words "at 20 metre intervals" from condition 16(1). Condition 16(2) remained unchanged. It clearly retained the requirement that a detailed survey would be carried out but not at 20 metre intervals.

19. Though the decision to amend condition 16(1) did not purport to confer on the local authority any discretion to agree any variation of the detailed survey to be submitted under condition 16(1) by, for example, inserting the phrase referred to in Mr. Carey's e-mail "or as may be agreed by the planning authority", the following reason was given for the amendment:

> **"Reasons and Considerations:**
> It was considered that the requirement for a survey at 20 metre intervals was unduly onerous and that the details of the survey would be more appropriately agreed between the planning authority (as roads authority) and the developer. It was considered that an amendment of condition 16 as set out above would not result in a material alteration of the terms of the development".

These reasons are contained in the Board direction dated 19th July, 2010.

The more limited formula suggested by Sean Lucy and Associates was not adopted by the Board.

20. On the 1st December, 2010 the first notice party made a submission pursuant to the amended condition 16(1) which indicated the position of eight proposed lay-bys to be located on an 8 kilometre section of the haul route between Crookedwood and Multyfarnham. On the 11th March, 2011 the respondent agreed that this submission by the notice party complied with the condition as amended notwithstanding the fact that it referred to a survey of less than one third of the haul route i.e. 8 kilometres of the 27 kilometres and appeared to exclude both villages. This was the precise limited stretch of roadway which Sean Lucy and Associates had suggested to An Bord Pleanála in its proposed draft amendment of condition 16(1) when seeking to restrict its ambit but which had not been granted.

21. The applicant contends that the Council's decision was in clear breach of the unambiguous requirements of the original and amended condition 16(1) which required a detailed survey of the entire one way haul route showing width, levels, verges and all other relevant features and the identification of the number and location of all lay-bys to be provided by the first notice party.

22. The applicant on attending the Council's planning office on the 25th March, 2011 discovered that the submission consisted of three A1 drawings and a CD. There was no hard copy of the CD available nor was there a facility for viewing it in a readable format. A copy of the drawings was requested and the applicant stated that she was informed she would be contacted when they were ready. On the 16th May Sean Lucy and Associates submitted a route map of L1618, L1820, R394 and the N4 and figures giving the width of these roads. There was no further contact with the applicant and she returned to the planning office on the 7th April where she was given a copy of two of the A1 drawings (one of which she claimed was incomplete). She then made a written request on 7th April seeking copies of the two outstanding A1 drawings and the information from the CD in readable format.

23. On the 21st April, 2011 the applicant collected a copy CD but she did not have the CAD software with which to read it. She was furnished with a copy of the maps. Though the applicant was able to secure the services of an engineer who opened the CD in her presence, a further file could not be opened. The opened CD indicated details of proposed lay-bys and a survey of 7-8 kilometres of the haul route. She was advised that the remaining unopenable CD was insufficient to contain a survey of the remaining 27 kilometres of the route.

24. The applicant complained by letter dated 28th April, 2011 that the decision of the 11th March, 2011 was in breach of condition 16(1) and also complained that the information was not properly available on the public file.

25. The submission of 1st December, 2010 stated:

> "We enclose herewith in CD format a survey of the road number L1168 from Crookedwood to Multyfarnham showing the proposed location of 8 No. proposed lay-bys. The locations for lay-bys as shown have been previously discussed with Mr. Mkhululi Ndebele and Mr. PJ Carey, engineers for the Castlepollard area. The road survey has been provided in CD format

because of the impracticality of the number of drawings that would otherwise be involved.

However, detailed surveys and designs were undertaken at each of the proposed lay-by locations and we attach those survey drawings together with Drawing No. SL-1 to a scale of 1/10,000, details of which can be assessed from the CD enclosed."

The decision by the Council of 11th March, 2011 is stated shortly in a letter to Sean Lucy and Associates acknowledging receipt of the letter of the 1st December, 2010 and informing them "that condition number 16(1) has been complied (sic)".

