Neutral Citation Number: [2005] IEHC 480

THE HIGH COURT
JUDICIAL REVIEW

[2003 No. 331 J.R.]

BETWEEN

ABBEYDRIVE DEVELOPMENTS LIMITED

APPLICANT

AND
KILDARE COUNTY COUNCIL

RESPONDENT

Judgment of Mr. Justice Roderick Murphy dated the 29th day of November, 2005.

1. Outline of case
The judicial review application before the court concerns the default permission whereby it is submitted that the planning authority had neither requested further information nor made a decision within the eight weeks required under the provisions of s. 34(8) of the Planning and Development Act, 2000.

That section provides:

> "(8)(a) Subject to paragraphs (b), (c), (d), and (e), where –
>
> (i) an application is made to a planning authority in accordance with the permissible 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 a period of eight weeks beginning on the date of receipt by the planning authority of the application.
>
> (b) Where a planning authority, within eight weeks of the receipt of a planning application serves notice in accordance with 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 four weeks of the notice being complied with, provided that the total period is not less than eight weeks.
>
> (c) (refers to Environmental Impact Statement)
>
> (d) Where a notice referred to in sub-section (6) (where the development concerned would contravene materially the development plan) is published in relation to the application, the authority shall make its decision within the period of eight weeks beginning on the day on which the notice is first published.
>
> (e) (refers risk of a major accident)
>
> (f) Where a planning authority fails to make a decision within the period specified … a decision by the planning authority to grant permission shall be regarded as having been given on the last day of that period."

3. The proposed development comprises a seven-year planning permission for a phased development of twenty units per annum at Ballymore Eustace West / Broadleas Commons comprising site development works, road site access, outfall foul and surface water drain and services and the erection of 10 No. two-storey, three-bed semi-detached houses, 55 No. bungalows, 72 No. dormer bungalows, two-storey community facilities comprising crèche, neighbourhood shops, medical centre and 3 No. two-bed apartments over.

4. On 3rd December, 2002 the planning application was received by the respondent as acknowledged on 12th December. On 6th February, 2003 the respondent served a notice requiring further information outside the statutory eight-week period. On 5th February, 2003 the applicant claimed that a decision by default was deemed to have been made and seeks a declaration to that effect.

2. Judicial Review application
2.1 The applicant sought declarations that the decision to grant planning permission in relation its application reference No. 02/2308, received by the respondent County Council on 3rd December, 2002 was to be regarded as having been given on 5th February, 2003 being a period of eight weeks beginning on the date of receipt of the application but disregarding the period between 24th December and 1st January, both days inclusive, and that the notice requesting further information dated 6th February, 2003 was invalid as not being served in accordance with Article 33(1) of the Planning and Development Regulations, 2001.

The applicant also sought, if necessary, an order of mandamus directing the County Council to grant the application.

The applicant formally called upon the County Council to issue a grant of permission on 6th March and 10th March, 2003. The delay in making a decision has had the consequence of the applicant being unable to carry out the development and having suffered financial loss as a consequence.

2.2 The grounding affidavit of Mr. Gavin Lawlor, B.Sc., M.Sc. in Regional and Urban Planning and an associate of Tom Phillips Planning Consultants, filed 15th May, 2003 referred to the planning history wherein the County Council had made two decisions to grant permission. The first, a decision dated 8th January, 1999 (ref. 98/1191) granted permission for the construction of 416 No. housing units and certain associated development, subject to 44 conditions. By further decision dated 6th November, 2000, (ref. 00/419), the respondent County Council granted permission for a proposed development comprising 187 No. housing units on the land subject to 77 conditions. The second condition attached to the said decision required the applicant/developer to complete the proposed extension and upgrading of the Ballymore Eustace sewage treatment system permitted under planning reference No. 98/1333, in order to ensure adequate service existed for the proposed development before first occupation of any of the proposed dwellings. The fourth condition

attached to that decision required the applicant/developer to omit 27 No. dwellings from the proposed residential scheme.

On appeal An Bord Pleanála refused permission for the said proposed development by decision dated 22nd May, 2001 (ref. PL09.122432).

