THE HIGH COURT

[2005 No. 54 MCA]

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 160 OF THE PLANNING AND DEVELOPMENT ACT, 2000 (AS AMENDED)

BETWEEN

P.M. CANTWELL LIMITED AND GMB CONSTRUCTION LIMITED

APPLICANTS

AND

PADDY McCARTHY, TONY McCARTHY AND McCARTHY BROTHERS BUILDING CONTRACTORS LIMITED

RESPONDENTS

Judgment of Mr. Justice Roderick Murphy dated the 1st day of November, 2005.

1. The applicants sought an order prohibiting the respondents from carrying out any or any further alleged unauthorised development relating to a storm water outflow through the streets of Kilkenny. The development has involved the digging up of roads and the laying of pipes at Granges Road, Golf View Terrace, Thomas Street, Dean Street, Butts Green and adjacent car park to a new outfall at the Breagagh River beside the Butts roundabout, situate in the city of Kilkenny.

The applicants also sought an order directing the respondents and each of them to reinstate the lands and roadways aforesaid. However, the time the action came for hearing last month the development had been completed and the roadways had been reinstated to the satisfaction of the planning authority.

In addition to the present s. 160 application, judicial review proceedings have been initiated by the applicants.

The hearing took place from 3rd to 6th October last.

Permission had been granted in respect of 66 houses (P56/03) on Granges Road, the main site. The present application relates to the surface or storm water outfall from the main site, (P04/126).

2. Grounding Affidavit
By affidavit of Mark Cantwell, director of the first named applicant company, sworn 30th July, 2005, the planning permission P04/126 of the first and second respondents is exhibited.

Permission was granted subject to seven conditions for a revised storm water system with attenuation, discharging via a new drain through Granges Road, Golf View Terrace, Thomas Street, Butts Green and adjacent car park to a new outfall at the Breagagh River beside the Butts roundabout and ancillary related works.

Reference was made to planning permission P56/03 which related to the respondents' permission for a residential development and ancillary related works granted also to the first and second named respondents in respect of the development of 66 housing units from which the revised storm water system flows.

The first condition provided that the development should be carried out in accordance with the plans and particulars submitted on 3rd December, 2004 and further information submitted on 17th February, 2005. That information was by way of drawing No. DP/01 in relation to the drains inside the site of the planning permission for the housing units (P56/03) and the further drawing No. DP/02 in relation to the storm outfall from the site.

The third condition required that the surface water outfall sewer should be fully constructed and tested and in proper working condition prior to the commencement of any construction works on the (housing) site.

The fourth condition required the developer to obtain written agreements of appropriate landowners where the construction of the outfall necessitated entry onto lands other than public roads or the applicants own lands. I understand that the outfall did not fall outside public roads or the developer's lands.

The seventh condition relates to the monitoring of the works on the site by a suitably qualified and licensed archaeologist to ensure the preservation (either by record or in situ) of the places, sites, features and other objects of archaeological interest and notification to the Department of the Environment.

The remaining three conditions did not appear to be relevant to the application for judicial review.

Mr. Cantwell believed that the permission was granted in breach of the statutory requirements of the planning regime and as a result of the alleged developer's breaches and the failure of the local authority to rectify them he was denied his right to participate in the planning process. He made a distinction between the judicial review application and his s. 160 application. The judicial review proceedings sought to challenge the validity of the grant of permission. The s. 160 application was concerned with the development that had occurred in breach of pre-development conditions or development occurring outside the scope of the permission. He took particular issue with works taking place outside the area outlined in red on the planning application. The present application was, he said, a challenge to unauthorised development.

In this regard he referred to the copy of the map in relation to the application for planning permission date stamped 2004, No. P04/126, which referred to the storm water outflow from Granges Road, Kilkenny. The map outlined the housing site in red. The storm water system is not referred to on that site map. The planning permission P04/126 application is in respect of development on the local authority roads leading from the site to the Breagagh River. In the circumstances the deponent submitted that the respondents do not have permission to carry out the works, which, as exhibited in the photographs, are of a significant nature, in that they are unauthorised.

Mr. Cantwell refers to conditions 2, 3 and 7 which he says are in the style of preconditions and instances.

In particular condition 2 provided that no work whatsoever should be carried out until formal agreement with the planning authority

with regard to the method statement. There was no record that the method statement was submitted or agreed.

Mr. Cantwell also refers to condition 3 relating to the surface water outfall sewer being fully constructed and tested prior to the commencement of any construction works on the main site. He says that an inspection of the site revealed that foundations had been laid by the respondent.

There was no record of any commencement notice being filed; that excavations had commenced on 18th April, 2005 and that the respondents had commenced work some five weeks before the submission of the archaeological report on 23rd May, 2005. Mr. Cantwell says that the respondents filed a commencement notice with the local authority on or about 21st March, 2005 but did not obtain a grant of permission until 17th April, 2005.

The deponent objected to the carrying out of works which involved the closing of roads to traffic. He says that the works were carried out without notice to any third parties or to the public and implies that no temporary closing orders pursuant to s. 75 of the Roads Act, 1993 were obtained and that this incursion on the public roadway was unauthorised and that the intention was to continue excavations in the public road.

The judicial review proceedings were served on 21st June, 2005. Mr. Cantwell said that since that date the respondents had accelerated their work to try to complete as much as was possible before the application for judicial review was due before the court.