High Court Order 24th April, 2013

26. As a result a judicial review application (Record No. 2011 359JR) was initiated. Leave was granted on the 4th May, 2011 (Peart J.). The notice party herein was also a notice party in these judicial review proceedings which were settled. By consent on 24th April, 2013 the court (Kearns P.) made the following orders:

> 1. An order of *certiorari* … setting aside the decision made by Westmeath County Council on the 3rd March, 2011 and the agreement on compliance subsequently issued by Westmeath County Council on the 11th March, 2011, the subject matter of the proceedings herein.
>
> 2. An order directing that Westmeath County Council make a fresh determination and decision pursuant to the provisions of the Planning and Development Acts 2000 to 2011 as to compliance or otherwise with condition 16(1) of the permission granted by An Bord Pleanála on the 15th July, 2009 and subsequently amended by the Board on the 23rd July, 2010 in respect of a Notice Parties' quarry at Killintown, Multyfarnham, Co. Westmeath with provision being made for the said Notice Party to submit further information and the Applicant to make further submissions in respect of same, which submissions are to be taken into account prior to such determination and decision being made and notified to the said parties."

Subsequent Events

27. The applicant complained in those proceedings that there was once again, a failure by the notice party to furnish a survey of the entire one-way haul route as required in breach of condition 16(1) and that the Council had failed to give any reason for it's determination that the condition had been compiled with and had also failed to make the notice party's submission on the 1st December, 2010 available to the applicant. The respondent was obliged to make a fresh determination in respect of the compliance by the notice party with condition 16(1) in accordance with the terms of the order. This required also that provision be made for the notice party to submit further information and for the applicant to make further submissions which were to be taken into account prior to the making of the second determination.

28. Following the making of this order the applicant inspected the planning file between June and November 2013 and subsequently on the 16th May, 2014. No new documents had been submitted on behalf of the notice party. On inquiring with the planning office, the applicant was informed that it had received further documentation which was "unfiled" relating to the planning application. These documents were emailed to the applicant on the 16th May. They consisted of a letter from Sean Lucy and Associates on behalf of the notice party dated 23rd October, 2013, a copy of the court order perfected on the 19th May, 2013, a County Council memorandum dated 22nd November, 2013 signed the 5th February, 2014 and a notification by Westmeath County Council dated 12th February, 2014. These documents were subsequently placed on the public file with the exception of the letter of 23rd October, 2013 which had not been added to the file prior to 29th May, 2014. The applicant was not furnished with a copy of an order embodying a decision that the developer was in compliance with condition 16(1) nor was any such order included on the public planning file up to 29th May.

29. On 22nd October, 2013 a meeting took place between Mrs. Angela Boyhan, Mr. Sean Lucy, Mr. Declan Leonard, director of services, Westmeath County Council, and Mr. Billy Coughlan, an official of the Council. Mr. Coughlan made a note of the points addressed during the course of the meeting. There is a clear reference to condition 16(1) and the setting aside of the Council's previous compliance decision by the High Court. The note reads:

> "16(1) Set aside by judge
>
> Sufficient information to re-issue letter of compliance"

30. On 23rd October Mr. Lucy wrote to Mr. Leonard seeking clarification in respect of a number of matters and noting

> "In addition to the foregoing, it was agreed at our meeting that Westmeath County Council would forward, as soon as possible, a written notification in respect of Killintown Quarry's status, that:
>
> 1. …
>
> 2. That planning condition No. 16(1) has been complied with …"

31. On 22nd November, 2013, a memorandum was prepared by Mr. Tony Buckley, Executive Engineer with Westmeath County Council arising out of the High Court's order that the Council make a fresh determination and decision concerning compliance with condition 16(1). He stated in respect of the amended condition and the removal of the words "at 20m meter intervals":

> "C. Issues arising from the revised wording
>
> The revised wording did relieve the notice party (Boyhan) and their agents of having to produce cross-sections at 20m intervals.
>
> However, the remaining inclusion of the words "entire one-way" in the condition could lead persons to believe that the roads to be considered for lay-by construction would also include the Regional road R394 Crookedwood to Mullingar Road and the N4 Bunbrosna to Mullingar Road.
>
> The notice party's agent Sean Lucy and Associates made the argument to Westmeath County Council that the N4 and R394 were roads of sufficient width and did not need lay-bys as there are several quarries along these routes, and they are two-way trafficked, WCC agreed but unfortunately there was no written record of this agreement at that time.

