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THE HIGH COURT

COMMERCIAL

JUDICIAL REVIEW

[2006 No. 1347 J.R.]

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

BETWEEN

PAUL MAYE

APPLICANT

AND

SLIGO BOROUGH COUNCIL

RESPONDENT

Judgment of Mr. Justice Clarke delivered the 27th April, 2007.

1. Introduction

1.1 This case concerns what is commonly referred to as a "default planning permission". Such permissions arise where there is a valid planning application but the planning authority concerned does not make a decision on that application within the time required by statute. The subject of default planning permissions has been both legally and generally controversial over the years. On a number of occasions the courts have pointed out that the default mechanism has the potential to punish not the planning authority who has failed to make a decision in time, but rather those members of the public who may have opposed the planning permission (or sought that it be limited in some material way) and who do not get the benefit of having a decision made on the merits of their objections.

1.2 As Blayney J. stated in *Molloy v. Dublin County Council* [1990] I.R. 90:-

> "The purpose (of the default provisions) is to ensure that planning authorities make a decision on planning applications within a reasonable time of their being submitted. Nobody could take issue with that. But what seems both illogical and objectionable is the nature of the sanction imposed in the event of the failure of the planning authority to communicates its decision within two months. One would expect the planning authority to be penalised for its failure, but it is not. It is the community that is penalised because of permission, which there may have been good grounds for refusing in the public interest, is deemed to have been granted".

1.3 O'Flaherty J. made comments to similar effect in *Burke v. Westmeath County Council* (Unreported, Supreme Court, O'Flaherty J., 18th June, 1998).

1.4 Notwithstanding those comments, the Oireachtas decided in 2000 to retain the regime for default planning permissions in a more or less unaltered way when enacting the Planning and Development Act, 2000 ("the 2000 Act"). The 2000 Act was, of course, a consolidation measure designed to bring together all existing planning laws into one piece of legislation and, where appropriate, to modify those laws in the light of experience. In conducting that exercise the Oireachtas was clearly not persuaded that it was appropriate either to abolish entirely or amend significantly the regime in respect of default permissions. Against that background I have to consider the case made by the applicant ("Mr. Maye") to the effect that he is entitled to such a default permission on the facts of this case.

2. The Facts

2.1 At present there is an existing pub, nightclub and dwelling on a site at Crozon Crescent, Riverside, Sligo which comprise premises known as "The Blue Lagoon". The site appears to be just over one third of a hectare in area. Mr. Maye proposed a development which would involve the demolition of the buildings currently on the site and their replacement with a complex incorporating a pub, nightclub with a capacity for 1,900 persons and offices, together with ancillary car parking and other works.

2.2 On 21st December, 2005 an application was lodged with the respondent ("Sligo Council") for a planning permission in respect of that development. On 22nd February, 2006 Sligo Council issued a request for further information relying on Article 33 of the Planning and Development Regulations 2001 ("the 2001 Regulations"). On 15th August, 2006 Mr. Maye responded to the Council's request for further information which response was received by Sligo Council on 16th August, 2006. On the following day Sligo Council wrote to Mr. Maye's agents indicating that the response to its request seeking further information raised significant additional data and it directed that the receipt of the additional information concerned be advertised pursuant to Article 35(1)(c) of the 2001 Regulations. That letter stated as follows:-

> "The period of four weeks within which Sligo Borough Council must deal with this application will extend from the date of the newspaper notice when submitted to the planning authority".

2.3 On 25th August, 2006 the relevant notice was published and on 28th August a copy of the relevant advertisement was received by Sligo Council. On 20th September, 2006 Sligo Council made a decision to refuse planning permission.

2.4 Thereafter on 16th October Mr. Maye's solicitors wrote to Sligo Council calling on them to make a grant of permission on a default basis. The stated grounds were that the decision should have been taken within 28 days of the receipt by Sligo Council of the further information supplied on behalf of Mr. Maye.

2.5 These judicial review proceedings were instituted on 14th November, 2006, admitted into the commercial list by order of Kelly J. on 18th December, 2006 and were the subject of a grant of leave by Kelly J. on the following day.

2.6 While the overall issue between the parties is as to whether, in all the circumstances, Mr. Maye is entitled to the contended for default permission, in substance three sets of issues arise. I, therefore, turn to the issues.

3. The Issues

3.1 The first issue which arises concerns the proper interpretation of the statutory provisions which govern the time within which a planning authority is obliged to make a planning decision. It is argued on behalf of Sligo Council that what was said in the letter of the 17th August, 2006, quoted above, represents a correct statement of the law. It is common case that the period within which a planning authority has to make its decision is, in practice, suspended while there remains outstanding a request for further

information. Therefore, it is common case between the parties that time ceased to run from the issuing by Sligo Council of the request for further information on 22nd February, 2006 and that a new period commenced when that notice was complied with. What is at issue is as to whether (as is contended on behalf of Mr. Maye) that new period commenced on the 16th August, 2006 when the additional information was received by Sligo Council or whether (as contended by the Council) the new period only started to run when an appropriate advertisement of the additional information occurred and a copy of the relevant advertisement was sent to and received by Sligo Council.

