Neutral Citation Number: [2010] IEHC 226

THE HIGH COURT

JUDICIAL REVIEW

2003 397 JR

BETWEEN

MARGARET MAGUIRE

APPLICANT

AND

BRAY TOWN COUNCIL

RESPONDENT

AND

MAURICE MORTELL

NOTICE PARTY

JUDGMENT of Mr. Justice Eamon de Valera, dated the 4th day of June, 2010

The applicant is seeking an order quashing a decision of 11th April, 2003 of the respondent to refuse planning permission for a residential development described in the planning application as "one bungalow and entrance at land fronting Sidmonton Court" at Bray, Co. Wicklow and a declaration that she is entitled to a default planning permission in respect of the application.

The applicant alleges that the respondent issued a refusal of her application for planning permission on 11th April, 2003 but that the last day for the making of the decision was 10th April, 2003 and as such the decision was out of time, thus entitling the applicant to a default permission pursuant to the provisions of s. 34(8)(f) of the Planning and Development Act 2000 ("the 2000 Act").

Essentially, the court has to decide whether the decision of the respondent to refuse the applicant's application for planning permission was made within the eight week period provided for by statute and if not, whether the applicant is entitled to a default planning permission. The kernel of the case advanced on behalf of the respondent is that even if the decision was outside the eight week period, the court still has a discretion not to grant the relief sought and in all cases where default planning permission is sought, the courts must be slow to grant such relief as the entitlement to default permission is severely circumscribed by statute.

Background Facts

The applicant submitted the planning application to the Town Council on 14th February, 2003. A number of submissions were received opposing the application within the period prescribed by the Planning and Development Regulations 2001 ("the Regulations"). The respondent was obliged to make a decision on the planning application within eight weeks of the date of it having been received, that is by 10th April, 2003.

On 11th April, 2003, the respondent refused planning permission for the proposed development for the following reasons:

> "Reason 1: The proposed access across public amenity open space and a pedestrian route from a curved portion of roadway to the site would seriously injure the amenities of the area. The proposed development would, therefore, be **contrary to the proper planning and development of the area.**
>
> Reason 2: The proposed development by reason of its height and scale would be out of character with the general pattern of development in this area and would seriously injure the visual amenities of the area and would, therefore, be **contrary to the proper planning and development of the area.**" (Emphasis added)

By letter dated 12th May, 2003, from the applicant's solicitors to the respondent Town Council, it was stated that the applicant was entitled to a grant of planning permission by default because a decision on the planning application had not been made within the eight week period. That letter, dated 12th May, 2003, was outside of the time for an appeal to An Bord Pleanála against the decision of the respondent. On 29th May, 2003, the applicant instituted the within judicial review proceedings and Herbert J. granted leave on 31st July, 2003.

The Relevant Legislation

The relevant provisions of s. 34(8) of the 2000 Act, regarding the time limits within which bodies such as the respondent must make their decisions, provide as follows:

> (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** for permission 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…

(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**." (Emphasis added)

Here, the respondent submits that it did not "fail to make a decision" with the period specified in the legislation – the decision to refuse planning permission had been made within the permitted eight week period and it was merely the notice of their decision that had not been given within the eight weeks. That notice was then given one day after the eight week time limit had expired.

The previous statutory provisions dealing with default decisions were contained in s. 26(4)(a) of the Local Government (Planning and Development) Act 1963 (as amended) ("the 1963 Act"), which provided:

"Where –

(i) an application is made to a planning authority in accordance with permission regulations for permission under this section or for an approval required by such regulations,

(ii) any requirement relating to the application of or made under such regulations are complied with, and

(iii) the planning authority **do not give notice to the applicant of their decision within the appropriate period,**

a decision by the planning authority to grant the permission or approval shall be regarded as having been given on the last day of that period." (Emphasis added)

The "permission regulations" referred to in s. 34(8)(a) of the 2000 Act are contained in Part 4 of the Planning Regulations and deal with public notice requirements in respect of a planning application, the documentation to be submitted as part of the application, the content of the application and other related matters. Compliance with the permission regulations is mandatory and not directory and any non-compliance will only be overlooked by the courts where shown to be trivial or technical. *Monaghan UCD v. Alf-a-Bet Promotions Ltd.* [1980] I.L.R.M. 64 and *Molloy v. Dublin Corporations* [1990] I.L.R.M. 633 apply here.