Westmeath County Council stipulated in an email from Mr. PJ Carey, senior executive engineer, Coole Area to Sean Lucy and Associates dated 18th 2010:

> 'The developer shall submit a detailed survey of the route LP1618 between Crookedwood and Multyfarnham showing width, levels, verges and all other relevant features in identifying the number, location and details of the proposed lay-bys.'

Sean Lucy and Associates prepared further documentation submitted on the 1st December, 2010."

32. The memorandum then lists the drawings and documents submitted on 1st December, 2010 and recites that on 16th May, 2011, Sean Lucy and Associates submitted an overall map of the LP1618, LP1820, the R394 and the N4. The typical road widths of the N4, R394 and LP1618 being 8.5m, 7m and 5.5m respectively were also submitted.

33. Mr. Buckley then recites how he conducted a site survey on the 20th November, 2013. He determined that the average width of the LP1820 Multyfarnham to Bunbrosna Road was 5.23m which was obtained by taking 16 width measurements along its length and calculating the average. The LP1820 had several long stretches and several "natural lay-bys" by using parking strips in front of "one off" houses. He stated that it was the Council's standard procedure to condition the construction of 3m wide by 3m long parking strips when considering the granting of permission for a one off house in a rural area. He stated "there is no need for additional lay-bys on this section of the haul route". He outlined that during the same survey he identified the proposed lay-by sites for the LP1618 (Crookedwood to Multyfarnham Road) and photographed same. The average width of the LP1618 was determined to be 5.45m. He also determined on this inspection that there were eight stretches of the LP1618 where passing lay-bys are required, where the road is less than 5m there are no other suitable parking strips available for passing. He stated:

> "The planning authority is satisfied that the eight number passing lay-bys proposed by the developer will adequately cater for the requirement of passing lay-bys on these stretches of the LP1618. The planning authority is also satisfied that the verges at these locations are suitable for the construction of passing lay-bys."

34. He stated his conclusion as follows:

> "E.
>
> Since the High Court Judicial Review Record No. 2011/359JR instructed the Council to make a fresh determination as to whether condition 16(1) was deemed to be compliant I would conclude as follows:
>
> The developer has submitted to the planning authority a survey of the entire one way haul route, the widths, levels and verge details has been shown at eight number lay-by locations identifies to be provided by the developer.
>
> Westmeath County Council agree that the level of detail provided is satisfactory. Westmeath County Council also agrees that the eight number lay-bys proposed are satisfactory.
>
> It is therefore considered by the planning/road authority of Westmeath County Council, that condition 16(1) of An Bord Pleanála Re: PL25.22217M and WCC Re: PP06/5362 are deemed to be compliant".

Mr. Declan Leonard noted his agreement with this report by signing it on the 5th February, 2014.

35. On the 12th February, 2014 Mr. Leonard on behalf of the County Council informed Mr. Lucy and Associates on behalf of the third named notice party as follows:

> "In relation to Planning Permission No. 06/5632 and Condition No. 16-1 of the Board's decision, I wish to confirm that we have examined your submissions in relation to this condition and we can confirm compliance with this condition".

36. There is clearly an inconsistency between Mr. Lucy's understanding that the Council had accepted that planning condition 16(1) had been complied with in his letter of 23rd October, 2013, following an indication to that effect by Mr. Leonard on the 22nd and the report furnished by Mr. Buckley on 22nd November in which he purports to offer his conclusion, following a survey of the haul route said to have been carried out on 20th November, a month after the meeting at which compliance had been agreed. Furthermore, Mr. Leonard does not purport to agree with the report until 5th February, 2014. No explanation for these inconsistencies has been furnished to the Court by the County Council which has not taken any part in these proceedings. Mr. Lucy's recollection on affidavit of the meeting on 22nd October is that various matters including condition 16(1) had been discussed but were not agreed at the time. This is entirely inconsistent with his letter in respect of compliance with condition 16(1) of the 23rd October.

37. The determination that the notice party was compliant with condition 16(1) reached at the meeting of 22nd October and acknowledged subsequently in correspondence, was based on the same material submitted on behalf of the notice party by Sean Lucy and Associates on 1st December, 2010. There was a further submission by Sean Lucy and Associates on 16th May, 2011, which enclosed a set of generally available OSI discovery series maps taped together and forming a large map showing the haul route, which the applicant contends does not contain any detailed surveys as required by condition 16(1). In addition, apart from the fact that Mr. Buckley's report appears to post-date the decision made in October, the applicant complains that this report relies on average road widths of the LP1820 Multyfarnham to Bunbrosna Road and does not constitute the detailed survey showing widths, levels, verges and other relevant features contemplated by the amended condition and the High Court order of 19th May, 2013. It also includes as proposed lay-bys parking strips outside private houses. I am satisfied that this is so.