3.2 There is no depute between the parties but that, as a matter of calculation, the planning authority was in time in the making of its decision if it, the council, is correct in its interpretation of when time starts to run again. It is equally not disputed but that, if Mr. Maye is correct in his interpretation of when time started to run again, then the planning authority was out of time.

3.3 The first issue, therefore, concerns the proper construction of the relevant provisions of s. 38 of the 2000 Act for the purposes of determining whether Sligo Council was, in fact, out of time. If Sligo Council was not of time then, obviously, that is the end of the case. On the other hand if it is out of time then a *prima facie* entitlement to a default permission arises. However, in that event, Sligo Council raises further issues which it will be necessary to consider.

3.4 That leads to the second issue which concerns certain limitations on the sort of application which can be the subject of a default permission. Those limitations derive from the jurisprudence of the courts and are not expressly to be found in the statute. That some limitations actually exist, in accordance with that jurisprudence, is a matter agreed by the parties. However two separate questions as to the precise extent, in principle, of those exceptions are in controversy.

3.5 It is common case that a default permission cannot be obtained in respect of a planning application which would involve a material contravention of the development plan for the areas in respect of which the application is made. There are, in addition certain legal authorities to which I will refer in due course, which, it is argued, suggest that the restriction may go further. There is a dispute between the parties as to just how much further (if at all, in reality) those authorities put the matter.

3.6 Furthermore, while accepting that there is no existing authority for the proposition, counsel on behalf of Sligo Council argues that it is appropriate for this court to now take the view that a further and wider limitation on the scope of default permissions should be identified so that a default permission should not be allowed in any case in respect of which planning permission would not normally be given in relation to the development concerned. Thus, in reality, there is controversy between the parties as to the precise extent of the limitation on obtaining a default permission under the existing jurisprudence of the court and a further dispute as to whether that jurisprudence should be extended to widen the limitations on default permissions. It will, therefore, be necessary for me to determine the boundary of the limitation on a default permission and, by reference to that boundary, to determine on which side of that boundary the development in this case lies.

3.7 Thirdly, in the event that I am satisfied that the decision of Sligo Council was taken outside time and that a default permission is not excluded by reason of whatever limitations might be found to exist in relation to such permissions, Sligo Council suggests that the court retains a discretion to refuse the relief claimed and that that discretion should be exercised against recognising a default permission in this case. A number of factors are put forward which, it is suggested, should lead the court to exercise its discretion against making the order sought. It is, in particular, suggested that the court should take into account the nature and scale of the development in the context of potential interference with third party rights, the fact that, it is said, the planning permission could not be implemented in any event because of the inability of Mr. Maye to develop in accordance with the planning permission without obtaining other concessions from the local authority and, in particular, because, it is said, Mr. Maye was aware of the fact that Sligo Council was proceeding on the basis that time would not start to run again until the copy newspaper advertisement had been returned to the Council. On that basis it is said that Mr. Maye was aware that the Council considered that time would not expire until a later date and did not inform the Council of his contrary view. In those circumstances it is suggested that it would be unjust to allow Mr. Maye to have the benefit of the default permission and in those circumstances it is suggested that the discretion of the court should be exercised against making the order sought.

3.8 It seems to me that the issues in the case logically arise in the order in which I have set them out and I propose to deal with them in that order. I, therefore, turn first to the question as to when time may be said to have run.

4. Applicable Time Limit

4.1 The relevant statutory provision is to be found in s. 38(4) of the 2000 Act. That section provides as follows:-

> "(4)(a) Subject to paragraphs (b), (c), (d) and (e), where –
>
> (i) an application is made to a planning authority in accordance with the permission regulations under this section, and
>
> (ii) any requirements of those regulations relating to the application are complied with,
>
> a planning authority shall make its decision on the application within the period of 8 weeks beginning on the date of receipt by the planning authority of the application.
>
> (b) Where a planning authority, within 8 weeks of the receipt of a planning application, serves notice in accordance with the permission regulations requiring the applicant to give to the authority further information or to produce evidence in respect of the application, the authority shall make its decision on the application within 4 weeks of the notice being complied with, provided that the total period is not less than 8 weeks.
>
> (c) …
>
> (d) …
>
> (e) … …
>
> (f) Where a planning authority fails to make a decision within the period specified in paragraph (a), (b), (c), (d) or (e), a decision by the planning authority to grant the permission shall be regarded as having been given on the last day of that period.