A claim for compensation was made by the applicant pursuant to s. 11 of the Local Government (Planning and Development) Act, 1990 in respect of the said refusal. On 13th December, 2001, the respondent purported to serve a notice pursuant to s. 13(1) of the Act of 1990, notifying the claimant that, notwithstanding the refusal by An Bord Pleanála to grant permission, the planning authority was of the opinion that having regard to all the circumstances of the case the said lands were capable of other development for which permission under Part IV of the Local Government (Planning and Development) Act, 1963, as amended and extended, ought to be granted.

The validity of the said notice is a matter of dispute between the parties.

Mr. Lawlor deposes to the date of the application and the latest date for the determination of the application being 5th February, 2003.

Mr. Lawlor further says that the planning application was made in accordance with the requirements of the relevant permission regulations. He says that the proposed development did not constitute a material contravention of the development plan and was supported by the previous decisions of the respondent.

He says that the notice requiring further information dated 6th February, 2003 was not in accordance with Article 33 of the Regulations of 2001 which required it to be made within eight weeks of the receipt of the application.

2.3 Mr. Gerard Deane, the Managing Director of the applicant company, said that the applicant was a property developer and had made a number of applications in relation to the lands which had been purchased with other lands in or about 1998 and comprised in total approximately 62.2 acres.

He referred to the planning application and his solicitor's letters dated 6th and 10th March, 2003, seeking a grant. He said that the delay in issuing the grant was likely to inflict considerable financial losses upon the applicant.

3. Grounds of opposition

3.1 The respondent pleaded that the said planning application was not made in accordance with the requirements of the Planning and Development Regulations, 2001. It also says that the proposed development would not be in accordance with the relevant statutory development plans and would constitute a material contravention thereof. In the alternative there was insufficient information provided in the application such as would allow a proper determination to be made as to whether the proposed development was in accordance with the relevant statutory development plans and would not constitute a material contravention thereof.

In addition it denied the claims made by the applicant.

3.2 The statement of opposition was grounded on the affidavit of Mr. Kevin Kelly, Senior Executive Officer in charge of the respondent's planning department. He said that the applicant's planning application ref. 02/2308, the subject matter of the proceedings, was not made in accordance with the Regulations.

He says that Mr. Lawlor was correct in pointing out that there were two previous planning applications in respect of the site for residential development and says that it is important to note that both of the applications were solely for housing. It was true to say that both were more extensive than the subject application but neither was considered to require to be dealt with as a material contravention of the development plan. He noted that that view was not shared by An Bord Pleanála who decided that the proposed development "would conflict with the provisions of the development plan" although it was not indicated by the Board which provisions were contravened.

Mr. Kelly said that the subject application was not solely for residential housing as it included a two-storey community facilities building comprising of a crèche, neighbourhood shop and medical centre. The proposed development was on a site located on the east Kildare uplands which is dealt with in para. 4.24 of the Kildare County Development Plan, 1999 which provides that the zoning of the subject site was R2 and R3. A proportion of the subject site has R2 zoning which is zoned as "solely residential" to provide for the development of a low-density residential area. A portion of the subject site has a R3 zoning which is zoned as "solely residential" to provide for the development of a rural community.

The Ballymore Eustace Development Plan, 1996 includes the site within the development boundary but there were no rigid land used zoning objectives included therein.

Accordingly, as the proposed development included aspects which were not solely residential and that the site is subject to a "solely residential" zoning, the development would, *prima facie*, constitute a material contravention of the development plan and was certainly not, *prima facie*, permissible.

Mr. Kelly to the s. 13(1) notice and the opinion of the planning authority that the lands were capable of other development for which permission under Part IV of the Act ought to be granted. However, he believed that that could not be taken as an opinion that such other development would not amount to a material contravention of the Development Plan. He said that a s. 13(1) notice is valid even if the development indicated would be a material contravention of the Development Plan.

Mr. Kelly that the planning authority was not satisfied that it had sufficient information as to how the proposed development would comply with the above mentioned plans and with the Strategic Planning Guideline for the Greater Dublin Area, 1999 and the National Spacial Strategy, 2002.

