Neutral Citation Number: [2007] IEHC 242

THE HIGH COURT

[2004 No. 378CA]

IN THE MATTER OF THE PLANNING AND DEVELOPMENT ACT 2000 AND IN THE MATTER OF ORDER 56 OF THE RULES OF THE CIRCUIT COURT AND IN THE MATTER OF AN APPLICATION BY THE COUNTY COUNCIL OF THE COUNTY OF WICKLOW

BETWEEN

THE COUNTY COUNCIL OF THE COUNTY OF WICKLOW

APPLICANT/RESPONDENT

AND

FOREST FENCING LIMITED TRADING AS ABWOOD HOMES AND GEORGE SMULLEN

RESPONDENTS/APPELLANTS

Judgment of Mr. Justice Charleton delivered on the 13th day of July, 2007

1. In this case, Wicklow County Council seek injunctions under s. 160 of the Planning and Development Act 2000 to put an end to a development near the N11 roadway that the developers claim is authorised by a default planning decision. Injunctions under that section, which arise on two different motions claiming a total of eight different infringements of the planning code, were granted by the Circuit Court in Wicklow, through Judge McCartan, on the 10th February, 2004, but were stayed by reason of an appeal to this Court.

2. The developments in question are at a place called Timore Lane, which is near the village of Newtownmountkennedy and stretch over an area of just under three hectares to the eastern side of the N11 roadway. The activity carried on by the developer used to be to the western side of that road and it was by reason of the relocation of the N11 route that the respondents, who are the appellants in this case, Forest Fencing Limited and others, had to make some readjustments of their business. They claim that they have a default decision to develop the site as a factory, display area, storage area, car parking area and a general working area for the manufacture, display and sale of various timber products. Wicklow County Council plead that there is no default permission and that there has been a flagrant breach of the Planning and Development Act 2000. Essentially, Wicklow County Council argue that injunctive relief should be granted by the Court because, firstly, no default permission could possibly have been granted as the relevant time period never expired; that, secondly, a default permission cannot be granted, even if time expired in that regard, where a development materially contravenes the planning authority's development plan; and, thirdly, even if there is a default permission and it is not in material contravention of the development plan, the buildings on the ground, and the activities of the developer, were not in conformity with the application which they made for planning permission and in respect of which they now claim a default decision.

3. The case therefore raises issues as to the circumstances under which a default permission can be granted under the Planning and Development Act 2000 and as to whether developments carried out in pursuance of a decision, whether default or not, can vary, and if so to what degree, from those specified in the decision to grant permission.

Facts

4. Because of the building of the N11, the majority of the buildings previously operated by the respondents/appellants were demolished. Some structures continue to exist on a small area to the far side of the new carriageway. A tiny triangular shaped area also subsists on the site of the new development. The relevant land was compulsorily purchased for the N11 and, I understand from the submissions of counsel, the disruption to the existing business was valued together with the land purchase price at a sum around of €4m. By reason of this dispute between the parties, such portion of that sum as requires to go to arbitration has yet to be decided upon and, in consequence, that amount has yet to be paid. On the very far portion of the site, away from the new N11 road, beside where the old N11 road used to run, there is a small wedge-shaped building to which a default planning permission granted by the Circuit Court in 1994 applies. That permission, however, only covers the activity of sale and display in respect of the relevant products in that area and does not cover office use.

5. When one takes out these two tiny portions of the disputed area, which I will consider separately, we find a situation of complete controversy between the parties. As a matter of what is occurring on the ground, I am satisfied from the evidence, including photographs, that the respondents/appellants have built four substantial buildings, one of which is now demolished, leaving three buildings in controversy; have set out an area which has turned a green field site into a large hardcore surfaced display area; have put car parking in a large area which was previously undeveloped; have extended the storage area for timber products along the front of the N11 carriageway, having moved this area from the other end of the site; and have put an advertisement indicating the nature of the activity carried on there in a prominent position on the top of one of the disputed buildings. The respondents/appellants seek to justify all of this on the basis of a default planning decision.