The provisions of subs. (c), (d) and (e) relate to a different regime in respect of particular cases which are of no relevance on the facts of this case.

4.2 It will be seen that the basic provision is to be found in subs. (a) which is to the effect that a decision requires to be made within eight weeks provided that the application is made "in accordance with the permission regulations" and any requirements of those regulations are complied with.

4.3 Subsection (b) requires that the decision be made within four weeks of a notice for further information "being complied with". Permission regulations are made by the Minister for the Environment, Heritage and Local Government under s. 33 of the 2000 Act which, in subs. (1), states:-

> "The Minister shall by regulations provide for such matters of procedure and administration as appear to the Minister to be necessary or expedient in respect of applications for the development of land".

4.4 The relevant provisions of the 2001 Regulations are Article 33(1) which provides as follows:-

> "Where a planning authority acknowledges receipt of a planning application in accordance with Article 26, it may, by notice in writing, within 8 weeks of receipt of the planning application, require the applicant:-
>
> (a) to submit any further information (including any plans, maps or drawings, or any information as to any estate or interest in or right over land), which the authority considers necessary to enable it to deal with the application, or
>
> (b) to produce any evidence which the authority may reasonably require to verify any particular or information given in or in relation to the application."

4.5 Furthermore Article 35 deals with what is to occur on receipt of further information. It is in the following terms:-

> "35(1) Where a planning authority receives further information or evidence following a request under article 33, or revised plans, drawings or particulars following a request under article 34, or otherwise receives further information, evidence, revised plans, drawings or particulars in relation to the application, and it considers that the information, evidence, revised plans, drawings or particulars received, as appropriate, contain significant additional data, including information in relation to effects on the environment, the authority shall –
>
> (a) send notice and a copy of further information, evidence, revised plans, drawings or particulars, to any person or body specified in article 28, as appropriate, indicating that a submission or observation in relation to the further information or evidence or revised plans, drawings or particulars received may be made in writing to the authority within a specified period, and
>
> (b) notify any person who made a submission or observation in relation to the planning application in accordance with the article 29(1), as soon as may be following receipt of the further information or evidence or revised plans, drawings or particulars, as appropriate, indicating-
>
> (i) that significant further information or revised plans, as appropriate, in relation to the application has or have been furnished to the planning authority, and is or are available for inspection or purchase at a fee not exceeding the cost of making a copy, at the offices of the authority during office hours,
>
> (ii) that a submission or observation in relation to the further information or evidence or revised plans, drawings or particulars received may be made in writing to the authority within a specified time period,
>
> (iii) that no fee or further fee shall be payable on condition that any submission or observation referred to in sub-paragraph (ii) is accompanied by a copy of the acknowledgement by the authority of the receipt of a submission or observation referred to in article 29,
>
> (c) require the applicant to publish a notice in an approved newspaper, containing as a heading the name of the planning authority marked "Further Information" or "Revised Plans", as appropriate, and stating –
> (i) the name of the applicant,
>
> (ii) the location, townland or postal address of the land or structure to which the application relates (as may be appropriate),
>
> (iii) the reference number of the application on the register,
>
> (iv) that significant further information or revised plans, as appropriate, in relation to the application has or have been furnished to the planning authority, and is or are available for inspection or purchase at a fee not exceeding the reasonable cost of making a copy, at the offices of the authority during office hours, and
>
> (v) a submission or observation in relation to the further information or revised plans may be made in writing to the planning authority on payment of the prescribed fee.
>
> (2) Where a planning authority considers that the notice published in accordance with sub-article (1)(c) does not adequately inform the public, the authority may require the applicant to give such further notice in such a manner and in such terms as the authority may specify."

4.6 It is, therefore, clear that where further information received under Article 33 contains significant additional data, the provisions of Article 35 come into operation. Article 35 requires that the local authority, firstly, considers whether or not the additional information is significant. If it does not consider it to be significant, it takes no further steps other than to go ahead and determine the planning application. If it considers the additional information to be significant then it must, itself, notify the bodies specified in sub article (1)(a) together with all persons who have been involved in the process under sub article (1)(b). It must also require the applicant for permission to publish a notice in a newspaper in accordance with sub article (1)(c).

4.7 The argument as to the proper construction of both s. 38 of the 2000 Act and Articles 33 and 35 of the 2001 Regulations as put forward on behalf of Mr. Maye has the merit of simplicity. It is said that s. 38(4)(b) is clear in its terms and refers to the time limit expiring four weeks after the notice is complied with. It is said that the notice is complied with when the information is provided. It follows, the argument goes, that the time limit expires four weeks after the further information is provided.