The Submissions
The applicant alleges that the respondent's decision was out of time and submits that the last day of the period within which the respondent was obliged to make its decision was 10th April, 2003. As, according to the applicant, the decision was not made on or by that date, the applicant submits that a decision granting permission must be presumed to have been made in her favour on 10th April, 2003, that being the last date on which any decision could have been lawfully made regarding its application.

As regards the respondent's claim that the applicant did not comply with the permission regulations and therefore the court should refuse the reliefs sought in the within proceedings because no valid application for planning permission was in fact submitted, the applicant claims that any failure to comply with the permission regulations did not invalidate her application, her application having been accepted by the respondent as a valid application, and in any event she says that any inconsistencies between her application and the requirements of the regulations were minor and should be treated as *de minimis*.

The respondent submits that the decision was made within the eight week period prescribed for in s. 34(8) of the 2000 Act and refers to Simons on *Planning and Development Law* where the point is made that the crucial thing is that the decision is made within eight weeks, and not necessarily that notification of the decision is given within that period.

The provisions of s. 34(8) have changed the law on this issue. Previously, 26(4)(a) of the 1963 Act, the decision had to be made within eight weeks **and** notified within that time period also. As a result of s. 34(8), the respondent says that certain of the authorities on the time limits for decision-making which pre-date the 2000 Act, such as *Flynn and O'Flaherty Properties Ltd. v. Dublin Corporation* [1997] 2 I.R. 558 and *Freeney v. Bray UDC* [1982] I.L.R.M. 29, have no application here.

The respondent submits that the entitlement to a default permission is severely circumscribed and subject to close scrutiny by the courts. Crucially, the respondent submits the proposed development would materially contravene the relevant development plan for the area, the Bray Development Plan, 1999. In *Pine Valley Developments Ltd. v. Dublin County Council* [1984] I.R. 407, it was held that a default permission could not arise where the proposed development would constitute a material contravention of the relevant planning authority's development plan, or where such development would not normally be permissible or a development within the norm of a development plan. Therefore, according to this line of reasoning, if the development the subject of these proceedings would contravene materially the relevant development plan, no default permission could arise. The respondent also relies on *McGovern v. Dublin Corporation* [1999] 2 I.L.R.M. 314 in this regard. It is further submitted that the proposed development in this case, by reason of its height and scale, would be out of character with the general pattern of development in the relevant area and would seriously injure the visual amenities of the area and be contrary to the proper planning and development of same. By way of additional authority for its submission that a default decision cannot arise in respect of a planning application where the development would constitute a material contravention of the relevant development plan, the respondent relies *on P&F Sharpe v. Dublin County Council* [1989] I.R. 701, *Calor Teoranta v. Sligo County Council* [1991] 2 I.R. 267, *Marran v. Dublin County Council* [1985] I.L.R.M. 593 and *Walsh v. Kildare County Council* (Unreported, High Court, Finnegan J., 29 July, 2009). In addition to the submissions of the respondent on this point, the notice party also objects to the applicant being granted the reliefs sought on the basis that the development, if granted, would involve a material contravention of the development plan in respect of the relevant area. The notice party, however, is a private citizen and is not in a position to decide what is or is not materially in contravention of a development plan. That is a function of a planning authority and ultimately of the courts. In fact, even a planning authority does not enjoy any discretion in interpreting its own development plan and its functions must be discharged in strict accordance with the plan.