6. Wicklow County Council brought the first motion in this case in May, 2003 and the case came on for hearing before the Circuit Court on the 10th February, 2004. Judge McCartan granted the relevant injunctions but allowed time for an application to be made by the respondents/appellants for retention permission. This indulgence was not taken up as, I am told, the respondents/appellants believed that they had a default permission in respect of their development and, as was their right, proposed instead to appeal to the High Court. The second motion in this case was brought on the 12th October, 2004 because what had initially been a development incorporating two new buildings, had by that stage become four new buildings with other major changes to the site. On the 5th November, 2004 Judge McCartan made further orders on the second motion. The result is to effectively condemn the entire of the development. This is an appeal from all those orders.

7. Wicklow County Council allege a history of non-compliance and a breach of undertakings given to the Circuit Court by the respondents/appellants in respect of which they have had to return to court. However, the core issue for me is to decide whether there is any decision to justify the development covering the three new large buildings in the centre of the site, the hardcore area, the storage area, the car park, the display area and the advertisement. Having resolved these issues, I then must consider whether I should grant injunctive relief that condemns the development. As this is a matter of discretion, I need to look at all the issues raised before me in order to come to a final view on the merit of the application and the response to it.

The default issue

8. It is a matter of history, only, that in January, 2002 the respondents/appellants applied for planning permission to develop this site. That was refused, and no issue arises in relation to it. On the 12th August, 2002 the application for planning permission that is relevant here was lodged. The case made on this application for a default decision is set out at paras. 18 and 19 of the affidavit of George Smullen, sworn on behalf of the respondents/appellants on the 20th June, 2003 and is as follows:-

> "I . . . believe that, for the reasons set out below, a valid planning permission arises by operation of law, which default permission authorises . . . the laying of hardcore and storage of materials on the lands occupied by Abwood Homes . . . In

this context, I . . . believe that because of the failure of Wicklow County Council to make a decision on the planning application submitted by your deponent under Reg. Ref. No. 02/6876 within the appropriate period as extended, a decision to grant permission is to be regarded as having come into existence by operation of law. . . .”

9. In giving a detailed description of the proposed development, as the form accompanying an application for planning permission requires, the architect on behalf of the respondents/appellants indicated that they wished to demolish an existing golf clubhouse, to construct a factory comprising timber storage, workshops, offices, a showroom, a car park, a delivery yard and a waste water treatment plant. The use of the site was to be changed from a golf course into a timber products manufacturing and sale facility.

10. Section 34(8) of the Planning and Development Act 2000 provides 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.

(b) Where a planning authority, within 8 weeks of the receipt of a planning application, serves notice in accordance with the permission Regulations requiring the applicant to give to the authority further information or to produce evidence in respect of the application, the authority shall make its decision on the application within 4 weeks of the notice being complied with, provided that the total period is not less than 8 weeks.

(c) Where, in the case of an application accompanied by an environmental impact statement, a planning authority serves a notice referred to in paragraph (b), the authority shall make its decision within 8 weeks of the notice being complied with.

(d) Where a notice referred to in subsection (6) is published in relation to the application, the authority shall make its decision within the period of 8 weeks beginning on the day on which the notice is first published.

(e) Where, in the case of an application for permission for development that—

(i) would be likely to increase the risk of a major accident, or

(ii) is of such a nature as to be likely, if a major accident were to occur, and, having regard to all the circumstances, to cause there to be serious consequences, a planning authority consults, in accordance with the permission Regulations, with a prescribed authority for the purpose of obtaining technical advice regarding such risk or consequences, the authority shall make a decision in relation to the application within 4 weeks beginning on the day on which the technical advice is received.

(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.