The applicants wrote to the respondents and to the local authority on 23rd June, 2005, specifying the unauthorised nature of the works. The local authority replied by letter of 27th June, 2005 that it was open to the applicants to enforce the matter of their own accord.

Further correspondence between the parties ensued.

3. Replying affidavit of Anthony McCarthy
3.1 By affidavit dated 8th July, 2005 the second named respondent referred to the previous grant of planning permission, P56/03 (the permission for the main site) the installation of which was unsuccessful due to engineering difficulties. In consequence permission was sought for a revised storm water system as granted by planning permission 04/126 on 16th March, 2005, which was expressly for:

> "A revised storm water system with attenuation, discharging via a new drain through Granges Road, Golf View Terrace, Thomas Street, Butts Green and adjacent car park to a new outfall at the Breagagh River beside the Butts roundabout and ancillary related works."

He referred to two copies of drawings on foot of which such permission was granted and expressly referred to in the permission which the Court understands to be drawing No. DP/01 and DP/02.

3.2 Mr. McCarthy believed and was advised that the works were permitted by and were in compliance with the planning permission; that prior to the commencement the necessary legal consents were obtained from the planning authority to commence works on the site.

He referred to an application of 1st April, 2005 and a licence granted on 22nd April, 2005 and 20th May, 2005. The application was in respect of the opening of the roadway at Granges Road, Golf View Terrace, Thomas Street and Butts Green for the purpose of surface water outfall. The road opening licence issued on 23rd April, 2005 was somewhat more extensive. It related to Granges Road, Golf View Terrace, Thomas Street and St. Canice's car park – installation of a surface water pipeline. It was subject to nine conditions. Condition 4 referred to the method statement submitted being of insufficient detail in relation to S7 to S8 on DP/02 and request to address the issues prior to the commencement of works.

The second road opening licence, RO(13) – 2005, related to Dean Street (close to Butts Green roundabout) and was subject to eighteen conditions, the first of which related to a works programme and method statement for approval by the local authority area engineer at least one working week prior to commencement.

3.3 Mr. McCarthy says that, contrary to the averments in Mr. Cantwell's affidavit, that an initial method statement dated November, 2004 with three addenda agreed the method of such works with the planning authority prior to the commencement of the works. The method statement exhibited, dated November, 2004, with addendum of 17th February, 2005, together with a further two undated addenda, were prepared by Occupational Safety and Training Organisation Ltd. on behalf of the third named respondent and by Frank Fox & Associates, civil and structural consulting engineers respectively.

3.4 In relation to the allegation regarding the foundations having been laid on the housing site prior to the installation of the storm water system in breach of condition 3 of the planning permission, Mr. McCarthy said that the planning permission permitted a storm water system with attenuation and in accordance with the planning permission engineers on behalf of the respondents designed an attenuation area of 630 sq.m. on the housing site to retain storm water. Its location lay extremely close to a depression on the lands and in order for the attenuation to be constructed the depression had to be filled. Rather than excavating and refilling the depression only to re-excavate it to construct the house foundations, the foundations of two houses were laid to facilitate completion of the attenuation area. It was not intended to carry out further works on the housing site until the planning conditions regarding commencement were adhered to and no such works were undertaken. The works carried out were done so for technical reasons to prevent duplication of excavation works and unnecessary interference with the structure of the attenuation area at a later stage. It was de minimis and had no detrimental affect on the proper planning and sustainable development of the area.

3.5 In relation to the averment that the respondents had failed to provide the appropriate notice to the Department of the Environment, Heritage and Local Government in accordance with condition 7 of the planning permission, Mr. McCarthy said and believed and so advised that the appropriate notice being an application for a licence to excavate, was made on 6th April, 2005 by Kilkenny Archaeological Consultancy, which notice expired on 5th May, 2005. Monitoring commenced on 11th May, 2005 and the licence was granted on 23rd May, 2005. The works were professionally monitored by Kilkenny Archaeological Consultancy. The licence was granted for a period of thirteen weeks, commencing 7th June, 2005. An invoice in relation to (radio) advertising from 27th to 28th May, 2005 was exhibited.

Mr. McCarthy avers that the respondents were in constant communication with the planning authority in relation to method statements, programme of works, commencement dates and provision of test holes. The authority was fully appraised of the respondents' intentions to proceed with the works and liaised to ensure that the least disruption would occur.

3.6 In relation to the alleged breach of the Road Acts, 1993, in failing to obtain temporary closure orders for the roads under excavation, Mr. McCarthy was advised that such breach was not a planning matter and was, accordingly, not justiciable in an application pursuant to s. 160. In any event, once it became apparent that, in the interest of public safety, a small proportion of a laneway should be closed, the local authority agreed, subject to conditions of advertising, already referred to and notification to the Gardaí and Ambulance Service. He was informed that the local authority received no complaints in relation thereto.

3.7 Mr. McCarthy referred to a letter dated 4th July, 2005 from the solicitors acting on behalf of the planning authority in relation to proceedings issued against the respondents by the first named applicant. In relation to the respondents seeking clarification in relation to the licence issued from the local authority dated 22nd April, 2004, the local authority's solicitor confirmed as follows:

> "Our clients instruct us that they are entirely satisfied with the work done in relation to the water main and its manner of construction to date and the manner technically in which the work has been carried out. From their inspections of the works to date (and subject to anything that might arise in the future) our clients accept that the work, so far as they can tell, has been done in a technically proficient manner and to their requirements and that they are satisfied that the efficiency and integrity of the water pipe network has not been in any way compromised. Our clients accept that the technical methodology of the approach of the work satisfied our clients' requirements. It is fair to say that our clients are more or less satisfied about what has been done and do not have any real concerns about the manner in which your clients have carried out the work done."