On the material contravention point, the notice party relies on *P&F Sharpe Ltd. v. Dublin City Council*, where Finlay C.J. held as follows:

"Having regard to my conclusion that this proposal constitutes a 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 the efflux of time because the granting of permission without the passing of a valid resolution pursuant to s. 26 subs. (3), would be illegal and outside the powers of the planning authority."

The respondent also appeals to the discretionary nature of the court's jurisdiction on judicial review and submits that, no matter whether the decision was in or out of time, all of the reliefs sought may be refused in exercise of that discretion. As regards the

somewhat cautious approach taken by the courts in deciding whether or not to declare the existence of a default planning permission, the respondent submits that much of the jurisprudence regarding s. 26(4)(a) of the 1963 Act still applies to the issue of the appropriate use of the court's discretion. Ultimately then, it is the respondent's case that even if the court finds that the decision concerning the applicant's planning application should have been made by 10th April, 2003, this alone does not entitle the applicant to a default permission. The notice echoes the respondent's submissions on the nature of the court's discretion and submits that in the instant case, its discretion should be exercised against the applicant.

Also of relevance to the exercise of the court's discretion is the matter of the applicant's conduct. Whilst estoppel, as a private law concept, is not an appropriate term in these types of public law proceedings, the respondent submits that given the discretionary nature of the court's jurisdiction in judicial review, the conduct of the applicant is central to the issue of her entitlement to the orders sought. The respondent submits that the applicant failed to notify the respondent at the earliest opportunity that the provisions of s. 34(8)(f) might apply to her application and that she considered herself to be entitled to a default planning permission. Instead, she waited until 12th May, 2003, after the time for an appeal to An Bord Pleanála had elapsed, to inform the respondent of her alleged entitlement to a default permission. The respondent says that this failure on the part of the applicant constitutes conduct which ought to deprive her of the relief which she now seeks. In *The State (Conlon Construction Ltd.) v. Cork County Council* (Unreported, High Court, Butler J., 31st July, 1975), a case in which the applicant was seeking an order of *mandamus*, Butler J. held as follows:

> "Among the well recognised grounds for refusing the remedy is delay on the part of the applicant in pursuing the claim and the abandonment of the claim in favour of alternative remedies. Where such delay and abandonment was deliberate because the claimant may have thought such a course to be in his better interests he cannot repent his decision and ask for the discretion of the Court to be exercised in his favour by the making of the Order…"

The respondent relies on this passage to bolster its submission that the applicant's conduct, in the form of her delay in notifying the respondent of her alleged entitlement to a default permission, should preclude her from obtaining the relief sought in these proceedings. In addition to the delay on her part, the respondent says the applicant has been further lax in her conduct as regards these proceedings in attempting to carry out a number of works at the development site in spite of the fact that no permission has ever been granted and in advance of the court's determination of these proceedings. In an affidavit filed on behalf of the respondent, it is averred that the applicant has removed a portion of a hedge and opened an entranceway into the property. The respondent submits that in so doing, the applicant has behaved in a highhanded manner and has shown disrespect for the process of the court whose assistance she has invoked and that consequently, she should be refused any relief sought.

As regards the "permission regulations", the respondent submits that these regulations are of particular importance to the court's determination of this case. Although the permission regulations require a planning authority to consider whether a planning application complies with them in every case and to invalidate a planning application that is not so compliant, the respondent submits that where someone is contending that a default decision arises under s. 34(8)(f), the court should scrutinise the application to assess whether it was made in accordance with the permission regulations or not, notwithstanding that the planning authority may not have invalidated the application itself on the grounds of non-compliance with same. An affidavit filed on behalf of the respondent describes a number of instances of non-compliance with the permission regulations in the applicant's application for planning permission, which cumulatively amount to a serious breach of same. In those circumstances, the respondent submits that as a matter of law, there was no obligation on it to make a decision on the planning application by 10th April, 2003 as the permission regulations had not been complied with by the applicant in making her planning permission application.