3.3 Ms. Anita Sweeney, Senior Executive Planner, said that the plans and drawings did not comply with the Regulations in the following respects:

> (a) the site boundary was delineated in pink and not in red on the site layout plan contrary to the requirements of Regulation 23(1)(a);
>
> (b) the plans and drawing did not indicate the name and address of the person by whom they were prepared as required

by Regulation 23(1)(i) as it indicated no more than: "SKH Horan and Associates";

(c) the north point was not indicated on the floor plans as required under the provisions of s. 23(1)(h);

(d) as regards house types 7 to 11, the scale of drawings was indicated as being 1:100. However, side elevations would appear to be drawn at a scale of 1:200 and there was no reference to or indication of this difference in scale on the drawings. This was contrary to Article 23(b) of the Regulations which required a prescribed scale to be indicated on the drawings.

3.4 Ms. Shirley Farrar, Senior Staff Officer, averred that she was at the public desk of Kildare County Council on 3rd December, 2002 when the application was submitted by a person acting on behalf of the applicant. She referred to the site notice which was signed by a person acting on behalf of the applicant but the contact address of the person was not inserted as required. She advised the person submitting the application and then inserted, in her handwriting, the applicant's architect's name as Horan and Associates and the person who submitted the application inserted their address as 127 Phibsboro Road, Dublin. She said that she advised the person that the site notice already erected on the site should be amended accordingly. She says that there was no evidence as to the date upon which the site notice actually erected was so amended and referred to Regulation 17(1)(b) of the Regulations which required that such notice should be given of the intention to make the application two weeks before the making of the application by the erection of a site notice in accordance with Article 19.

4. Mr. Lawlor's Supplemental Affidavit.
Mr. Lawlor, by way of supplemental affidavit of 14th May, 2004 referred in more detail to the application in respect of just under 60 acres, some 42 of which were on the lower lands. The community facilities had a site coverage of 0.2% with a floor area of 361 sq. m. while the floor area of the housing for the proposed development was 28,230 sq. m. or 98.7% of the total floor area.

He had been personally involved with the proposals since 1998 and was familiar with the plans, drawings and particulars accompanying the application. He had had numerous discussions with planning officials from the respondent and was of the understanding that the form and type of development which was being proposed was considered by the respondent to be consistent with their objectives to the planning expansion of Ballymore Eustace village and was consistent with the provisions of the County Development Plan, the Ballymore Eustace Development Plan, both of which were statutory development plans. Neither of the two planning applications previously granted by the respondent was found to be in material contravention. An Bord Pleanála's inspector, in dealing with the second application, concluded that the proposed development was in accordance with both of the statutory development plans applying to the site. The third application, the subject matter of these proceedings, was primarily for a lower density residential development.

Accordingly, the only element which fell to be considered in the context of whether there was a material contravention of the Development Plan was the community facilities building. This building is located on the lower lands to which the R3 zoning objective applies. The lands were described in the report of the inspector as being "suitable for urban development in the context of the development of a rural community" which was consistent with the stated planning policy for R3 to "provide for the development of a rural community" in the County Development Plan. Reference was made to the report of Mr. Ben Cranwell, Senior Planning Officer with An Bord Pleanála, which referred to R3 zoning establishing a presumption of development and to Mr. Kelly, the then Senior Planning Officer with the respondent, who agreed that the R3 zoning should extend to the development boundary as defined under the Ballymore Eustace Plan, 1996.

Mr. Lawlor says that the expression "solely residential" should not, in his opinion, be interpreted in the context of the County Development Plan as meaning "solely housing". The County Development Plan at Schedule 1, page 170, in the context of Blessington, refers to the policy to create portion of planned residential neighbourhood units within the context of the future expansion of Blessington.

With regard to community facilities the County Development Plan at para. 2.16 states that it is the policy of the Council to ensure the development of community facilities for the population of the county and to co-operate with other organisations in their provision. Facilities should include school requirements, shopping facilities, swimming pools, community halls, churches and public open spaces etc.

At p. 173 of the County Development Plan under the heading of specific objectives for housing it is stated that there is an objective to investigate the provision or improvement of services and community facilities in selected centres such as Kilteel, Rathmore, Tipperkevin and Ballymore Eustace and notes that there are separate development plans prepared for the first and last mentioned centres.