The applicants had, by letter of Monday, 17th January, 2005, addressed the planning officer of the authority in relation to the planning application 04/126. The letter acknowledged that the latest date for receipt of submissions was Saturday, 15th January but, in their view, the submission was made within the appropriate time. A number of comments were made in relation to the surface water pipe being upgraded to serve the adjoining zone lands at Loughmacask or why a new foul water drain could not be laid in tandem with the new surface water drain, given that the said lands were inadequately serviced. In their view an opportunity existed within the planning application for the planning authority to undertake its duty to provide for serving all lands zoned for development in the Loughmacask area. The letter continues:

> "(7) If it is found that the above planning application is not sustainable development the planning authority in our opinion has the power to make the necessary changes by way of planning conditions.
>
> (8) We would obviously be happy to contribute to the cost of any additional works undertaken to service our lands at Loughmacask.
>
> We would wish to emphasise that we do (sic) have an objection principle to the above planning application. In fact we would welcome this development subject to it being sufficient to service the lands at Loughmacask in a sustainable manner."

A letter was sent from the respondents' quantity surveyor to the applicants on 21st March, 2005, confirming the decision to grant P04/126 in relation to the surface water drain on 16th March and that the local authority condition 3 required surface water outfall to be fully constructed and tested prior to any construction work on the site.

Mr. McCarthy referred to discussions taking place between the respondents and the applicants. He said that the applicants had unsuccessfully objected to the planning application by letter dated 17th January, 2005, already referred to. He further said that the applicants took no steps, even in correspondence, from the date of their letter informing them of the grant of planning permission until the applicants' letter of 1st June, exhibited in a later affidavit of Mr. Cantwell. That letter notified the respondents that the applicants had instructed their solicitors to make an application to the High Court for leave for judicial review and that their clients believed that the development was proceeding contrary to conditions attached to the planning permission. That letter was replied to by solicitors for the respondents who said that they were entitled to proceed with the development on foot of a valid planning permission, that they had a launch date for the development on 16th June, 2005 and that any intrusion by the applicants into the surface water pipe would not be permitted under P04/126 and would invalidate the respondents' development. The motion for leave to seek judicial review was dated 20th June, some six weeks after the commencement of the works and thirteen weeks after the letter of 21st March advising the applicants of the grant of permission. Mr. McCarthy said that it was not appropriate that the applicants instigate separate proceedings pursuant to s. 160 of the Planning and Development Act, 2000, prior to the determination of the judicial review proceedings.

He denied that there had been acceleration in the works but rather that the pace of works had been agreed with the local authority to minimise disruption to the public and that the respondents were behind in that programme. He says that the applicants had expended approximately €400,000 plus VAT (as part of the total investment of €3m.) and that if the works ceased prematurely they would suffer significant financial loss and prejudice and that the demobilisation and remobilisation would leave the public roadworks unsafe. At the date of the swearing there was approximately one week's work left on the installation of the storm water drain pipe.

The deponent says that the applicants' sole motivation in all of the proceedings was to prevent the respondents from constructing a pipeline with capacity to serve only the respondents' housing units. The applicants were owners of a neighbouring (but not adjoining) property and wanted an "upsizing" of the surface water sewer and the additional installation of a foul sewer along the route undertaken by the respondents in accordance with the planning permission. He believed that the present proceedings were of a merely "spoiling" nature as none of the proceedings prosecuted by the applicants could achieve their aim of obtaining access to an expansion of the storm water system. The issues should more properly be dealt with between the applicants and the planning authority. The applicants had an opportunity to be heard by the planning authority but failed to make a submission within the relevant time limit. He referred to the various meetings held.

4. Further affidavit of Mark Cantwell dated 10th July, 2005.
Mr. Cantwell said that it was significant that the respondents had not disputed that significant works were carried out outside the red line area identified on the map lodged with the planning application ref. 04/126. He said he had been disadvantaged by the fact that he had not received copy of the drawings. He referred to article 23 of the Planning and Development Regulations of 2001 which he says is a mandatory requirement directing that plans accompanying the application must identify by delineating in red the nature and extent of the proposed development.

Further, he says that no reference was made to Dean Street.

He cited s. 254 of the Planning and Development Act, 2000 in relation to the prohibition on the construction of, inter alia, a pipeline over or along a public road save in accordance with the licence granted by a planning authority under the section. He further takes

issue with the letter from the local authority's solicitor dated 4th July, 2005, and that it was a matter to be established in the course of judicial review proceedings.

In relation to the provision of a method statement and his concern that addenda 2 and 3 are undated and that there was no letter of acknowledgement from the local authority that pre-dated the road opening licence of 24th April, 2005. He also takes issue with the works carried out by the respondents in the preparation of the attenuation area. He says that the issue regarding the temporary road closing orders was a matter for separate proceedings.

The applicant also takes issue with the respondents prejudice and financial loss, and reiterated the respondents purpose to carry out as much work as possible prior to the hearing.

Mr. Cantwell says that the applicants did not seek to restrict the respondents but sought to establish that the local authority had incorrectly applied a private planning permission to works that were in the nature of public development which matter was set out in the judicial review proceedings.