4.8 The counter argument put forward on behalf of Sligo Council is, understandably, more complex given that the straightforward approach adopted on behalf of Mr. Maye seems, if correct, to lead to the conclusion argued for on his behalf.

4.9 Counsel for Sligo Council draws attention to the fact that a pre-condition for obtaining a default permission is that the applicant has complied with any requirements of the regulations. If an applicant were to fail to comply with an requirement to publish an appropriate notice then he would not, of course, have complied with the regulations and would not, it is said, it follows, be entitled to a default permission. However it is pointed out that the regulations do not, of themselves, require the publication of the notice within any particular time frame.

4.10 This is undoubtedly true. It seems to me to be another example of a difficulty in respect of the overall regime in relation to planning permissions which I noted in a judgment delivered by me today in *Dunkerrin Homes v. Dun Laoghaire Rathdown County Council* (Unreported, High Court, Clarke., 27th April, 2007). The devil in relation to many of these matters is in the detail. In at least certain cases it appears to me that the detail has not been adequately worked out. In *Dunkerrin Homes* I identified one such matter. This seems to me to be a second. There is no doubt that s. 38 requires compliance with the regulations. There is no doubt that the regulations require, in appropriate case, the publication of a notice. Section 38 requires a decision within four weeks of compliance with a notice for further information. However the regulations impose no time limit on such compliance. Does the notice even have to be published within four weeks. If so why? If not, then how are we to know that the regulations have been complied with at the time when, if Mr. Maye's argument be correct, the obligation to make a decision arises. Given that the Oireachtas, and the Minster who made regulations on foot of legislation enacted by the Oireachtas, do not appear to have turned their mind to the difficulty that arises from these interlocking provisions, the court has to do the best that it can.

4.11 Sligo Council argues that the solution to the difficulty is to be found by construing all of the relevant measures in the context of each other and taking the view that, properly construed, an applicant could not be said to have complied with the request for further information unless he had complied with the obligation (if it arises) to publish a notice. The difficulty with that argument is that s. 38(4)(b) simply speaks of complying with the notice for information. The notice for information simply requires the provision of the information. If the additional information is not considered to be material then no further steps are to be taken. The construction contended on the part of Sligo Council seems to me to create a most illogical situation. What is the status of time running in the period immediately after the receipt of additional information but before the Council has made its mind up as to whether the information received is sufficiently material to warrant invoking the provisions of Article 35. In those circumstances, in accordance with the argument put forward on behalf of Sligo Council, the question of whether time has begun to run again is, in effect, in abeyance. If a decision is taken that the publication of a notice is unnecessary, then time will, retrospectively, be deemed to have started to run again as of the date of receipt of the information. That does not seem to me to be a construction which ought to be placed on the relevant provisions unless constrained to do so by clear wording. On the contrary, in this case, the position adopted on behalf of Mr. Maye has the benefit of being in accordance with what seems to be the natural meaning of the terms of the section.

4.12 Sligo Council also places reliance upon the undoubted fact that courts have frequently acknowledged the importance of public participation in the planning process. See for example *State (Standford) v. Dun Laoghaire Corporation* (Unreported, Supreme Court, Henchy J., 20th February, 1981,) Crodaun *Homes Limited v. Kildare County Council* [1983] ILRM 1 and *White v. Dublin City Council* [2004] 1 I.R. 545. In that context it is pointed out that the time which any person seeing a notice concerning the materiality of further information would have to deal with that information would be very short indeed. There is no doubt that there is some merit in the underlying factual contentions for that argument. The planning authority is required to decide on materiality. It then must require the applicant to publish a notice, some time may then elapse before the notice is actually published. (Indeed the question was raised at the hearing as to whether the planning authority has an implied entitlement to impose a time limit on the publication of the notice). Whatever may be the answer to that question (and it does not seem to me that it needs to be answered in these proceedings) it is clear that some little time will elapse between the receipt by the Council of the additional information and the publication of a notice, if required. On the basis of the construction advanced on behalf of Mr. Maye, that period eats into the four week period within which the local authority must makes its decision. Thus the decision will have to be made in a relatively short period of time after the publication of the notice, thus limiting the ability of persons interested to make an effective contribution.

4.13 However, it is also important to note the limited function of a notice required to be published in accordance with Article 35. Firstly the remaining provisions of Article 35 require all of those who have participated in the planning process to that date to be directly notified by the planning authority itself. Therefore the only persons who, in practice, may become involved because of the publication of a notice under Article 35 are persons who did not choose to become involved by way of making observations in relation to the original planning application. It must also be noted that the further information supplied cannot lead to the making of an entirely new application. It can only lead to variations in the application which can properly be described as modifications.