Mr. Lawlor is of the opinion that the provision of the rather limited community facilities is consistent with an R3 zoning policy and the objectives of the Development Plan and that Mr. Kelly had not offered any definitive view that the proposed development would amount to a material contravention of the development plan. He had been quite circumspect in this regard in the use of the words *prima facie*.

He refers to planning applications in relation to the Ballymore Eustace area which Mr. Kelly, in a replying affidavit, distinguishes from the present application. Mr. Lawlor believes that the proposed community facilities building to be ancillary to the overall residential development which was on a small scale appropriate to the level required by the new residential community of that size. He points out that the Government's policy document entitled "Sustainable Developments – a Strategy for Ireland" referred to in para. 4(1) of the County Development Plan, in the context of provision of child care facilities has guidelines to which planning authorities are obliged to have regard which recommend the provision of one crèche for every 75 houses.

He further says that the provision of local shopping in the context of new residential development is in accordance with the implementation of the provisions of the Development Plan insofar as they relate to the provision of community facilities in conjunction with new residential development in specified villages, including Ballymore Eustace. Similarly, he says that the medical care facility proposed was an appropriate community facility to be provided in the context of a new residential community at that location.

5. Mr. Deane's Supplemental Affidavit.
5.1 Mr. Deane, the Managing Director of the applicant company, swore a supplemental affidavit in reply to Ms. Farrar's affidavit. He said that as he left Kildare County Council premises he had his secretary insert the address of Horan and Associates on the copies of the original site notice, had the site notices laminated and went back to the site and replaced the existing site notices. That replacement was achieved in each case within minutes. He confirmed that he inspected the site notices two to three times a week for a period of eight weeks. He said and believed that they were not interfered with and were maintained in position and actually

remained there to the date of the swearing of the affidavit on 14th May, 2004.

Mr. Deane said that Mr. Edward Horan was responsible for the preparation and submission of the plans, drawings and particulars and was familiar with the contents of the same. He too referred to the affidavit of Ms. Sweeney and noted that there was no explanation offered as to why she did not raise any of the issues relating to alleged non-compliance with the Regulations until the swearing of her affidavit on 6th May, 2004.

6. Architect's Affidavit.
In the affidavit filed 14th May, 2004, by Mr. Edward Horan, architect for the applicant, each of the four matters is dealt with as follows:

> (a)(i) The boundary was, in fact, delineated in red on the site location plan Drawing No. 0207/2500/01. The site boundary map, due to its size, was furnished in four parts with the site boundary also clearly delineated in pink. He said that the respondent could not have any reasonable doubt as to what the pink line was intended to delineate, i.e. the site boundary.
>
> (a)(ii) The definition of 'red' in the Concise Oxford English Dictionary and of 'pink' (of pale red colour … verging on red) shows that the respondent was making an extremely technical point.
>
> (b) The plans and drawings indicate the name of the firm, Horan Associates, and were prepared by his firm by Ms. Susan Horan, indicated by the initials "SKH".
>
> (c) The literal compliance with the requirements of Regulation 23(1)(h) would have required that 137 No. 4 plans be furnished in respect of that number of houses all with different orientation even within the eleven different house types. The north point was clearly indicated in the overall site location plan. In his professional opinion that amounted to sufficient compliance with the Regulations. The north point was also inserted on other drawings.
>
> (d) It was clear that Ms. Sweeney was not in any way confused by the absence of a scale for the side elevations as she indicates in her affidavit that they "would appear to be drawn on a scale of 1:200". She did not suggest that the planning authority were in any way handicapped in their assessment. The side elevations submitted with the planning application were scaleable as 1:200 from the written figured dimensions stated on the drawings. In his opinion the planning authority were not hampered in any way in their evaluation of the plans by the absence of a scale for the side elevations.

In all these cases the drawings could have been requested by the planning authority pursuant to a request for further information.

Mr. Horan said that, in his professional opinion, insofar as there were any minor or technical infractions of the requirements of the Regulations, these were of a trivial nature and certainly not of such a type or degree that could have impeded the planning authority or any other person in their assessment of the subject planning application.