5. Further affidavit of Mr. McCarthy
In a supplemental affidavit of Anthony McCarthy it is stated that while the service water pipeline the subject matter of the proceedings extended beyond the red line boundary in the planning application the said works formed part of the development in respect of which planning permission was granted and that statutory notices made reference to the development of the pipeline. Accordingly, the applicants could not claim to have suffered any prejudice. He did not accept that the conduct of the works in the areas outside the red line boundary identified in the planning permission constituted unauthorised development. The block work in relation to the two houses in the attenuation area represented two per cent of the bills value of both houses. The attenuation area was an integral part of the service outfall sewer and provided levels from source. It was imperative to conduct the attenuation area in order to satisfy condition number 3.

At the time of the swearing of the supplemental affidavit (sworn the 17th July, 2005) all that remained was 17 linear metres of excavation on the footpath of Granges Road and that agreement had been reached with both land owners involved to remove their boundary walls and reinstate them on completion.

He referred to the failure of Mr. Cantwell to disclose the applicants' letter of 21st March, 2005 relating to the decision of the planning authority and referred to the very significant delay in the issue of proceedings.

6. Experts Affidavits
6.1 The affidavit of Peter Bluett, Architect engaged by the respondents was sworn on the 15th July, 2005 who says that the facts deposed to in the affidavit of Anthony McCarthy, the second named respondent, sworn the 8th July, 2005 accorded with his professional opinion. He could not see how the works done by the respondents in anyway damaged the proper planning or sustainable development of the area and said that the procedure by way of licence in the Council was entirely in accordance with normal practice. He referred to the two planning permissions: P58/03 and 04/126. He said that the latter expressly and clearly granted permission for an attenuation pond on the housing site and a storm water pipe entering onto the public road and discharging into the Breagagh River. The area marked red on the plans and drawings submitted with the application showed clearly to any member of the public consulting the planning file that the storm water outfall system was along the route identified therein and coloured on the map in accordance with the legend identified thereon.

The legend showed the foul drain in red and the storm drain in relation to which planning was sought and granted in blue. It also showed the public sewer in hatched red line and the limited area in drawing DP/01 in relation to the housing site in respect of road drainage area diverted to the new storm drain as been shown by a hatched navy line.

The planning authority receipted the application and regarded it valid. He had been in general practice for over 24 years and had experiences of similar applications and said that such a system for the description of the said proposed works represented the current and good practice. The applicants on inspecting the planning file called their engineers to prepare a revised system in May 2005 and there was no difficulty whatever in identifying what was proposed in respect of the disposal of storm water.

The unexpected necessity of a brief road closure for public safety reasons in consultation with the planning authority was entirely practical, prudent and in accordance with good practice and, indeed, necessary in the interests of public safety.

The suggestion from the applicants that they were not notified of the date of the decision to grant permission arose as there was no obligation to notify them as they had not made any submission to the planning authority on the application. Mr. Bluett found it difficult to comprehend that they were not aware of the decision given their familiarity of the planning process and their interest in a number of developments in the environs of Kilkenny. They were informed by the respondents by letter of 21st March, 2005 of the decision and that they had retained professional planning consultants to advise them generally in the matter.

6.2 The affidavit of Mr. Gavin Lawlor MSc, Chartered Town Planner and Senior Associate in Tom Phillips and Associate on behalf of the applicants said that the issue was not whether the work carried on by the respondents damaged the proper planning or sustainable development of the area but whether the works were authorised. The issue of licences from the local authority did not in their own right authorise works in the nature of those carried on by the respondents.

He said that he had not come across a case where a development authorised by a planning permission allowed work to be undertaken outside the scope of the works as defined by the red line boundary nor was he aware of any developer who would rely on the text of a permission as comprising the scope of works. The site map had to identify the extent of that work which had to be outlined in red as required by Article 23 of the Planning and Development Regulations, 2001. This identification of the area under development is basic legislative requirement so determined to allow the scope of the works and the impact thereof to be readily identified. The absence of a red line lodged with the applicants identifying the works and the scope thereof becomes inaccurate and misleading. It was incorrect to present the drawings submitted as being similar to or in compliance with the requirements of Article 23 which drawings were most commonly utilised to illustrate the manner in which the developer would connect the proposed development to existing infrastructure but were not fundamental to the planning application. Pipeline connection to existing infrastructure was an exempt development and did not of itself need to be identified within the scope of the works to be undertaken. The works undertaken by the respondent was not exempt development and it was incumbent on them to properly identify not only the nature of the works to be undertaken but the scope thereof in order to obtain the authority therefore. It was incorrect that persons should be required to refer to technical drawings. The receipt by the planning authority and its validation does not, of itself, authorise the works undertaken. For works to be authorised by any permission they must meet the legislative requirements. The permission granted did not provide authority for the works undertaken. Such works that fall outside the scope of the permission constitute unauthorised

development.

6.3 Mr. Bluett filed a supplemental affidavit where he asserts that the works were in compliance with planning permission and/or were an exempted development and that the issues of licences from the local authority was a matter of legal argument.

The validity of the planning permission was the subject of related judicial review proceedings before the court. In the present application the applicants were retrospectively seeking to call into question the validity of the planning permission which, in the circumstances, was not an appropriate matter to be raised in an application pursuant to s. 160.