11. Having applied for planning permission in respect of this development on the 12th August, 2002, a default permission would have been granted eight weeks later pursuant to statute. This would have occurred on the 7th October, 2002. Both parties are agreed, however, that there was an extension of time for considering the application, consented to between the proposed developer and the planning authority, which brought the default date to the 1st November, 2002. The day before this, on the 30th October, 2002, Wicklow County Council wrote informing the proposed developer that the information submitted by them was not adequate to enable a decision to be made and therefore sought further information, under Article 33 of the Planning and Development Regulations 2001. That request is described in argument on behalf of the developer as one for a modification of plans, as opposed to one which genuinely seeks further information. Under the legislation where a request for further information is made, it has the effect of automatically suspending the running of time for a default decision to be made but, for that to happen, it has to be made within eight weeks of a valid application being made for planning permission. Here, Wicklow County Council argue that there was, either, never a valid application for planning permission, or that it was in fact made on the 10th September, and not on the 12th August, with the delivery of certain essential documents by the developer. If that is so, then no default decision could have been granted. As the request for further information was never answered, the proposed developer choosing to write instead after what they say is the deadline of the 1st November, 2002, claiming that they now had default permission, the application is now deemed by the legislation to have been withdrawn six months after the date of the notice. I turn first to the issue of whether the notice for information was valid. Article 33 of the Planning and Development Regulations 2001 provides that where a planning authority acknowledges receipt of a planning application it may, by notice in writing, within eight weeks require that the applicant should submit any further information which the authority considers necessary to enable it to deal with the application. In contrast, Article 34 provides that where a planning authority which has considered an application, and becomes disposed to grant permission subject to a modification of the development, it may invite the applicant to submit revised plans providing for the modification of the development. Where these are submitted, the authority may decide to grant permission in respect of the development plans as modified. Once any genuine request is made under Article 33 for further information which accords with the statutory purpose of allowing the authority to enable it to deal with the application, then time is suspended pending receipt of the information and the eight weeks, allowed before the default permission comes into operation, is suspended until same is received.

12. An administrative body cannot abuse its position by causing time limits to be apparently suspended through the abuse of a legitimate procedure. They cannot dress up a delaying tactic so as to apparently meet a statutory obligation. Whereas the affidavits in this case have claimed bad faith on both sides, there is nothing in the discovery documentation opened to me, in the exhibits contained in the affidavits, or in the evidence otherwise before the Court, to indicate that Wicklow County Council ever had any such purpose. On the contrary, my view is that they acted fairly and in accordance with the statutory powers given to them at all relevant times.

13. Turning to the request for further information dated 30th October, 2002, this seems to me to be predominately for the purpose of seeking further information. It asks, for instance, what proposals the developer has in relation to waste water and effluent. While it seeks that an appropriate water storage tank for fire-fighting purposes should be included in the development, it also asks what proposals are to be made with regard to connections to the local water supply. Concerns are expressed as to the entrance avenue on Timore Lane and whereas some of the requests might be regarded as an indication that a modification to this junction is necessary, the majority of the information sought is as to how issues relating to traffic and customer safety might be overcome.

14. In this context, I would prefer to apply the test of genuineness to any such request rather than to construct what, to my mind, would be a wholly artificial test based on the predominant purpose of the notice or to sift through the notice seeking to discover whether the majority of the queries raised were in respect of modification or seeking further information. After all, a request for modified plans should be specified in accordance with the purpose set out in Article 34, whereas a request for further information should be apparent on reading what is sought under Article 33.

15. It is difficult to find a guidance on how the exercise of a power which might delay a statutory entitlement, in this case to a default permission, might be invalidly exercised. Under the Local Government (Planning and Development) Regulations 1994 these matters were also dealt with in Article 33. This permitted a planning authority to require an applicant to submit further information, including plans and drawings, and to produce any evidence which might reasonably be required by them to verify any information that was already given in relation to an application. In the context of that similarly worded provision O'Leary J. at p. 10 of his unreported judgment in *Illium Properties Limited v. Dublin City Council*, [2004] IEHC 327 said the following:-

> "The power of the planning authority to request further information under this Article is limited to matters which fall within Article 33. Article 33 requests should not (indeed cannot) be used to vary a planning application. Variation can only be done by agreement or by condition (and in these circumstances to a limited extent only in view of the public interest in planning applications) or by reapplication. If a planning authority cannot get agreement or cannot apply suitable conditions to its decision it must accept or refuse the application as submitted. The authority is not the developer and should stay within its remit."

16. To arrest a citizen is to deprive him or her of their liberty and to subject them to potential humiliation, involving as it does the invasion of their privacy, their right to be left in peace, and the curtailing of their right to go where they please. In that context, an arrest must be exercised on the basis of reasonable grounds, in good faith and for the purpose for which the arrest power was granted. I do not think that the requirement of reasonableness arises in this setting. The purpose of the planning code is to enable the relevant authority to make decisions which protect the rights of neighbouring property owners, the environment and our national heritage in landscape. It would be wrong, in my view, for the Court to impose a requirement of reasonableness in this context, similar to that required in the law relating to arrest. An individual applying for planning permission is seeking to be permitted to do something which is otherwise forbidden. In the law relating to arrest, a citizen is immediately deprived of a number of existing rights. The other two requirements besides reasonable grounds relating to arrest seem to me, however, to be apposite. One cannot exercise a statutory power in bad faith because statutory powers are given for the purpose of proper use, and not for the purpose of abuse. Similarly, a statutory power is to be exercised for the purpose for which it was given and not on the basis of an ulterior motive. In the context of arrest, for instance, one is not entitled to dress up an arrest for a serious crime by using a colourable device which suggests that a different crime has been committed; the motive sometimes being found where that other crime gives more extensive powers of detention. I would therefore hold that a party seeking to impugn the validity of a request for further information under Article 33 of the Planning and Development Regulations 2001 bears the burden of proving that this statutory power was not exercised in good faith for the purpose for which it was granted. On the evidence before me, that test is not met by the respondents/appellants.