In an affidavit filed on behalf of the respondent, a number of instances of the applicant's alleged non-compliance with the planning regulations are described. These include the following:

> 1. The rear, east and west elevations shown on Drawing 02/118B submitted with the material planning application did not indicate any dimensions. Section A-A shown on the said Drawing did not indicate an overall height.
>
> 2. The site plan described on Drawing 02/118A did not indicate the north point.
>
> 3. Neither the site (layout) plan and site location map shown on Drawing No. 02/118A nor the ground floor plan shown on Drawing No. 02/118B indicate either levels or contours of the land.
>
> 4. There was no physical boundary between the land and Sidmonton Park and it was the applicant's intention to cross the open space on Sidmonton Park. This was not clearly spelt out in the newspaper notice.

Finally, the respondent submits, by way of illustrating the concern it has regarding the proposed development, that if the applicant succeeds in this application, she will receive a grant of planning permission which has no conditions attached to it and which is not capable of being appealed to An Bord Pleanála by the eight different third parties who objected to the development. This is because, the respondent submits, an appeal to An Bord Pleanála can only be taken four weeks following the date of the planning decision and such period cannot be extended. In this case, if the applicant is successful, the decision will be regarded as having been made on 10th April, 2003. Again, the respondent re-iterates that if the applicant is successful, a number of third parties opposed to the development will have been deprived of an opportunity to challenge the decision in any way. In this regard, the respondent referred the court to the decision of the High Court in *McGovern v. Dublin Corporation* [1999] 2 I.L.R.M. 314 where Barr J. observed that the right to a default permission should be strictly interpreted in view of the potential consequence for any objectors.

Decision

Was "the decision" made within eight weeks?

In interpreting s. 34(8)(f), the court must bear in mind that the right of a developer to permission by default should be strictly construed.

The decision in this case was notified to the applicant one day beyond 10th April, 2003, the 10th being the last date for the making of the decision. This does not of necessity mean that the decision was not made or decided prior to that date or within time. For example, the respondent pointed to a relevant paragraph in Simons on *Planning and Development Law* which highlights that it is the decision that must be made within eight weeks, not its notification. For example, if the respondent's decision in this case was as a matter of fact made on 10th April, 2003, but was not notified to the applicant until 11th April, then it would be arguable that the decision was made within time.

Notwithstanding the ambiguity stemming from the wording of s. 34(8)(f), I am of the view that the time limit for the making of a

decision by the respondent in this case was 10th April, 2003 and that the decision was not made until 11th April, 2003, and was therefore out of time.

Is the applicant entitled to a default permission?

As I have found that the decision was made out of time, I must now decide whether the permission sought in this case is one which could have been granted by the respondent. In other words, was this a permission which it was within the power of the respondent to grant? If, as the respondent alleges, the permission would have materially contravened the development plan, then it is not one which could ever have validly been granted.

Is the proposed development in material contravention of the Development Plan?

If the answer to this question is yes, then the applicant can have no entitlement to a default permission, as no permission could ever have been granted in the first place which would have the effect of contravening the relevant development plan for the area.

If, however, the development would not have contravened the development plan, then, in the absence of any significant breaches of the planning regulations, I can see no reason to deprive the applicant of her entitlement to a default permission pursuant to s. 34(8)(f) of the 2000 Act.

According to the judgment of Barr J. in *Tennyson v. Corporation of Dun Laoghaire* [1991] 2 I.R. 527, when interpreting a development plan, the court should ask itself what would a reasonably intelligent person, having no particular expertise in law or town planning, make of the relevant provisions. In considering whether a development would constitute a material contravention of a development plan, the court has to consider two matters. First, is the development in contravention of the development plan? Secondly, if there is a contravention, is that contravention material. What is material will depend upon the grounds upon which the proposed development was or might reasonably have been opposed by local interests. If there were no real or substantial grounds in the context of planning law for opposing the development, then it was unlikely that the contravention would ever be considered to be a material one. *Roughan v. Clare County Council* (High Court, Barron J., 18th December, 1996) and *Maye v. Sligo Borough Council* [2007] I.E.H.C. 146 are relevant authorities in this regard.