7. Further Supplemental Affidavits of Mr. Lawlor, filed 18th May, 2004.
7.1 Mr. Lawlor in his second supplemental affidavit referred to the report of Ben Cranwell of An Bord Pleanála where it was stated:

> "The site is unzoned in the Ballymore Eustace Development Plan, 1996 but it is recognised that the land has potential for residential development. The rural detail map zones the lower part of the site R3 and the higher land above the escarpment R2.
>
> The East Kildare Uplands Plan has been a part of the Kildare planning process since 1977 and has set the strategy for the preservation of the important environmental features in this section of Kildare, but it can not be seen as to provide a definite zoning for the villages in the locality. However, in respect of the appealed site, it is the objective (R2) to preserve the higher lands against intensive developments, while the lower lands are considered suitable for urban development but in the context of the 'development of a rural community'."

7.2 Mr. Lawlor, in the third supplemental affidavit also filed 18th May, 2004, referred to the standardised checklist designed by the planning authority for the purpose of vetting the validity of planning applications. This checklist contains the name of the person who prepared the plans and drawings in respect of the subject application. The last page of that checklist addressing the question of the scale of drawings would appear not to have been filled out by the authority.

He was advised that the respondent may not have placed the planning officer's report on the planning file in circumstances where a notice requesting further information is issued on the basis that the planning authority had no obligation to so request.

8. Senior Planner's affidavit
The affidavit of Mr. Pat Gallagher, a senior planner with the respondent, the holder of a Master's degree in regional and urban planning, a corporate member of the Irish Planning Institute and a Chartered Town Planner, concurred with Mr. Kelly's and Mr. Lawlor's conclusions. The only matter in issue was whether there was material contravention because of the two-storey community facilities building. The zoning objectives of the subject site are R2 and R3. He believed that the proposed community facilities building was development that had sufficient merit to allow its consideration in the content of the overall proper development of the area but that the Kildare County Development Plan did not suggest that they should be developed on lands zoned "solely residential". The Ballymore Eustace Development Plan makes no mention of development other than residential. No action plan was prepared by the respondent for the subject lands. The mixed uses referred to by Mr. Lawlor differed materially from the community facilities proposed.

In a further affidavit, he refers to the policy of the respondent to child care facilities at a variety of employment, educational, transport and retail locations. He referred to the Ballymore Eustace Development Plan, 1996 and, given its objectives on 6th February, 2002, required further information as he was unclear whether the proposed development conformed with the objectives. That development plan provided that, due to its size, it was not proposed to adopt a rigid land use zoning objective strategy for the village. "Extensive or dense development will not be permitted outside the development area until such time as the land within it is substantially developed". (para. 2.1 of the Development Plan) "… it is not intended to seek residential densities which would be more appropriate to larger urban areas". (para. 3.3.)

9. Mr. Lawlor, in is fourth affidavit, referring to Mr. Gallagher's averments. The development plan did not prescribe any specific density standard.

The report of Mr. Cranwell recommended refusal of permission in respect of a sewage treatment plant. Despite this, the respondent decided to grant permission and An Bord Pleanála, on 8th September, 1999, so decided. The most likely manner in which that would be implemented is by the applicant obtaining a grant of planning permission.

In his opinion the proposed development would not be in material contravention of the development plan.

10. Submissions on behalf of the applicant
10.1 Mr. Galligan, S.C. for the applicant submitted that the notice requiring further information was not served in accordance with Article 33(1) of the Planning and Development Regulation, 2001 and was, accordingly, invalid.

He further submitted that the application was made in accordance with the regulations and in substantial compliance therewith. Alleged breaches were purely technical. He referred to *Molloy v. Dublin County Council* [1990] 1 I.R. 90 and to *Monaghan U.D.C. v. Alf-a-Bet Promotions Limited* [1980] I.L.R.M. 64.

In relation to the material contravention of the development plan he submitted that the respondent had not particularised the basis of such contravention as was required by *McNamara v. An bord Pleanála* (No. 2) [1996] 2 I.L.R.M. 339. The respondent did not discharge the onus of proof in relation to the Statement of Opposition.

10.2 Mr. Galligan distinguished between material contravention and "open for consideration".Section 34(6)(a) of the 2000 Act requires, inter alia, a resolution to be passed by the authority requiring that a decision to grant permission be made.