4.14 Therefore the only persons affected are those who chose not to involve themselves in the original planning application but who might choose to involve themselves because of a modification. While there is no doubt that the regime contemplates giving such persons an opportunity to become involved, the level of that opportunity needs to be seen both against the limited nature of persons who could legitimately be affected and also against the overall background as the 2000 Act which permits that, in an ordinary case, a final decision can be made as early as five weeks after the planning application itself is first made.

4.15 In all those circumstances I do not see that there is any sufficient basis for departing from what seems to me to be the natural meaning of the section and I therefore am of the view that the four week period specified in s. 38(4)(b) starts to run as soon as there has been compliance with the obligation to deliver the information requested to the planning authority.

4.16 I leave over to a case where it arises, and is argued, the possibility that a new approach to the issue of default permissions may be mandated by the requirements of the E.U. Public Participation Directives such as Directive 96/61/EC.

4.17 I should note that I am not satisfied that the fact that the notice requiring additional information in this case makes reference to the possibility that a newspaper advertisement might be required in the event that the additional information was considered to be material, can affect the issue. The time at which the four week extended period starts is a matter of law dependent on the proper construction of s. 38. That period could not be altered by reference to whether attention was drawn to the provisions of Article 35, of the Regulations in the notice or whether the notice contained no such reference.

4.18 Finally I should note in passing that the Minister has purported to make regulations under the 2000 Act which seek to give a

quasi statutory basis for an extension of time along the lines contended for by Sligo Council in this case. While it is not, strictly speaking, relevant to this case, in that the relevant regulations post date the events of this case, it does not seem to me that the section permits the Minister to make regulations of that type. The section, it seems to me, is clear and has the meaning which I have identified.

4.19 I am, therefore, satisfied that the four week period specified in subs. (b) began to run as soon as Mr. Maye had supplied Sligo Council with the information requested. It not being contended that that information failed to meet the requirements of the Council and furthermore it not being contended that Mr. Maye was otherwise in breach of the regulations it seems to me that if follows that a default permission prima facie arises on the facts of this case subject to the other issues which I have earlier identified. I therefore turn to those issues.

5. The Limits on a Default Permission

5.1 That there are some limitations on the entitlement to a default permission cannot be doubted. In *Dublin County Council v. Marren* [1985] ILRM Barrington J. stated

> "The fact that the monument is a monument listed for preservation in the County Council's own development plan is, however, relevant. Were the County Council to grant a permissions in total disregard of the implications of that permission where a monument listed for preservation in its own development plan it would, it appears to me, be in material contravention of that plan. The question therefore arises of whether the County Council would have power to grant such a permission. Section 26, subsection (3) of the 1963 Act provided that the planning authority might not grant permission for a development which would materially contravene the development plan without the consent of the Minister. If therefore the planning authority could not grant such a permission of its own initiative it seems logical to conclude that it could not, by default, and without reference to the Minister, grant a permission which it had not power to grant without the Minister's consent".

5.2 In similar vein Finlay CJ in *P. & F. Sharpe Ltd. v. Dublin City and County Manager* [1989] I.R. 701 said the following:-

> "Having regard to my conclusion that this proposal constitutes material contravention of the development plan, there can be no question of the planning authority being deemed to have decided to grant permission by reason of efflux of time because the granting of permission without the passing of a valid resolution pursuant to s. 26, sub-s. 3, would be illegal and outside the powers of the planning authority".

5.3 That proposition has been followed in *Calor Teoranta v. Sligo County Council* [1991] 2 I.R. 267 and more recently in *Walsh v. Kildare County Council* [2001] 1 I.R. 483. It is clear that the logic of those decisions is based on the *vires* of the local authority to grant the permission concerned. At the time when *Marren* was decided a planning permission in respect of an application which was in material contravention of the development plan could only be permitted after a reference to the Minister. By the time *P. & F. Sharpe* was decided it was necessary that a resolution of the elected members of the planning authority be passed. In either case the grant of permission in the case of an application which involved a material contravention of the development plan was outside the competence of the planning officials who would, in the ordinary way, have an entitlement to determine the application. There is no doubt, therefore, but that I must consider whether, as alleged by Sligo Council, the application in this case is in material contravention of the plan.

5.4 However it has been argued in this case that both on the basis of the existing jurisprudence of the court and on the basis of a contended for development of that jurisprudence I should determine that a wider jurisdiction to refuse a default permission exists.