I am persuaded, from the evidence put before me and from the facts averred to in the affidavits filed on behalf of the respondent, that the proposed development, the subject of these proceedings, would constitute a material contravention of the Bray Development Plan, 1999. In reaching this conclusion, I have had particular regard to the findings of the respondent's Inspector's Report which included a finding that the development would be a traffic hazard and to the several objections to the application made by local residents opposed to the applications. Having determined that the development would constitute a contravention of the development and a material contravention at that, no right to a default planning permission could arise in circumstances where the development in respect of which permission is sought materially contravenes the relevant plan. In those circumstances, it seems to me that the application for planning permission in the instant case is not one for which default permission could ever be obtained as it was not one which originally could have been granted by the respondent. If it would not have been possible for any valid grant of planning permission to have been made in this case in the first place, then it is not possible now to declare the existence of a default permission. In reality, no such permission could ever arise, neither through the normal course of events nor as a result of a default on the part of the planning body. An impossible permission cannot ultimately be rendered possible simply through the lapse of time.

The effect of a failure to comply with the Permission Regulations

The court having reached the conclusion that the decision was made out of time, the next issue for the court to determine is whether the respondent was correct in its submission that, as a matter of law, there was no obligation on it to make a decision on the planning application by 10th April, 2003 in circumstances where the permission regulations had not been complied with by the applicant in making her application for planning permission.

It is a strict statutory precondition to the operation of the default provision of s. 34(8) of the 2000 Act that the application for planning permission should have been made in accordance with the permission regulations. As regards the need to comply with regulations in the context of s. 26 of the 1963 Act, the predecessor of s. 34(8), in *Monaghan UDC v. Alf-A-Bet Promotions Ltd.* [1980] I.L.R.M. 64, at p. 68-9, Henchy J. held as follows:

> "…when the 1963 Act prescribed certain procedures as necessary to be observed for the purpose of getting a development permission, which may affect radically the rights or amenities of others and may substantially benefit or enrich the grantee of the permission, compliance with the prescribed procedures should be treated as a condition precedent to the issue of the permission. In such circumstances, what the Legislature has, either immediately in the Act or mediately in the regulations, nominated as being obligatory may not be depreciated to the level of a mere direction except on the application of the *de minimis* rule. In other words, what the Legislature has prescribed, or allowed to be prescribed, in such circumstances as necessary should be treated by the courts as nothing short of necessary, and any deviation from the requirements must, before it can be overlooked, be shown, by the person seeking to have it excused, to be so trivial, or so technical, or so peripheral, or otherwise so insubstantial that, on the principle that it is the spirit rather than the letter of the law that matters, the prescribed obligation has been substantially, and therefore adequately, complied with." (Emphasis added)

In assessing the effect of the applicant's alleged non-compliance with the permission regulations, the possible application of the *de minimis* rule must be borne in mind. The fact that none of the alleged instances of non-compliance with the regulations caused the respondent to reject the applicant's application for planning permission for being invalid must also be borne in mind. Also of relevance to the court's view on this matter is the fact that the respondent did not make a particularly forceful case at the hearing of the within judicial review proceedings as regards the seriousness of these allegations of non-compliance with the planning regulations. In light of the nature of the alleged instances of non-compliance and the attitude of the respondent to them, I am of the view that there were no particularly significant breaches of the planning regulations and while breaches of the regulations should not be treated lightly, minimal or trivial deviations from them is not of itself sufficient to bar an applicant from an entitlement to judicial review.

The Applicant's Conduct

Having determined that the development in question constituted a material contravention of the relevant development plan, it is not necessary for me to consider whether the conduct of the applicant, in failing to raise the s. 34(8)(f) point at an earlier stage and in commencing development works at the site despite the absence of permission for same, would disentitle her to the relief sought.

For all of the above reasons, I refuse the relief sought and dismiss the application.