17. I turn now to the issue of whether the plans were lodged by the proposed developer on the 12th August or the 10th September, 2002. Section 34(1) of the Planning and Development Act 2000 provides:-

> "Where-
>
> (a) an application is made to a planning authority in accordance with permission Regulations for permission for the development of land, and
>
> (b) all requirements of the Regulations are complied with,
>
> the authority may decide to grant the permission subject to or without conditions, or to refuse it."

18. The relevant Regulations referred to in the text of the statute which, unusually, specifically requires compliance with same, are the Planning and Development Regulations 2001. They specify the content that must be included in planning applications, in Article 22, and describe the necessary plans, drawings and maps that must accompany such an application, in Article 23. The procedure on receipt of a planning application is set out in Article 26. Among the requirements in Article 23 are for a site layout plan which is drawn to scale and which outlines in red the boundary of the site on which the development is proposed to happen. In addition, the site layout plan must show the contours of the land to be developed and relate this to the relevant Ordnance Survey data. It is not for the Court to decide whether these Regulations are reasonable or unreasonable. The requirement that a site map should be outlined in red, however, will give a clear view as to who is a neighbour to the proposed development and assist in deciding how they might be affected. A requirement for a contour map of the site will indicate where proposed buildings might stand in relation to each other; a building on a hill looking very different from one in a valley.

19. Under Article 26, the planning authority is required to stamp each document with the date of its receipt and then to consider whether the specific requirements set out in Chapter 1 of the Regulations have been complied with. Article 26(2) provides:-

> "Where a planning authority considers that a planning application complies with the requirements of Articles 18, 19(1)(a) or 22 and, as may be appropriate, of article 24 or 25, it shall send to the applicant an acknowledgment stating the date of the application as soon as may be after the receipt of the application."

20. On the 10th September, 2002 Wicklow County Council wrote to the proposed developer stating:-

> "A Chara,
>
> It is desired to acknowledge receipt of your application for permission to demolish golf club house, construct a factory

comprising timber storage, workshops, offices, showroom, car park, deliveries yard and waste water treatment system at Timore, Newcastle, Co. Wicklow which was received on 12/08/2002 and to state that it is receiving attention."

21. Since this was the statutory letter pursuant to Article 26(2), the respondents/appellants have relied heavily on it. If Wicklow County Council are bound by what is stated in the letter, the proposed developer has received a planning decision through efflux of time by reason of the default of Wicklow County Council in dealing with same. The correspondence indicates, however, that the requirements for a valid application for planning permission, as defined in part by s. 34(1) of the Planning and Development Act 2000, and as set out in Chapter 1 of the Planning and Development Regulations 2001 were not complied with on the 12th August, 2002, the date of the application. In fact, the contour map and the site outline map were not received until later.

22. There are two letters from the architects for the proposed developers before me. One of the 4th September, 2002 is addressed to a planner at Wicklow County Council and, as it begins, the letter refers to a telephone call. That call clearly was from the planning department to the developer's architect pointing out a gap in the documents and asking for it to be put right. This first letter encloses six copies of a revised site plan outlining the site in red. It promises that the contour drawing required by law would follow by Friday. By letter dated the 9th September, 2002, the architects for the proposed developer write enclosing revised copies of the site plan with the relevant contours marked thereon. This is sent to the same planner at Wicklow County Council "as promised". These documents were then date stamped in Wicklow County Council as of 10th September and a letter acknowledging receipt, giving the wrong date, was then issued. The letter stated that the planning application had been received on 12th August.

23. Under Article 26(3) of the Planning and Development Regulations 2001, an application for planning permission should be rejected if it is incomplete on receipt. Article 26(3) provides:-

> "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."