5.5 I turn first to the existing jurisprudence. In *McGovern v. Dublin Corporation* [1999] 2 ILRM 314 Barr J. took a view that the entitlement to a default permission should be strictly interpreted in view of the potential consequences. In refusing to hold that a default permission arose on the facts of that case Barr J. stated the following:-

> "… it would be unreal and potentially unjust to others to interpret the sub-section as including not only permission by default for a development which is "normally permissible" and where the sanction is dependent on the planning authority being satisfied that the proposed use is consistent with the proper planning and development of the area in the special circumstances of this case. The latter is granted by default entails a substantial and potentially far-reaching incursion into the rights and obligations of the authority under the planning code and of possible objectors to the project in question. The grant of permission by default for a development which is "normally permissible" on foot of the relevant plan entails no major encroachment on the rights and obligations of the planning authority …"

5.6 However it is important to note that the development plan with which Barr J. was concerned was one which specifically used the term "normally permissible". The judgment does not, in my view, amount to a determination by Barr J. that a default permission could not arise in a case where, in the view of the court, a permission would not normally be granted. Rather the use of the term "normally permissible" is a reference to the fact that the development plan itself indicated that a development of the type proposed in that case would not normally be allowed and would only be allowed in special circumstances. In my view, therefore, Barr J. considered the application in that case to either be a form of material non contravention or something so close to that as required to be treated in the same way.

5.7 In my view it is not appropriate to extend the limitations on an entitlement to a default permission beyond the material non contravention circumstances identified in *P. & F. Sharpe.* The position adopted in most of the cases stems from the *vires* of the planning officials concerned to make a decision without reference to the elected members of the planning authority (or formerly the Minister). The starting point has to be that the 2000 Act itself (which as I pointed out earlier in this judgment has been recently re-enacted by the Oireachtas) places no limitation on the entitlement to a default permission by reference to the type of planning application involved. It does require that the applicant has complied with the planning regulations. There is not even a hint, however, in the legislation that the Oireachtas took the view that there should be any limitations by reference to the type of application involved. In *P. & F. Sharpe* it was determined that an overall and harmonious construction of the legislation required the exclusion of applications from the possibility of a default permission where the application could not itself have been granted by the planning officials. It is, of course, the failure of those planning officials to make a decision in time which gives rise to the default permission. There is therefore a clear logic in the exclusion of the possibility of a default permission in circumstances where it would not have been open to the planning officials, whose default is relied on, to have granted the permission in the first place.

5.8 However it seems to me that to go further and involve the court in deciding the questions of planning judgment as to what sort of planning permission might properly be allowed in a particular area would be wrong in principle for a number of reasons.

5.9 Firstly it would seem to me to amount to legislation by the courts.

5.10 Secondly it seems to me that it would involve the courts in a role inappropriate to the courts. The content of a development plan is determined by the elected members of the planning authority after a process specified in law. The judgments involved are matters for the elected local representatives with whatever advice they consider appropriate. Once the development plan has been adopted it is then there in black and white in documentary form. While there may be difficulties in determining, on the facts of an individual case and having regard to the way in which the development plan is formulated, whether a particular development is in contravention of that plan, such questions of construction of a development plan and the application of the plan as properly construed to the facts of a case, are no different, in principle, from the types of questions of construction and application to the facts of cases that the courts have to deal with in a huge variety of circumstances. There is nothing, therefore, unusual in asking a court to construe a document and apply it to the facts of a case. This is so even where the document is generated in a context that requires some degree of expert knowledge to inform its construction. That expert knowledge can be supplied by expert evidence as appropriate.

5.11 However to ask the courts to go further and form a generalised judgment about whether a particular planning permission would ordinarily be allowed would be to involve the courts in exercising the type of planning judgment which requires an expertise which the courts do not have and would involve the courts in a role not contemplated by planning legislation. It seems to me, therefore, that if there are to be limitations beyond the material contravention limitation then it is a matter for the Oireachtas to determine, as a matter of policy, what those limitations should be. Clearly, despite the many comments made by courts as to the potential unfairness of the default permission regime, the Oireachtas was not persuaded to introduce any such limitations when revisiting the issue on the enactment of the consolidation 2000 Act. The Oireachtas has, therefore, in my view, at present, set its face against such limitations. In those circumstances it would be wrong of the courts to impose them.

I, therefore, propose approaching the limitation in this case on the basis that in order for the limitation to apply it is necessary that it be established that the application concerned involved a proposal that was in material contravention of the development plan.

5.12 The question of what constitutes a material contravention of a development plan needs to be approached in two parts. Firstly, the proposed development must be in contravention of the development plan. Secondly, the manner in which it is in contravention of the development plan must be material. On that basis I propose to consider the question of whether the development in this case was in material contravention of the Sligo Development Plan. That this is a matter for the courts is clear from *Tennyson v. Dun Laoghaire Corporation* (1991) 2 I.R. 527.