The Present Proceedings

38. An application for leave to apply for judicial review was granted on 5th June, 2014. Initially the applicant sought to rely upon an alleged contempt of court by the respondent in failing to adhere to the terms of the High Court order made on 19th May, 2013. However, the case proceeded on the basis of grounds 17 to 20, namely that the decision of the County Council dated 22nd November, 2013 (5th February, 2014 and/or 12th February, 2014), purporting to accept that the submission by the first named notice party concerning the haul route survey and provision of lay-bys constituted compliance with amended condition 16(1) of the planning permission, should be quashed because:-

> (i) the respondent failed to give reasons for its decision;

(ii) the submission made by the third named party failed to include a survey of the entire one way haul route as required and was limited to only 8km of the 27km haul route;

(iii) the decision was irrational because the information required by An Bord Pleanála and required to determine compliance with condition 16(1) was not submitted by the first named notice party; and

(iv) the decision was *ultra vires* the respondent and of no legal effect.

The County Council's Response

39. The respondent declined to deliver a statement of opposition in a letter dated 3rd September, 2014. The respondent's solicitors wrote to the applicant's solicitors indicating that "they may be in a position to agree not to oppose the relief sought in these proceedings if costs could be agreed". In a further letter dated 6th October, 2014 the Council wrote to the first notice party's solicitors and stated that, having taken advice they were advised "that the survey submitted by your client did not satisfy the requirements of An Bord Pleanála's Decision and accordingly the County Council proposes to consent to the relief sought by the Applicant subject to the Court being so satisfied". In a reply dated 17th October, 2014, the first notice party's solicitors stated that they did not believe there were proper grounds for judicial review by the applicant. They indicated that if the County Council consented to the granting of the relief sought and this caused economic loss to their client, they would pursue the Council for compensation. By letter dated 20th April, 2015, the Council in a letter to the Registrar of the High Court indicated that though the parties at the call-over were directed to make submissions in relation to the matter by close of business on Monday 20th the Council stated that it was "not opposing the relief sought by the applicant on the basis of the grounds alleged at paras. (e) 18, (e) 19 and (e) 20 and has not filed any papers in opposition and accordingly does not intend to make submissions on the substantive issues herein".

40. At the commencement of the hearing of this action, counsel on behalf of the respondent varied that position and indicated that by not consenting to the making of the orders sought it had not entered a statement of opposition but did not wish to be seen to be consenting to orders made on the grounds set out in the letter of 20th April.

The First Notice Party: Mrs. Boyhan

41. The first notice party is understandably frustrated with the present course of events. The lands in issue are the subject of a planning permission and the litigation which has ensued is principally directed against the perceived inadequacies of the Council and the notice party in giving effect to the implementation of condition 16(1). An understandable complaint is made that no reason has been given by the County Council as to why it has adopted its position in these proceedings. It is said that Mrs. Boyhan is entitled to the benefit of a decision made by the Council that she is compliant with condition 16(1). She complains that the Council's position in these proceedings contradicts its previous determination and effectively revokes its agreement that Mrs. Boyhan is compliant with the condition. It is submitted that had the Council advised the notice party that her submission on compliance was not accepted and explained the reason why, she could have then submitted a further compliance submission addressing any particular concern or made an application to An Bord Pleanála under s. 34(5) of the Planning and Development Act 2000. The notice party therefore submits that she is left with little option but to oppose the applicant's claim in particular where a declaration is also sought that her planning permission has expired by effluxion of time.