24. Instead of rejecting the entire application on procedural grounds, as it were, what happened was that the planning authority considered the application as having been made on the 10th September, the date of the stamping of the receipt of the missing portions of the application. The planning authority should have rejected the application and required the developers to start again. Instead, both parties acted, I am satisfied on the evidence, on the basis that a valid planning application had been received as of the 10th September, 2002. It is claimed on behalf of Wicklow County Council that any time in respect of the default permission ran from that time.

25. Where two parties to a decision act by agreement on a basis which is not in strict compliance with the law, an estoppel can be set up. In circumstances where a judicial review application were taken by a proposed developer and where a planning authority were alleging that a planning application had been invalid under Article 26, but where they had acted in a way which unambiguously represented that the planning application was valid upon the receipt of the last document required by the Regulations, the Court would be very slow to accept any plea of invalidity. While the ultimate manner in which the documents were accepted from the proposed developer by Wicklow County Council is not provided for in the Regulations, the actions of both parties show that they were attempting to take a practical view of the administrative burdens that the law imposes on them both. I would be very slow to let either side resile from this situation, which I regard as the unambiguous acceptance that a valid planning application had been made as of the 10th September, 2002.

26. Insofar as it is argued that the letter of the 10th of September acknowledges the receipt of a planning application on the 12th of August, and so creates an estoppel, I must reject that argument. An estoppel requires a party to understand a situation as it was represented to them. The letter in question was written in the context of clear promises by the architect for the proposed developer to the planning authority. Let us not forget that the architects are conversant with planning law. Insofar as it is pleaded that the letter of the 10th September gives an unambiguous declaration that a valid planning application had been received as of 12th August, 2002, this argument is untenable. All the parties, on the evidence before me, would have realised that the application was only completed on the 10th September, 2002 and there could be no question, therefore, of an unambiguous declaration by Wicklow County Council even if the other tests for estoppel, which I have not considered, were met.

The Development Plan

27. It is essential that I note the County Development Plan for Wicklow of 1999. This encourages the County Council to protect green belt areas between expanding towns. Specifically, its purpose is to prevent unnecessary and haphazard development so that towns may retain their individual identities and character. The County Development Plan, 1999 encourages further developments in industry and housing to locate within towns and villages so that there can be full use of the existing infrastructure. In contrast to many other areas of Ireland, which have had the economic advantage of the country side much diminished as a tourist attraction, and as an amenity for the local population, through ribbon development of housing along roadways and in scenic areas, the Wicklow County Council Development Plan, 1999 specifically sets its face against turning the countryside into an unplanned suburb. Since this area where the disputed development is comes within the corridors zone that links towns I quote from the objectives as set out in table 3.1 of the Development Plan:-

> "Corridor Zone: To provide for agriculture and forestry uses, to allow for essential rural housing need, to preserve greenbelts and to provide for development in accordance with the policies outlined for other land uses in this Development Plan which are consistent with the Landscape Zoning."

28. The other zones in the plan, which refer to areas of outstanding natural beauty, to special amenity areas and to rural areas, all provide for their preservation through planning for agricultural and forestry uses while allowing for essential rural housing need. It is obvious, in a county as beautiful as Wicklow, which this plan seeks to maintain, that the economic viability of the tourism industry should be, and is, a central part of the development plan.

Contravention of the Development Plan

29. Wicklow County Council argue that default permission cannot be declared by the court to have been granted where the

development consists of a material contravention of the development plan. Section 34(6) of the Planning and Development Act 2000 provides as follows:-