6 Is the development a material contravention?
6.1 So far as materiality is concerned I adopt the test set out by Barron J. in *Roughan v. Clare County Council* [1991] 2 I.R. 527, where he stated as follows:-

> "What is material depends upon the grounds upon which the proposed development is being, or might reasonably be expected to be, opposed by local interests. If there is no real or substantial grounds in the context of planning law for opposing the development, then it is unlikely to be a material contravention."

6.2 In other words if the extent of a deviation from what is specified in the development plan is such as might give rise to a reasonable expectation of opposition based on that deviation, then the deviation will be regarded as material.

6.3 In addition questions may arise as to what is, or is not, on the facts of an individual case, a contravention (whether material or otherwise) of the development plan itself.

6.4 The way in which development plans are set out vary. Certain aspects of the plan may have a high level of specificity. For example the zoning attached to certain lands may preclude development of a particular type in express terms. Where development of a particular type is permitted, specific parameters, such as plot ratios, building heights or the like may be specified. In those cases it may not be at all difficult to determine whether what is proposed is in contravention of the plan. In those circumstances it would only remain to exercise a judgment as to the materiality of any such contravention.

6.5 However at the other end of the spectrum, it is not uncommon to find in a development plan objectives which may, to a greater or lesser extent, be properly described as aspirational. Such objectives may be expressed in general terms. In such cases a much greater degree of judgment may need to be exercised as to whether the development proposed amounts to a material contravention of the development plan.

6.6 Having made those general observations it is necessary to consider the basis upon which it is contended, on the facts of this case, that the proposal put forward is in contravention of the development plan and thus, not open to being the subject of a default permission. In reality two separate grounds for suggesting that the proposed development is in material contravention of the development plan are put forward.

6.7 Firstly it is said, undoubtedly correctly so far as it goes, that the development would involve a significant intensification in the nightclub use on the site having regard to the fact that the proposed nightclub would be capable of serving up to 1,900 persons. In that context it is said that the scale and intensity of the proposed use was not in keeping with the character of the area which would appear to be primarily an established residential area with community facilities and office use.

6.8 Paragraph 3.4.19 of the development plan does suggest that larger scale night time uses, such as nightclubs, should have good access to public transport and taxis at closing time.

While factors such as those identified under this heading might well have been matters which could properly be taken into account by the planning authority in considering whether to grant permission. It does not seem to me that the location of the premises is such that it has been demonstrated that it would infringe paragraph 3.4.19 of the development plan by permitting it to go ahead in that location. In the circumstances I am not persuaded that the scale and location of the development would, in itself, amount to a breach of the development plan.

6.9 A more substantial argument was, in my view, put forward in respect of another aspect of the plan. Objective OS 7 of the development plan specifies certain lands in relation to which the objective specified in the plan is to provide a linear park running along the Garvogue River from Sligo town to Doorly Park/Cleveragh Park. In the immediate vicinity of the proposed development this objective has been partially achieved by including new facilities between the roadway and the river. The proposed development is on the side of the roadway opposite to the river. Moving from the road towards the river, provision has been made for a grassy area

followed, as one moves towards the river, by a cycle path and a paved zone around bench seating. Such a development is in the course of construction in a number of phases. It will not, of course, be the case that it will be possible to construct an identical facility along all of the length of the river in respect of which objective OS 7 has been specified.

6.10 These matters are relevant to this proposed development because of a variation introduced into the planning application in the course of its progress. To allay concerns expressed by the local authority's road department, revised plans were submitted which involved creating a centre turning lane to enable access to be obtained to the proposed developed without blocking traffic while vehicles were awaiting an opportunity to make a rightward turn into the premises. In order to achieve that variation it would be necessary to widen the road at the relevant point to three lanes thus making provision for a centre, right turning lane. The widening of the road, in turn, would, eat into the grassy area immediately opposite the proposed development. Therefore the net effect of the development going ahead as modified, in accordance with the observations of the roads department, would be that there would be a curved bite out of the grassy area immediately opposite the development leading to a situation where, at its widest point, there would be no grassy area at all and a reduced grassy area for a distance either side of the widest point. Obviously such a development would impinge on the establishment of an attractive linear park as identified as an objective in the development plan.

6.11 The question of judgment which I must exercise is as to whether the attesting of that infringement would amount to a material contravention of the plan. On balance I have come to the view that the development would, in that respect, amount to a material contravention of the development plan. While it is, of course, the case, as was argued by counsel for Mr. Maye, that it is unlikely to prove possible to have such a grassy area along the entire route, it nonetheless remains an objective of the development plan. To actually go backwards and remove a portion of the grassy area would seem to me to be in conflict with that objective. The fact that an objective may not be capable of being completely achieved does not take away from the fact that developments, in order to conform with the development plan, should at least move in the right direction. Where, to a material extent, the development not only fails to move in the right direction but actually goes against the objectives of the development plan, then it seems to me that has a potential to amount to a material contravention of that plan. The second judgment that must, of course, be exercised, is as to its materiality.