The section provides:

> "34(6)(a) In a case where the development concerned would contravene materially the development plan, a planning authority may, notwithstanding any other provision of this Act, decide to grant permission under this section, provided that the following requirements are complied with before the decision is made, namely

(i) to (iii) (notices, submissions) and (iv) a resolution passed by the authority requiring that a decision to grant permission be made.

Mr. Galligan argued that the section did not apply as the subject matter of the application was open for consideration.

11. Submissions on behalf of the respondent.
John Aylmer S.C., agreed that, due to an administrative error, the request for information was late.

The issue was whether there was compliance with the Development Plan. He referred to *McGovern v. Dublin Corporation* [1999] 2 I.L.R.M. 314 where Barr J. held that the applicant is on proof that it is within the plan. Insufficient information had been given in this regard. The onus was on the applicant and not on the respondent.

In the applicable 1991 Development Plan for the City of Dublin it was provided that:

> "uses shown as 'normally permissible' are generally acceptable in principle in the relevant zones. Uses shown as 'open for consideration' are uses which would not be acceptable in principle in certain parts of the relevant use zone and will only be permitted where the Planning Authority is satisfied that the use would be consistent with the overall objective, not have undesirable effects and would be consistent with the proper Planning and Development of the area."

Counsel submitted that it is clear from the said affidavits of Mr. Kevin Kelly and Mr. Pat Gallagher that the proposed development the subject matter of these proceedings was not *prima facie* permissible in principle and, if not a material contravention of the applicable Statutory Development Plans, it is certainly a development which could only be allowed by the planning authority if satisfied that it would be consistent with the proper planning and development of the area after a positive assessment by the planning authority of the application which is outside the normal confines of "solely residential" development.

The request for further information specifically raised queries as to how the proposed development complied with the relevant statutory development plans. The respondent planning authority deemed that it had insufficient information upon which to decide whether or not the proposed development would comply with provisions of the relevant statutory development plans. It is submitted that a default permission cannot arise where there is such a deficiency in the information in the application for planning permission and in this regard, the respondent relied upon the dicta of Barron J. in *Calor Teoranta v. Sligo County Council* [1991] 2 I.R. 267.

Counsel agreed that the Regulations varied in strength. The question of the north point on the floor plans of all 140 proposed dwellings would not be required. Moreover he was not pressing the issue of the pink outlining even though the use of red and pink indicated a difference as it would in conveyancing.

The kernel of the case was compliance with the development plan. The respondent had no complaint regarding the density given the planning history of the development site. He conceded that the application would be open to consideration. However, this did not cause the default provisions to apply.

12. Decision of the Court.
12.1 The first ground of opposition was the denial that the notice was invalid by reason of not being served within eight weeks of receipt of the application. The applicant submitted that s. 34(8)(a) of the Act of 2000 requires the authority to make its decision within a period of eight weeks beginning on the date of receipt of the application.

Where a period of time is expressed to begin on or be reckoned from a particular day, that day shall, unless the contrary intention appears, be deemed to be included in such period, and, where a period of time is expressed to end or to be reckoned on a particular day, that day shall, unless the contrary intention appears, be deemed to be included in such period.

The application was received on 3rd December, 2002 and acknowledged on 12th December. The period of 8 weeks expired on 5th February, 2003. On 6th February the Article 33 request was made seeking further information.

The request for further information was not made in accordance with the permission regulations as required by Article 33(1). The notice was, accordingly, invalid. It was, indeed, accepted by the respondents that this was so.

12.2 The second ground of opposition related to the application itself not being made in accordance with the Regulations. No further

details were given. However, Mr. Sweeney referred to details of non-compliance. Mr. Lawlor and Mr. Horan replied thereto. In relation to the north point not being indicated on the floor plans, it was submitted and agreed by the respondent that the alleged breach of the respondent was a purely technical one which would ordinarily never be raised in the course of a planning application. Additional floor plans were not sought in the purported request for further information. There was no prejudice due to the absence of literal compliance with Article 23(1)(h).

The site boundary was delineated in pink, not red. The plans and drawings did not indicate who prepared them. The scale of drawings did not comply with Article 23(b).

It was submitted that to the extent that there had been any non-compliance with the Regulations such incidents come within the *de minimis* rule.