> (a) In a case in which 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) notice in the prescribed form of the intention of the planning authority to consider deciding to grant the permission shall be published in at least one daily newspaper circulating in its area and the notice shall specifically state which objective of the development plan would be materially contravened by granting this permission,
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> (ii) copies of the notice shall be given to the applicant and to any person who has submitted a submission or observation in writing in relation to the development to which the application relates,
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> (iii) any submission or observation as regards the making of a decision to grant permission and which is received by the planning authority not later than 4 weeks after the first publication of the notice shall be duly considered by the authority, and
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> (iv) a resolution shall be passed by the authority requiring that a decision to grant permission be made.
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> (b) It shall be necessary for the passing of a resolution referred to in *paragraph (a)* that the number of the members of the planning authority voting in favour of the resolution is not less than three-quarters of the total number of the members of the planning authority or where the number so obtained is not a whole number, the whole number next below the number so obtained shall be sufficient, and the requirement of this paragraph is in addition to and not in substitution for any other requirement applying in relation to such a resolution.
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> (c) Where—
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> (i) notice is given pursuant to section 4 of the City and County Management (Amendment) Act, 1955, of intention to propose a resolution which, if passed, would require the manager to decide to grant permission under this section, and
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> (ii) the manager is of the opinion that the development concerned would contravene materially the development plan,
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> he or she shall, within one week of receiving the notice, make, by order, a declaration stating his or her opinion (a copy of which shall be furnished by him or her to each of the signatories of the notice) and thereupon the provisions of *subparagraphs (i), (ii)* and *(iii)* of *paragraph (a)* shall apply and have effect and shall operate to cause the notice to be of no further effect.
>
> (d) If a resolution referred to in *subparagraph (iv)* of *paragraph (a)* is duly passed, the manager shall decide to grant the relevant permission.

30. The effect of these provisions is to allow for the grant of planning permission in circumstances where a development would materially contravene the development plan for the area only where the local authority votes in favour of it. In contrast to a default decision for a development that would fit in with the development plan, the procedure under s. 34(8), a decision to grant planning permission in respect of a development which would materially contravene the development plan cannot be made by default or, in the ordinary way under s.34 (1), by administrative decision of the planning authority. Under s. 9 of the Act, a planning authority is obliged to make a development plan every six years. Under s. 10 of the Act, the development plan sets out the overall strategy for the proper planning and sustainable development of the area. It must designate the zoning of land for particular uses, the provision of infrastructure facilities, the conservation and protection of the environment, the maintenance of the existing community, the preservation of the landscape and architecture, and the renewal of areas in need of regeneration, among other objectives. A draft is first drawn up. The draft development plan is subject to public consultation under s. 11 and then subsequent revision by the authority which votes in relation to it.

31. Since *The State (Pine Valley Developments Limited) v. Dublin County Council* [1984] 1 I.R. 407, it has been settled law that the High Court is not entitled to do more on an application for judicial review than the planning authority is empowered to do by statute. I cannot declare there has been a default decision in favour of a development if Wicklow County Council Planning Authority could never have decided in its favour. The crucial issue here involves construing the development plan. In that regard, I have already quoted the section of the development plan which is relevant to the corridor zone. It is urged on me that the development plan should be considered in the round. I agree that no section of the development plan should be considered in isolation from the entire document. I note that at para. 2.8.8 of the development plan, the Council declares its support for suitable development of resource based rural activities, which includes timber processing and the processing of aggregates and stone. However, there is no timber in this area and the raw material for processing must be brought many miles, usually from the southern part of Co. Wicklow. The development plan encourages tourism. This aspirational objective is not met by unplanned development where the distinction between urban and rural areas is lost.

32. In *Tennyson v. Dún Laoghaire Corporation* [1991] 2 I.R. 527 at pp. 535-536, Barr J. gave the following useful assistance as to how the Court should approach the construction of planning documents, and a development plan in particular:-

> "Principles regarding the true construction of planning documents were considered by the Supreme Court in In *re X.J.S. Investments Ltd*. [1986] I.R. 750. The judgment of McCarthy J., which was that of the Court, contains the following passage at p. 756:-
>
> '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 construed 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 . . .'

McCarthy J. elaborated on the same theme in the course of his judgment in The *Attorney General (McGarry) v. Sligo County Council* [1991] 1 I.R. 99 at p. 113, in the following passage:-

'The plan is a statement of objectives; it informs the community, in its draft form, of the intended objectives and affords the community the opportunity of inspection, criticism, and, if thought proper, objection. When adopted it forms an environmental contract between the planning authority, the council, and the community, embodying a promise by the council that it will regulate private development in a manner consistent with the objectives stated in the plan . . .'

In the light of these authorities it seems to me that a court in interpreting a development plan should ask itself what would a reasonably intelligent person, having no particular expertise in law or town planning, make of the relevant provisions? What would he or she learn from the . . . development plan as to the types of development which the planning authority might allow . . . ?"