6.12 In that regard counsel for Mr. Maye pointed out, again correctly so far as it goes, that in the overall context of the length of the proposed linear park, the amount that would be lost would be relatively small. However that submission seems to me to ignore the fact that what is sought to be achieved is, so far as possible, a continuous pleasant walking area running from Sligo centre along the river towards the outskirts of the town. In that context it is not the percentage of the length which is key but rather the extent to which any such walkway might be interrupted by areas which do not meet the linear park criteria specified in the objective. In that sense it seems to me that the interference with the objectives specified in the development plan is material.

6.13 In those circumstances I have come to the view that this development, if implemented in accordance with the revised road plan submitted in the course of the application, would amount to a material contravention of the plan. It, therefore, follows that it is not appropriate to deem a default permission to exist for such a development.

7 Discretion

7.1 However lest I be wrong in that conclusion I should also deal with the question of discretion. It has been suggested that the court retains a jurisdiction to exercise a discretion not to permit a default permission, notwithstanding that the decision of the planning authority was not taken in time and notwithstanding that the proposed development would not amount to a material contravention of the development plan. In *Illium Properties Limited v. Dublin City Council* (Unreported, High Court, O'Leary J., 15th October, 2004) it was noted that it was not necessary to decide whether the default permission was mandatory or discretionary. Butler J. had noted such a discretion in *The State (Conlon Construction Limited) v. The Council of the County of Cork* (Unreported, High Court, Butler J., 31st July, 1975). It would seem that in Conlon Construction the development concerned was a significant one and the relief sought was refused by Butler J. in the exercise of his discretion. I am not persuaded that the scale of the development is an appropriate factor to be taken into account in the exercise of the courts discretion. As pointed out earlier in the course of this judgment there is nothing in the statute from which it might even be inferred that there are particular types of development for which default permissions cannot be obtained. To impose a regime, under the heading of judicial discretion which would mean that significant developments could not be the subject of a default permission would also, in my view, amount, in practice, to legislation by the court. It does not seem to me to be a factor that could properly be taken into account. As indicated earlier it is possible that the Public Participation Directive may influence the proper construction of Irish planning law in this regard in cases to which it applies.

7.2 Furthermore, it is submitted that a discretion should be exercised against allowing a default permission in this case by virtue of the fact that the development could not be carried out without a separate consent from the Council in relation to that part of the development (that is to say the roadworks to which I have already referred) which will take place outside Mr. Maye's lands. It is undoubtedly factually correct to state that such a consent would be required. It may well be that, having regard to the position taken by Sligo Council in these proceedings, it might well be inferred that such a consent would not be forthcoming. However it does not seem to me that that issue has, in reality, anything directly to do with the planning application itself. The courts have consistently held that the fact that a person may need some other form of permission from a public authority in order to carry out a development does not, of itself, amount to a basis upon which planning permission should be granted or refused. In like manner it does not seem to me to be an appropriate basis upon which the court should exercise its discretion.

7.3 Finally reliance is placed on behalf of Sligo Council on the correspondence, to which I have already referred, in which the Council made it clear that it was operating on the basis that time would only begin to run again when the copy advertisement was sent on behalf of Mr. Maye back to the Council. For the reasons which I have analysed above, I have concluded that that view was incorrect in law. However it was made clear to Mr. Maye and his advisors that that was the view of the Council and it was, therefore, reasonable to assume that the Council would operate on the basis that time did not expire until four weeks after the receipt of the advertisement.

7.4 Neither Mr. Maye nor his advisors wrote to Sligo Council in the intervening period indicating that they did not accept the position adopted by Sligo Council. It seems to me that that fact does represent an appropriate basis for the exercise of the courts discretion. In so doing I make no finding of a deliberate attempt on the part of Mr. Maye or his advisors to mislead the Council. However they were, or ought to have been, aware that the Council were of the view that there was an extended period available for the making of the decision. No indication was given to the Council that that view was contested. If Mr. Maye or his advisors had indicated to the Council that there was a different view and if the Council had decided to take its chances in reliance of their alternative view of the law, then no question of the exercise of the courts discretion could, in my view, arise.

7.5 However where Sligo Council were, not unreasonably, entitled to take the view that the position which they had set out was not contested then it seems to me that it would be appropriate, on that ground and only that ground, to exercise a discretion against recognising a default planning permission. I should emphasise that it is only on that ground and not on the other grounds advanced

that I have come to that view. I would, therefore, have been prepared to exercise my discretion against recognising a default permission on that ground if I had not been satisfied that the development amounted to a material contravention of the development plan.

7.6 In all the circumstances Mr. Maye's application must be refused.