He noted that Mr. Lawlor accepted the lodgement of drawings was common and good practice in planning applications, and the lodgement in the present case was merely to highlight that they showed clearly to any member of the public consulting the planning files the storm water outfall system was along the route identified thereon and coloured in accordance with the legends identified. The planning permission did provide authority for the works undertaken by the respondents. It was clear from the text of the permission, the description of the proposed development, the plans and drawings lodged with the application that the works the subject matter of the proceedings fell within the scope of the planning permission 04/126.

6.4 Ms. Aoife Smithwick, Solicitor referred to the orders sought restraining the respondents from carrying out the works which he said were authorised and the necessary legal consents were obtained.

She says that on 10th June, 2005 the local authority served on the respondents a warning letter pursuant to s. 152 of the Planning and Development Act 2000 asserting that the respondents were not in compliance with condition no 3 of the planning permission PO/126.

That letter stated, in part, as follows:-

> " … it has come to the attention of Kilkenny Borough Council that you have not complied with the following condition of planning permission PO/126, which is an offence under the Planning and Development Act, 2000.

Condition No. 3 which states;

> The service water sewer should be fully constructed and tested in a proper working condition prior to the commencement of any construction works on site.

REASON: in the interests of proper planning and sustainable development.

> In this regard you are advised that you may make a submission or observation in writing to the planning authority regarding this offence not later than four weeks from the date of this warning letter.
>
> Where Kilkenny Borough Council considers that unauthorised development is being carried out, I am to advise that you that an enforcement notice may be issued."

Ms. Smithwick then referred to the letter from the Solicitor of the local authority dated 4th July, 2005 confirming that their clients instructed them that they were entirely satisfied that the work done (see 3.7 above).

7. Legal Submissions on behalf of the Applicants
7.1 Mr. Hardiman S.C., on behalf of the applicants, submitted that the storm water system was not in accordance with the planning permission. It was outside the site location of the map outlined in red on the application and was over public roads. He said that, at the date of the hearing, the pipeline was in place and, accordingly, the application for an injunction was to restrict the use of the system.

He submitted that Article 23 of the Planning and Development Regulations, 2001 was a mandatory provision and not simply directory and referred to *Slough Estate v. Slough Borough Council (No. 2)* (1971) AC 958; *Crodaun Homes v. Kildare County Council* [1983] I.L.R.M. 1; *Dublin City Council v. Marren* [1985] I.L.R.M. 593.

Counsel submitted that there were three parties involved the developer, the planning authority and the public. The regulations provide that the location of the land be "readily and reasonably identified". In *Dublin City Council v. Marren*, where planning permission was obtained by default, Mr. Justice Barrington said in relation to a second application which referred to the plans in the first application that the plan was mandatory (at 600).

Accordingly, development outside the red line was unauthorised. There was valid planning permission for development within the red line. Moreover the description was limited to three streets. Dean Street was not included.

Counsel referred to *Dunne v. Dublin County Council* [1974] I.R. 45. The notice published in the newspapers did not contain "as a heading", the name of "the area and the city, town or county in which the land" was situated. Mr. Justice Pringle held that the area contained in the notice "of the heading" is merely directory and not imperative but considers that the requirements with regard to the plans are inserted in order that the lands may be readily identifiable and that the requirements in regard to scale and north points are merely directory and not imperative (at 51-52).

Counsel submitted that there was a possibility that someone could be misled. The matter cannot be cured by the text of the planning permission if three streets are excluded. He referred to *Monaghan UDC v. Alf-a-Bet Promotions* [1980] I.L.R.M. 64 in relation to the nature and extent of development (at 68).

Section 160(1)(c) requires that the development be carried out in conformity with planning permission pertaining to land development.

There was no hardship or inconvenience to the respondent as matters could be resolved before the houses, the subject of the original planning permission, were built.

8. Submissions on behalf of the Respondents
Mr. Galligan S.C. submitted that the respondents have carried out development outside the scope of the grant of planning permission by Kilkenny Borough Council. It was necessary to construe the terms and conditions of the permission to ascertain whether the works associated with the drain fall within the scope of the permission. The principles for the construction of planning documents, including

planning permissions, were set out by McCarthy, J. in X.J.S. Investments Limited [1986] I.R. 750.

The "development as described" is –

> "A revised storm water system with attenuation, discharging via a new drain through Grange Road, Golf View Terrace, Thomas Street, Butts Green and adjacent car park to a new outfall at the Breagagh River beside the Butts Roundabout and ancillary related works - take note that planning permission P.56/03 relates to a residential development and ancillary related works. "

It was submitted that the ordinary layman reading this decision to grant planning permission would understand it to mean that it permitted the developer to construct a revised storm water system and a new drain and that permission had already been granted for a residential development with associated infrastructure but an alternative method of provision of this infrastructure was being put forward. This is the literal meaning of the words used. The terms of the notification of the grant are equally clear.

It was further submitted that the Respondents were not only authorised to carry out the works complained of in these proceedings on foot of planning permission Ref. No. 56/03, they are also obliged and, indeed, could be compelled by the Courts under Section 160, to carry out the works in accordance with that condition. The Applicants have contended in these proceedings that the development must be carried out in accordance with the "site layout map" which is contained in exhibit "MC.2" in the grounding Affidavit of Mark Cantwell. This map would more appropriately have been described as a "site location map". There is no development shown on this map and, therefore, it is inappropriately described as a "layout map ". Condition No. 1 requires the development to be carried out in accordance with the plans and particulars submitted with the application. This must include the plans which show the layout of the pipeline which form the subject matter of the application and the permission. The Applicants have sought to relegate the significance of these plans by describing them as "engineering drawings ". These plans are marked in block capitals – PLANNING - and are drawings forming part of the application. The fact that they have been prepared by engineers is hardly surprising considering the subject matter of the plans or drawings.