42. It is submitted that conditions 16(1) and (2), must be read together in order to understand the purpose of the survey directed under the condition. It is clear from the submission made by Sean Lucy and Associates in respect of the N4 carriageway and the regional route, that they were sufficient to satisfy the Council that no further survey of the haul route than that already submitted was required. No issue was raised by the Council concerning the adequacy of the width of the roadway apart from the 8km stretch. It is claimed that the course of dealing between Mr. Lucy on behalf of the first notice party and Council officials on this topic makes this clear. In particular, emphasis is placed on the fact that in a telephone conversation on 2nd October, 2009, with Mr. Ndebele, a road engineer with the County Council, regarding condition 16, he agreed that there was no necessity to carry out a survey of the national and regional routes which were included in the haul route. Reliance is also placed upon the views expressed by Mr. Buckley in his report of 20th November, 2013. His view is also said to be consistent with the extensive submissions by TPS submitted by Mr. Moran on 11th January, 2010, to the same effect. It is also claimed that Mr. Buckley's survey in November 2013 obviated any necessity for the submission of more detailed information on behalf of the notice party. It is also submitted that a full professional survey of the haul route was previously carried out by expert surveyors which was submitted in CD format from which the planning authority engineers could fully access and view road width, verges and other relevant features at any location along the length of the local road from Crookedwood to Multyfarnham. The first named notice party therefore claims substantial compliance with the requirements of condition 16(1).

Discussion

43. Under condition 16(1), the developers are obliged to submit to the planning authority "for written agreement, a detailed survey of the entire one-way, haul route showing width, levels, verges and all other relevant features in identifying the number and location of all lay-bys to be provided by the developer".

44. The only significant amendment from the earlier terms of condition 16(1) was the removal of the 20m interval requirement which was deemed to be unduly onerous. The Board did not accede to an application to amend the condition to confine the details of the survey to the 8km section of the haul route between Crookedwood and Multyfarnham. The condition retained a requirement that the detailed survey be submitted "for written agreement". The reason for the amendment was that the details of the survey would be more appropriately agreed between the planning authority and the developer. It was for the Council to determine whether they would agree that the detailed survey submitted reasonably and adequately showed the "width, levels, verges and all other relevant features and identify[ied] the number and location of all lay-bys to be provided".

45. As is clear from the history of the litigation the materials submitted on behalf of the first notice party resulted in a decision made by the Council on the 3rd March, 2011 and a further agreement based on that decision that there had been compliance with condition 16(1) issued on the 11th March, 2011. Both of these decisions were quashed by order of the High Court made by consent on the 24th April, 2013 of which the first notice party had full notice. That order provided that the Council should make a fresh determination and decision as to compliance with condition 16(1) and expressly provided that the notice party might submit further information and the applicant might make further submissions in respect of same. These submissions were to be taken into account prior to the making of any determination and decision and its notification to the parties.

46. It was crystal clear that the applicant was dissatisfied at that time with the information which had been provided to the Council under condition 16(1). This is what led to the judicial review proceedings and consent order. The complaints the subject matter of the

grounds in those proceedings set out at grounds 12 to 15 thereof were almost identical and based on the same alleged inadequacies of detail in respect of the haul route as ground 18 to 20 of these proceedings. The applicant maintains that the requirement of a detailed survey of the entire one-way haul route including the relevant features stipulated in the condition has not been addressed. I am satisfied that the effect of the consent order rendered redundant the previous agreements reached by the Council in respect of compliance. The order quashed the decision by the Council which was made upon the information submitted up to that time. Therefore, I am not satisfied that any prior agreement between the first notice party and Mr. Ndebele on behalf of the Council, resulting in an agreement that there had been compliance on 1st December, 2010 and the further decisions reached in that regard, are of any assistance to the first named notice party in these proceedings. The consent order was clearly made on the grounds of the inadequacy of the details submitted and the failure to comply with the condition.

47. The court must then consider the relevant steps taken by the notice party and the Council following the making of the consent order. I am satisfied from the note of the meeting which occurred on the 22nd October, 2013 that the Council had made a decision by that date and conveyed it to the notice party and her representatives that there was sufficient information to re-issue a letter of compliance with condition 16(1). This agreement was acknowledged in Mr. Lucy's letter of 23rd October. It was also acknowledged in the report prepared by Mr. Buckley, which reached the same conclusion, that the condition had been complied with. Mr. Buckley then carried out a site survey on the 20th November, 2013. He noted that the order instructed the Council to make a fresh determination as to whether condition 16(1) had been complied with and concluded that it had, as a result of the survey which he carried out in November. It appears from his report that that survey relies heavily on the materials submitted by the notice party, the inadequacies of which had already led to the making of the consent order. Mr. Leonard noted his agreement with this report on the 5th February, 2014 and wrote to the solicitors of the notice party on the 12th February confirming compliance with the condition.