12.3 The real test was whether there had been substantial compliance with Regulations so as to enable the planning application to be properly assessed and evaluated. In *Monaghan U.D.C. v. Alf-a-Bet Promotions Limited* [1980] I.L.R.M. 64 Henchy J. referred to the distinction between trivial departures and departing from what the Regulations mandated as being necessary when he stated as follows:

> "I do, however, feel it pertinent to express the opinion that 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 immediately in the Regulations, nominated as being obligatory must 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." (at p. 68)

The respondent agreed that the Regulations varied in strength and did not press the issue of non-compliance. While not condoning non-compliance with the regulations, the court does not believe that the non-compliance referred to invalidates the application.

12.4 The ground of opposition refers to the proposed development not being in accordance with the relevant Statutory Development Plans and would have constituted a material contravention thereof in the alternative. There was not sufficient information provided in the said application such as would allow a proper determination to be made as to whether the proposed development was in accordance with the development plans and did not constitute a material contravention thereof.

12.5 The net issue is that there cannot be a default permission where the application is in material contravention with the relevant development plan.

The statement of grounds of opposition alleged material contravention of the Development Plan without particularising them. Neither the affidavit of Mr. Kelly nor of Mr. Lawlor offered any opinion regarding the material contravention. Mr. Kelly had referred to a prima facie material contravention while Mr. Lawlor accepted that it was only the community facilities building which fell to be considered in the context of the issue of material contravention. Mr. Lawlor's affidavit had adverted to the County Development Plan of 1999 acknowledging the need for services and facilities and that he believed that the proposed two-storey community facilities building was a development that had sufficient merit to allow its consideration in the context of the overall proper planning and development of the Ballymore Eustace area.

It was submitted on behalf of the applicant that the onus then fell on the respondent to prove any assertion contained in its statement of opposition. The contention that there was insufficient information provided in the application was not particularised in the grounds of opposition. It is submitted that it would be unfair to expect the applicant to deal with this contention. It was primarily a matter for the planning authority to interpret the provisions of its own development plan.

It seems to the court that the applicant must show that the application is consistent with the development plan

12.6 A distinction must be made between

> (a) an application for a development which would contravene materially the Development Plan where there can not be a default permission
>
> (b) an application which could be considered by the authority, and
>
> (c) an application which is within the Development Plan where default permission applies.

The issue for the court to decide is whether an application which falls into the middle category can be granted by default.

Calor Teoranta v. Sligo County Council [1991] 2 I.R. 267, which was relied on by the planning authority and distinguished by the applicant touches on the issue.

In the Calor case the plan omitted from the application an essential feature of the development which was the thermal installation of the tank itself. The plaintiff had submitted that the defendant would have known that the tank would be so insulated since an application for a similar development within the jurisdiction of the planning authority had contained details of such an insulation.

The defendant had submitted that a permission in accordance with the plans submitted would be a material contravention of the Development Plan and therefore invalid. No new development could be permitted which did not structurally meet the requirements of the Fire Services Act as was provided for under the Development Plan.

This submission was not accepted by Barron J. who held that the plaintiff was bound by its actual application and not by any presumed knowledge on the part of the fire officer who had to consider the application.

Similarly, in *P&F Sharpe Limited v. Dublin City and County Manager* [1989] I.R. 701 the County Development Plan had provided that

absolute priority should be given to safety by the planning authority in its approach to development. The proposed permission related to the possibility of the grant of permission for the access to the dual carriageway which constituted a very significant and very important road hazard. The Supreme Court held that the only reasonable view which could be taken of the proposal was that it constituted a material contravention of the Development Plan.

What emerges from these cases is that if a plaintiff could never have obtained a valid permission from the planning authority it equally could not obtain a valid default permission.

12.7 Generally, a planning authority is required to make its decision within eight weeks beginning on the date of receipt by the planning authority of the application (s.34(8)(a)). The relevant exception to be considered is the request for further information or evidence where time only runs once both the initial request and genuine request for clarification has been complied with. It is acknowledged by the respondent that it was out of time, albeit by one day, and, accordingly this exception cannot apply.

The second relevant consideration is material contravention. It is arguable that it may not be material contravention where the planning authority is, by its development plan, open to consider an application for development.