The Applicants are precluded from questioning the validity of the planning permission in these proceedings as Section 50 provides that any such challenge is confined to Judicial Review proceedings brought within the parameters of Section 50 of the 2000 Act.

It was also submitted that the applicants were not in a position to raise any issue as to the validity of the permission in the Judicial Review proceedings for three reasons:

> 1. The applicants do not have *locus standi* as they did not make an observation or submission on the planning application within the prescribed period under the Regulations so as to establish their locus standi for the purposes of Section 50 of the Planning and Development Act, 2000 ("the 2000 Act")
>
> 2. The applicants' proceedings were commenced outside the eight week time limit under Section 50 of 2000 Act.
>
> 3. The respondents also submitted in order to establish an entitlement to an order under s. 160(1) of the 2000 Act, the applicants have the onus of proof of establishing that an "unauthorized development" has been, is being or is likely to be carried out or continued.

In the present case, it is submitted that the works carried out associated with the surface water drain were carried out in compliance with the permission and, in particular, with Condition No. 1 of the permission which required the development to be carried out, *inter alia*, in accordance with the plans of the surface water drain. In this regard, it is submitted that the words "the development" in condition No. 1 can only refer to "the development as described" as set out on the face of the grant of planning permission. Furthermore, condition No. 3 expressly requires the surface water outfall sewer to be fully constructed prior to the commencement of any construction works on site. It is therefore submitted that in so far as the construction of the drain is necessitated by both condition Nos. 1 and 3 of the permission, and is being carried out in compliance with the said conditions, it does not constitute "unauthorised development" or "unauthorised works" for the purposes of Section 2(1) of the 2000 Act.

Finally, Mr. Galligan S.C. submitted that s. 13(10) of the Roads Act, 1993 ("the 1993 Act") was relevant in so Far as it requires a person damaging or excavating a public road to have "lawful authority" or "the consent of a Road Authority".

Section 254 of the 2000 Act provides for the granting of licences for, *inter alia*, the construction of a pipeline on, under, over or along a public road. Such a licence is not necessary where the construction of the pipeline is authorised in accordance with a planning permission. The Road Opening Licences in the present case are not expressly granted under Section 254 of the 2000 Act. If the Respondents had not applied for and obtained planning permission for the surface water drain, they would have been entitled to apply for and obtain a licence pursuant to Section 254 of the 2000 Act. On the assumption that the Road Licences granted by the planning authorities were not intended to be granted pursuant to Section 254 of the 2000 Act, it is difficult to imagine that the planning authority would have refused to grant such a licence in circumstances where they were prepared to grant Road Opening Licences.

The surface water drain the subject matter of these proceedings was separately considered by the planning authority in the context of two different consent procedures and, in each case, the planning authority was willing to give its consent to the development proposed

9. Decision of the Court

9.1 The rationale behind the statutory constraints imposed upon judicial review, initially by Section 19 of the Local Government (Planning and Development) Act, 1992, is to ensure that there was certainty in relation to the legal status of substantial commercial developments. In *K.S.K. Enterprises v. An Bord Pleanála* [1994] 2 I.R. 128 at 135 Finlay, C.J. stated as follows:

> "From these provisions, it is clear that the intention of the legislature was greatly to confine the opportunity of persons to impugn by way of judicial review decisions made by the planning authorities, and in particular one must assume that it was intended that a person who has obtained a planning permission should at a very short interval after the date of such decision, in the absence of a substantial review, be entirely legally protected against subsequent challenge to the decision that was made and therefore presumably left in a position to act with safety upon the basis of that decision."

9.2 There are three proceedings running somewhat in parallel only one of which concerns this court. The first is the s. 160 application. The second is an application for judicial review against the planning authority in relation to the alleged unauthorised development. There are also proceedings in relation to compliance with the Roads Act by way of notice of motion dated 18th July, 2005 seeking an order directing the respondents to open up the public roads and preventing them from closing any of the roads

without the statutory consent required under s. 75 of the Roads Act, 1993.

At the date of the hearing earlier this month, from the 3rd to 6th October the development had been completed. Accordingly, I am unsure as to the practicality of the order sought by that motion.

In respect of the judicial review proceedings which is not before the court I understand that an application for an extension of time is required. Those proceedings are, of course, ones in which the respondent is the planning authority and the respondents herein are, presumably notice parties.

The present application is for orders pursuant to s. 160 of the Planning and Development Act, 2000. The first relief seeks an order prohibiting the respondents from carrying out any or any further unauthorised development in relation to the specified roads.

The second order is to reinstate the lands and roadways aforesaid. It is common case that the lands and roadways have been reinstated and, indeed, that the local authority is satisfied, according to its solicitors letter dated 21st June, 2005, that this has been done in a satisfactory manner.

Mr. Hardiman S.C., says that, in the circumstances, he requires an order prohibiting the use of the surface water system by way of blocking up the access from the respondents housing site the subject of the previous planning permission P56/03.

While no formal application was made to amend the notice of motion no argument was made by the respondent that such relief was *ultra petita*. I, accordingly, proceed on the basis that the pleadings be amended so that the court can consider that relief.