48. The first notice party chose not to make any further detailed submissions apart from the correspondence which continued between the Council and Mr. Lucy. However, the Council chose to direct its own engineer Mr. Buckley to carry out a survey of the proposed route and review the submissions made to date by Mr. Lucy on behalf of the first notice party. The applicant was not kept informed of any of these developments or that the other parties would continue to rely on the survey materials which had been at the centre of the previous judicial review proceedings. The applicant was not informed of the meeting of the 22nd October, or offered any opportunity to make submissions in relation to Mr. Buckley's report which clearly relied heavily upon the survey and submissions which the applicant considered to be inadequate. All parties were aware that this issue was at the core of the previous proceedings. The Council itself acknowledged the continued inadequacy of the survey submitted in correspondence relating to these proceedings.

49. It is clear that there was no obligation on the notice party arising out of the consent order to furnish any other material prior to the making of any further determination in accordance with the order. However, in failing to submit any additional material the first notice party took the risk that any decision based on the same materials would be subject to the same criticisms of inadequacy and failure to comply with condition 16(1) as those which grounded the application for judicial review which led to the consent order. In effect, the first notice party took the view that no further additional material plans or survey details were required and that to demand same would be quite unreasonable notwithstanding the history of the proceedings to date. It was submitted that the terms of the condition should not be given a literal interpretation.

50. The applicant's complaint remained, following the making of this order and the decision in February 2014, that the first named notice party had still not submitted a survey of the entire one-way haul route as required but had limited its submission to 8km of the 27km route. Undoubtedly, the first notice party's experts are of the view that a literal interpretation of the condition gives rise to a wholly unreasonable demand being made to supply further details which would include a survey of the national and regional routes which were of well defined and known dimensions and construction. The Board clearly viewed as unduly onerous the requirement to submit detailed surveys at 20m intervals along the entire route and consequently, that requirement was deleted. However, that did not absolve the notice party from carrying out a detailed survey of the balance of the route. In effect, the first notice party relies on the previous materials and submissions made by the Council as substantial or adequate compliance with condition 16(1) notwithstanding the fact that the Council had consented to an order quashing a decision made on what was essentially the same survey. It is difficult to avoid the conclusion that the first party remains adamant that the terms of the amended condition are too onerous and is dissatisfied with the amended term as directed by An Bord Pleanála.

51. If the amended term issued by the Board was irrational or unreasonable it could have been challenged by the first notice party by way of judicial review. The Board might have been approached for a further amendment. Instead the first notice party and the Council without notice to the applicant acted on the same materials and adopted the view that the consent order imposed no additional requirement on either.

Substantial Compliance

52. The first notice party submits that there has been a substantial compliance with condition 16(1) on the basis of the submissions previously made to the Council by Mr. Lucy and Mr. Moran. The applicant submits that the inadequacy of the compliance is evident from the very limited nature of the submissions and materials advanced to the Council by the notice party at any stage. It is claimed that of the four elements of the haul route of 27km, only one is the subject of the detailed survey in part of the 8km route.

53. There is nothing unusual about the attachment of a condition in relation to traffic flow to a planning permission of this kind. It is entirely permissible for the Board to delegate to the planning authority power to agree issues of traffic flow with a developer where the imposition of a detailed condition is impracticable. These matters of technical detail may be left for agreement between the planning authority and the developer to the extent approved of in *Boland v. An Bord Pleanála* [1996] 3 I.R. 435. The Board ought to set out the purpose of any such condition and lay down criteria by which the developer and planning authority may reach agreement.

54. The essential feature of condition 16(1) was that it required a written agreement by the planning authority in respect of a detailed survey of the entire one-way haul route. This is evident from the clear wording of the condition.

55. The notice party submits that the purpose of the condition was the identification of the number and location of the lay-bys that may be required along the route. As already noted, the Board removed the requirement that such a survey be carried out at 20m intervals as unduly onerous and agreed that the details would be more appropriately agreed between the planning authority, as roads authority, and the developer.