In such case the planning authority in granting permission would not be in contravention of its plan insofar as it left itself open to consider an application.

In order to determine whether there can be a default permission where the planning authority has not considered the application it is necessary to refer to the relevant case law.

In relation to a decision to develop a large halting site, Costello J. in *Williamson v. Dublin County Council* [1991] I.L.R.M. 605 stated:

> "A development may still amount to a material contravention of the plan if it is one which was not consistent with the proper planning and development of the area."

In the present case, neither Mr. Kelly nor Mr. Gallagher say how the proposed development would be in material contravention of the Development Plan. Mr. Gallagher, who accepts that it is only the community facilities building which is in issue, believes that it has sufficient merit to allow its consideration in the context of the overall proper planning and development of the Ballymore Eustace area. (para. 5 of his affidavit of 17th May, 2004)

12.8 However, the courts are reluctant to find that a default planning permission has arisen. Blayney J. in Molloy v. Dublin County Council [1990] 1 I.R. 90 at 97, was a case where, in an application for outline planning permission, did not have drawings or elevations nor north point and did not comply with the relevant 1997 Regulations. Blayney J. held that in his opinion, the incidence of non-compliance relied upon by the planning authority came within the de minimus rules enunciated by Henchy J. in *Monaghan U.D.C. v. Alf-A-Bet Promotions Limited* [1980] I.L.R.M. 64 AT 68/9. Accordingly, they did not prevent there being a substantial compliance with the Regulations. He continued:

> "It is with considerable regret that I have arrived at this decision as it means that the plaintiffs are obtaining a planning permission which the defendants, for a number of reasons, consider should be refused. It does not seem reasonable that failure to give notice of a decision within two months should result in the application being automatically granted, but such is the law and I have to apply it. It is only the legislature can change it and I am strongly of the opinion that they should consider doing so."

In *Joseph Burke and D.H. Burke Limited v. Westmeath County Council*, Supreme Court, 18th June, 1998, O'Flaherty J. stated:

> "It is agreed on both sides that the default provisions in the legislation were enacted for the purpose of compelling a planning authority to direct its mind to an application. But, of course, if a decision is found to be ultra vires or otherwise unsustainable in law for any reason it cannot be right that the default provisions would ever come into play. In Monaghan U.D.C. v. Alf-A-Bet Promotions Limited [1980] I.L.R.M. 64, the court held that the application for planning permission was not 'in accordance with planning regulations' as required and the applicant was not entitled to permission by default. A similar conclusion was reached by the court in Crodaun Homes v. Kildare County Council [1983] I.L.R.M. 1."

In *McGovern v. Lord Mayor, Aldermen and Burgesses of the City of Dublin* [1999] 2 I.L.R.M. 314, Barr J. held that the right to a default permission should be strictly interpreted in view of the potential consequence for any objectors. The wording of s. 26(4) of the Act of 1963 implies that the right of permission in default is restricted to an application which in the normal course of events, is one that in principle is entitled to succeed. The proposed development in that case was outside the scope of development "normally permitted".

In that case, "normally permitted" and "open for consideration" were defined in the development plan. The latter referred to uses which would not be acceptable in principle in certain parts of the relevant use zone and would only be permitted where the planning authority is satisfied that the use would be consistent with the overall objective … and would be consistent with the proper planning and development of the area.

The first of the three principles applying was that of normally permissible required a consideration by the planning authority and would be allowed if it were satisfied that the application would be consistent with the proper planning and development of the area.

While in the present case the respondent had, to the extent of seeking future information, applied its mind to the application, they were out of time in seeking that information. They were entitled to consider whether the application was one that was normally permitted or whether the application as open for consideration and, if so, to decide that it was consistent with the proper planning and development of the area. The respondent had not, however, considered whether it was consistent with proper planning.

The application was one which was proper to be considered. While neither of the two previous applications granted by the respondent was found to be in material contravention of the development plan, this was a separate application. An application which could be considered is one which is not within the development plan. Accordingly, default permission cannot arise.

The court is reluctant to allow a default permission and is concerned that objectors may not be heard. In view of the above decisions and in particular that of Barr J. in *McGovern* the applicants are not entitled to the relief's sought.