9.3 Once planning permission has issued, the onus is on an objector to prove that it is invalid. Section 50(2) of the Planning and Development Act, 2000 provides that a person shall not question the validity of –

> (a) a decision of the planning authority –
>
> > (i) on the application for a permission under this part, or
> >
> > (ii) under s. 179 other than by way of an application for judicial review under Order 84 of the RSC.

Section 179 refers to a local authority's own development. While there had been some argument in relation to whether the respondent was carrying out development on behalf of the local authority and, indeed, the court was not pressed on this point, it seems clear that the development was that of the respondent and, accordingly, s. 179 has no application.

The applicant has, as already noted, also proceeded by way of judicial review proceedings pursuant to s. 50.

An initial point arises whether the court has any jurisdiction to deal with a s. 160 application when the basis for such an application is the question of the validity of the planning permission granted. In passing it it should be noted that leave will not be granted for an application for judicial review unless the applicant shows to the satisfaction of the court that the applicant had made submissions or observations in relation to the proposed development or that there were good and sufficient reasons for his or her not making objections, submissions or observations as the case may be (see 50(4)(c)).

The reliefs available under s. 160 are limited:

> (1) Where an unauthorised development has been, is being or is likely to be carried out or continued, the High Court or Circuit Court may, on the application of the planning authority or any other person, whether or not the person has an interest in the land the Court by order require any person to do or not to do, or cease to do, as the case maybe, anything that the court considers necessary and specifies in the order to ensure, as appropriate, the following:-
>
> > (a) that the unauthorised development is not carried out or continued;
> >
> > (b) insofar as practicable, that any land is restored to its condition prior to the commencement of any unauthorised development;
> >
> > (c) that any development is carried out in conformity with the permission pertaining to that development or any condition to which the permission is subject.
>
> (2) In making an order under sub-section (1), where appropriate, the court may order the carrying out of any works, including the restoration, reconstruction, removal, demolition or alteration of any structure or other feature."

Leaving aside for the moment that the applicant in the present case bases his claim on unauthorised development which properly requires determination in judicial review proceedings, the reliefs which the court may grant by order is restricted to (a) (b) and/or (c).

Unauthorised development is defined in s. 2 as follows:-

> "Unauthorised development" means, in relation to land, the carrying out of any unauthorised works (including the construction, erection or making of any unauthorised structure) or the making of any unauthorised use.

Unauthorised use is defined in the following terms:-

> "Unauthorised use" means in relation to land, use commenced on or after the 1st October, 1964, been a use which is a material change in use of any structure or other land and being development other than –
>
> > (a) exempted development (within the meaning of s. 4 of the Act of 1963 or s. 4 of this Act) or
> >
> > (b) development which is the subject of a permission granted under Part IV of the Act of 1963 or under s. 34 of this Act, being a permission which has not been revoked and which is carried out in compliance with that permission or any condition to which the permission is subject."

Unauthorised works are defined in similar terms.

Now it seems clear that, in the present case planning permission has issued and has not been revoked and, accordingly, the works are not unauthorised and the use is not unauthorised.

The permission with regard to the restoration to its condition prior to the commencement of any unauthorised development does not arise.

Moreover, the development would appear to have been carried out in conformity with the permission pertaining to that development and, indeed, notwithstanding the warning letter of 10th June, 2005, the conditions would appear to have been complied with as evidenced by the letter from the local authority's solicitor dated 4th July, 2005.

Moreover s. 160(2) does not appear to allow the court to restrict the user of development even if it is proved to be unauthorised. The power of the court is to order the carrying out of any works, including the restoration, reconstruction, removal, demolition or alteration of any structure or other feature. This, of course, only arises where it is proven that the development is unauthorised.

It follows, accordingly, that an application for an order pursuant to s. 160 must fail so long as the permission remains unrevoked. There is no application before the court to have the permission revoked for indeed, that is a matter for judicial review and not for injunctive relief in relation to unauthorised development.

It is clear that s. 160 applies to development in respect of which no planning permission has been applied for or, having been applied for, is refused.

It may not, accordingly, be necessary to deal with the issues of non-compliance raised by the applicant regarding the application.

If I am wrong in so holding, I should proceed to deal with the issues raised.

9.4 It is clear that the impugned application arose because of the engineering difficulties in relation to the previous planning permission which was granted. Some of the issues raised by the applicant have been answered in relation to the permits granted by the local authority and the notices given to the public. The non-inclusion of Dean Street could not have been relevant. The fact that the applicant did not appear to have had sight of the warning letter is not conclusive in relation to whether or not it was on the main file or on an enforcement file. The drawings DP/01 and DP/02 which in fact were civil and structural engineer drawings, were on the file and were, indeed, copied by the applicants' own engineers, were part of the planning application.

9.5 The site map surrounded in red was clearly part of the previous application and, to that extent, had no relationship to the application for planning permission for the outfall.

Full plans had been submitted to the planning authority indicating the location of the new proposed outflow delineated in blue. The description on the face of the planning permission related to the proposed outflow.

The permission granted related to those plans. Condition 1 provided that:

> "1. The development shall be carried out in accordance with the plans and particulars submitted on the 03/12/04, and further information submitted on 17/02/05 save as amended by the conditions attached hereto.
>
> REASON: In the interests of the proper planning and sustainable development of the area."