56. I am not satisfied that the notice party or the council adjusted their respective views of the degree of detail required to be submitted in order to comply with the wording of the amended form of condition 16(1). The evidence is that notwithstanding the terms of the consent order and the inadequacies of the survey submitted and approved of which led to the quashing of the compliance decision, the first notice party's experts persisted in the view that the detail supplied to date was compliant and chose not to advance any further material. This attitude is clearly articulated in the affidavits submitted on behalf of the first notice party in these proceedings. Rather than provide a more detailed survey of the entire haul route, the notice party insists that there has been

substantial compliance with the condition and that the application should be dismissed.

57. When interpreting a condition attached to a planning permission it is appropriate to remember that the Board was entitled to leave certain technical matters to be agreed between the planner and the developer and to bear in mind the functions and responsibilities of the planning authority which, in this instance, was also a road authority. The criteria pursuant to which a condition may be imposed are set out in the Boland decision and must be taken into account when interpreting its true and correct meaning.

58. The legal principles applicable to the construction and implementation of planning condition were considered by the Supreme Court in *Kenny v Dublin City Council* [2009] IESC 19 (at paras. 17 to 35). It was emphasised that the Council, in exercising its powers at this stage of the process, must be careful when reaching any agreement in respect of details and must ensure that any agreement is in fulfilment of the condition(s) as objectively interpreted. This "excludes purely subjective considerations, such as the understanding of the developer or the planning authority, but it does not provide a result where a provision is unclear, ambiguous or contradictory" (para. 34). The nature of the task was also considered by O'Neill J., in *O'Connor v. Dublin Corporation* (unreported High Court 3rd October, 2000) as follows:

> "... what we are dealing with here is the tail end of the planning process. The application for planning permission has in the first instance been heard and determined ... in accordance with the statutory procedures involved ... Ultimately, An Bord Pleanála finally determined the matter by its decision to grant planning permission ... Thereafter all that remained to be done was to achieve compliance with the condition of the planning permission by way of an agreement between the Notice Party and the Respondents, or failing that by way of a determination by An Bord Pleanála. This final leg of the procedure was confined between the Notice Party and the Respondents and did not include the Applicant or any other member of the public. It necessarily follows from this that what is required of this compliance procedure is no more than faithful implementation of the decision of An Bord Pleanála. The jurisdiction so invoked on the part of the Respondents is a very limited one and of a ministerial nature. What they have to do is to implement that which has already been decided in essence. Thus all that they must ascertain is the true and correct meaning of the conditions attached to the planning permission and to confine themselves and the Notice Party to such proposals as are in compliance with those provisions."

As stated by McCarthy J. in *In Re XJS Investments Ltd.* [1986] I.R. 750 at p. 756, when construing planning documents including planning conditions, the court must consider them in their ordinary meaning as understood by members of the public without legal training as well as developers and their agents unless when read as a whole some other meaning is necessarily indicated. I am not satisfied that condition 16 is unclear or ambiguous.

59. There is no procedure for consultation with members of the public provided for under s.34(5) of the Planning and Development Act 2000 in respect of compliance with condition 16(1). However, what transpired in this case gave the applicant a platform for engagement in the compliance process once the notice party decided to refrain from active participation in the prior judicial review proceedings that led to the consent order. That order provides for a limited engagement between the planning authority and the applicant in respect of the decision as to whether the first notice party was compliant. No effort was made to set aside or amend the order or to re-enter the proceedings. It resulted in the quashing of the earlier decision on compliance and remitted the matter for a fresh consideration and decision. It was clearly, if implicitly, based on an acceptance by the council that its interpretation of compliance was in error. The order provided a further opportunity to the notice party to submit a more detailed survey of the entire route and for the applicant to make submissions thereon. The first notice party acquiesced in this process notwithstanding that she was also a notice party to those proceedings and could have opposed the proposed order if she thought it appropriate.