The wording of Condition No. 3 leaves little room for doubt as to what the planning authority's intention was. It provides -

> "3. The surface water outfall sewer shall be fully constructed and tested and in proper working condition prior to the commencement of any construction works on site.
>
> REASON: In the interests of proper planning and sustainable development."

The note at the end of the planning permission, is in the following terms:

> "A Road Opening Licence from Kilkenny Borough Council must be obtained before carrying out works in/on/to/under a public toad (sic) and/or footpath."

The only outstanding consent which the applicant/developer was obliged to obtain for the surface water outfall drain was a Road Opening Licence.

While the respondents were incorrect in not including the drain within the red line, this is a matter which does not go to the validity of the planning permission.

It is clear that the engineering drawings, albeit indicating the storm drain in blue on DG/01 and DG/02 do not seem to me to be such a breach of regulation 23 as to invalidate the planning permission granted. In relation to the provision therein that the site boundary should be clearly delineated in red, the identification of the route of drainpipes cannot, in any event, require a site boundary in the same manner as the boundaries of the housing site. The route of the storm water outflow has been outlined through in blue and not in red.

The respondents submitted that the acknowledgement by the planning authority for the purposes of Article 26 signified compliance with Articles 22 and 23. The planning authority in the present case issued an acknowledgement for the purposes of Article 26 of the Planning & Development Regulations, 2001 ("the 2001 Regulations"). It is worth setting out the terms of this Article in full:

> "26(1) Subject to sub-article (3), on receipt of a planning application, a planning authority shall(a) stamp each document with the date of its receipt, and (b) consider whether the applicant has complied with the requirements of articles 18, 19(1)(a) or 22 and, as may be appropriate, of article 24 or 25.
>
> (2) Where a planning authority considers that a planning application complies with the requirements of articles 18, 19(1)(a) or 22 and, as may he appropriate, of article 24 or 25, it shall send to the applicant an acknowledgement stating the

date of receipt of the application as soon as may be after the receipt of the application.

(3) Where, following consideration of an application under

sub-article (1)(b), a planning authority considers that

(a) any of the requirements of articles 18, 19(1)(a) or 22 and, as may be appropriate, of article 24 or 25 has not been complied with, or

(b) the notice in the newspaper or the site notice, because of its content or for any other reason, is misleading or inadequate .for the information of the public.the planning application shall be invalid."

Article 23 refers back to Article 22 which deals with the content of planning applications generally.

Sub-article (1) provides that an application is only deemed to be invalid for the requirements of Articles 18, 19(1)(a) or 22 and, as may be appropriate, if Articles 24 or 25 are not complied with. The requirement that "the site boundary shall be clearly delineated in red" is one of the requirements contained under Article 23 and, accordingly, its omission cannot be deemed to invalidate the application for permission.

If the planning authority is not satisfied that plans, drawings or maps accompanying a planning application do not comply with the requirements of Article 23, it can make a request pursuant to Article 33(1) of the 2001 Regulations.

The planning authority chose not to request fresh plans indicating the surface water drain outlined in red.

The remedy originally sought by the applicants to prohibit the development of the storm water outfall and the reinstating of the lands and roadways is rendered somewhat vacuous by reason of the completion of the development at the time of the hearing last month.

The alternative relief sought which was not the subject of an application for amendment seems to the court to be unduly restrictive. To seek to nullify a development even for every non-compliance with an alleged mandatory provision would leave the court with little discretion.

There is no general rule to that effect.

McCarthy J. in *Re X.J.S. Investments v. Dun Laoghaire* [1986] I.R. 750 at 756 held that:

"Certain principles may be stated in respect of the true construction of planning documents:

(a) To state the obvious, they are not Acts of the Oireachtas or subordinate legislation emanating from skilled draftsmen and inviting the accepted canons of construction applicable to such material.

(b) They are to be constructed in their ordinary meaning as it would be understood by members of the public without legal training as well as by developers and their agents, unless such documents, read as a whole, necessarily indicate some other meaning ... ".

These principles have been affirmed, more recently, by McKechnie J. in *Kenny v. An Bord Pleanála* [2001] 1 I.R. 565, and also by Quirke J. in *Dublin City Council v. Liffeybeat Limited* (Unreported, High Court, 10th March, 2005).

The burden of proof was on the respondents as was evident from *Frank Dunne v. Dublin County Council* [1974] I.R. 45 at 50 where Mr. Justice Pringle stated:-

"It appears that there is no general rule as to when a statutory enactment is imperative and when it is merely a directory. As Lord Campbell said in *Liverpool Borough Bank v. Turner* (1861) 30 L.J. Ch. 379, "no universal rule can be laid down for the construction of statutes as to whether mandatory enactments should be considered directory only or obligatory, with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature, by carefully attending to the whole scope of the statute to be constructed. It appears to be clear that some provisions in an enactment may be imperative and others may be directory".

While they do not have to, there is no restriction on persons applying for relief to the court showing that they have been prejudiced. The matter of prejudice is a matter that the court can take into account in the exercise of its equitable jurisdiction to grant or not grant injunctive relief.

The injunctive relief now being sought by the applicants, apart from not according with the provisions of s. 160(2), seems to me to be one in which the court could not in any event grant. To block the outfall in relation to the surface water accumulating on the site would be tantamount to perverting the course of nature and, in the case of storm water, would create a nuisance, not only to the respondents, but also to the surrounding area. Such nuisance would become more acute relative to the site density of the development where surface water will not have the same area for absorption.

In the circumstances the court must refuse the relief sought.