60. In *Conroy v. Craddock & Ors* [2007] IEHC 336 Dunne J., considered the issue of substantial compliance with a planning condition. The applicant complained that there had been a breach of a condition which required that the developer submit, for the written consent of the planning authority, a revised site layout plan for the reduction in the finished floor level of a number of units in a development before its commencement. The reason was to reduce the visual impact of the units on the nearby M9 motorway in the interests of visual amenity and to allow the planning authority to assess the proposed changes. There was no dispute that the developer did not in the literal sense comply with the condition. It did not submit a revised plan before the commencement of development. Of course, because the development had been commenced the condition could not in a literal sense ever be complied with. The plans that were later submitted did not indicate a reduced floor level and in fact showed an increase in floor levels. It was therefore submitted that there was a failure to comply with the condition. Dunne J. accepted that there could be belated compliance with a planning condition (*Mountbrook Homes Ltd. v. Oldcourt Developments Ltd.* [2005] IEHC 171). The learned judge concluded:

> "In consideration of the issue as to whether there has been a prima facie breach of condition 5, I am satisfied that it is necessary to look at the purpose of condition 5. Its purpose was to achieve the reduction of the visual impact of the units on the M9 motorway in the interests of visual amenity. I do not consider that this condition can be considered without reference to conditions 6 and 7.... The Council is satisfied as to the effect of the finished floor levels having regard to the visual impact on the motorway. In all the circumstances, I have come to the conclusion that there has been substantial compliance with condition 5."

61. The first notice party submits that condition 16(1) and (2) must be construed together and having regard to the purpose of the survey required. It is submitted that having regard to the views expressed by Mr. Lucy, Mr. Buckley and Mr. Leonard and the affidavits submitted by Mr. Lucy and Mr. Moran, the survey is and was considered by the council to be entirely adequate. I am satisfied that the clear terms of condition 16(1) requires a detailed survey of the entire one-way haul route which the first notice party chose to interpret as limited to a detailed survey of approximately 8km of the route. The details required were explicitly stated to include the width, levels, verges and all other relevant features and to identify the number and location of lay-bys to be provided by the developer. It is not for the court to engage in a qualitative analysis of the decision under review. The amendment sought to the condition limiting the detailed survey to the 8km stretch was refused by An Bord Pleanála but the notice party and for a time the council in essence, proceeded on the basis that the survey could be so-confined regardless of the refusal. This insistence was maintained vigorously in these proceedings notwithstanding the challenge to the compliance decision based on that approach and the resultant consent order quashing it. The council has now effectively resiled from that position and has indicated in correspondence to the notice party in the course of these proceedings that it accepts that the survey conducted was inadequate. I am satisfied that this is the correct approach. It is of importance that the reason for the amendment of the condition by the deletion of the 20m interval survey along the entire route was not to dilute the requirement of a detailed survey but to ensure that it was not unduly onerous. It was intended by the Board that the details of the survey would be more appropriately agreed in a proportionate and reasoned manner between the planning authority (as roads authority) and the developer. A written agreement was clearly envisaged in the body of the condition itself. It was not intended as a permission to provide a minimal survey for all, but the section which was covered by the first notice party's proposed amendment. I am therefore not satisfied that there was substantial compliance with condition 16 such as would justify the court in refusing relief.

62. There is no time limit set out in the condition for the completion of the survey. The first notice party has planning permission for the continuation of the quarrying on the site. Though the terms of condition 16(2) require that all lay-bys agreed under condition 16(1) should be completed within six months of being agreed, I am not satisfied that there has yet been a lawful agreement as contemplated under the condition and do not accept that it has been breached as alleged. Furthermore, I am not satisfied that the planning permission in this case has expired by effluxion of time. It seems to me that the permission to carry on quarrying relates to a use of land and is governed by s. 40(1)(b)(i). Furthermore, the repeated proceedings to which the development of the site has been subjected and the manner in which the council has behaved when engaging with the issues, with the applicant and the notice party (as set out above and partly, but vividly described by Hedigan J. in *Pearce v. Westmeath County Council* [2012] IEHC 300) would render such a result fundamentally unfair and I would be satisfied to exercise the court's discretion to refuse the declaratory relief claimed in that regard.

Conclusion

63. I am therefore satisfied that the decision that condition 16(1) has been complied with should be quashed. The court is not satisfied that the process mandated by condition 16(1) has yet been properly completed and will remit the matter to enable it to be carried out in accordance with its terms. There must be a full and proper engagement by the council and its engineers with the first notice party's experts in respect of the survey required and the intervals and any specific locations along the entire route that should be subjected to detailed survey. The council should consider such further details as are submitted in reaching its decision on compliance and should comply with the terms of the consent order previously made in respect of receiving submissions on any additional materials submitted by the notice party before arriving at its decision.