33. The interpretation of the development plan is a matter of law. In *Maye v. Sligo Borough Council* [2007] IEHC 146, Clarke J. proposed a two part test to the issue as to what constitutes a material contravention of a development plan. Firstly, the development must be in contravention of the development plan and, secondly the manner of the convention must be material. At paras. 6.1-6.5 he offered the following analysis which I gratefully adopt:-

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

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

6. 2 In other words if the extent of a deviation from what is specified in the development plan is such as might give rise to a reasonable expectation of opposition based on that deviation, then the deviation will be regarded as material.

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

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

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

34. I note that in Simons *Planning and Development Law* (Dublin, 2004) at paras. 1.55-1.56, the author states that it may be possible that a contravention of the development plan may not be material where it is on a small scale. He also argues, in my view correctly, that a material contravention of the development plan is a higher test than merely showing that there are matters which are might justify the refusal of the planning permission.

35. In this case, the purpose of the development plan possibly might not have been contravened had this development been proposed in a heavily wooded area. Then, the objective of fostering rural development through the use of natural resources might, and here I speculate, be said by the planners to be consistent, subject to proper conditions, with other aspirational objectives; such as the maintenance of the landscape and the encouragement of tourism. Conditions might attach to the development, in that context, that could require the buildings to be of a particular size or kind and the siting to be landscaped and buildings put on particular contours so that it appeared woodland based. What seems to me to be impossible, however, is any notion that this development might be acceptable. It has, as a matter of fact, turned the green belt corridor area between towns into a stretch of industrial and commercial usage. The clashes between the objectives of a specific kind in the development plan and the nature of this development have become obvious. I note, in that regard, that in the *Pine Valley* case at p. 473 Henchy J. quotes the development plan for Dublin County Council in relation to the Dublin Naas Road, which plan is similar to the corridor plan here. At p. 473 he stated:-

"That declared policy of having green belts in order to prevent urban or suburban sprawl, as affirmed by the respondents and acquiesced in by the Minister, was plainly not intended to be cast aside by either the planning authority or by the Minister."

36. It seems to me that a material contravention of the development plan may be shown where the development in question is of a nature, or is on such a scale, that makes it likely that the planning authority would refuse permission for development for reasons that are based predominantly on the development plan.

37. Insofar as it has been argued that there are other developments along this N11 road, I note they are less extensive, and set in a rural context. In any event, it seems to me not to be a tenable argument that even if there have been other contraventions, which argument I do not accept, by the grant of planning permission contrary to the development plan, that it should follow that a material contravention, as in this case, ought to be allowed by the Court through default.

Variations

38. In this case, even if it were possible that a decision in favour of this development had been made by default, I could not hold that the site actually developed is now in conformity with any default decision. Having examined the plans submitted with this application,

I note the following variations:-

> 1. A large building has been moved 8 metres towards the N11;
>
> 2. The large storage and manufacturing unit which is parallel and that building has been moved in the direction of the N11 by 3.5 metres;
>
> 3. The office building which was originally represented as a continual 'L' shape on the original plans has been moved approximately 6 metres and its top storey and internal layout are entirely different from the plans as submitted;
>
> 4. A storage building has been built to the south of the property though this has now been demolished;
>
> 5. A large hardcore area, which is described as a display area and associated car park, has been built starting from an area at the buildings just described and ending at the N11;
>
> 6. A storage area occupying the entire of the field area and directly on to the N11 has been captured and incorporated in favour of the development;
>
> 7. The buildings, considered as a whole, now infringe the 100 metre distance requirement from the N11 that is the policy of the planning authority;
>
> 8. A sign has been prominently erected on the building closest to the N11 which is advertising the development and its wares.

39. None of this is impressive from the point of view of ordered planning. It can be argued, correctly in my view, that small deviations in relation to a major site can be unimportant. This site, however, and for whatever reason, was entirely built by the developer in the way that they wanted it, with virtually no reference to any plans which they have contended are the subject of a default decision.

40. Planning permissions should be interpreted with some degree of flexibility so as to allow for the practical reality that buildings can sometimes not be built precisely as the plans indicate. However, the measure of tolerance allowed is in respect of immaterial deviations. I note that in *O'Connell v. Dungarvan Energy Limited* (Unreported, High Court, Finnegan J., 27th February, 2001), Finnegan J. approved the following passage from the decision of the Court of Appeal in *Lever (Finance) Limited v. Westminster Corporation* [1973] All E.R. 496:-

> "In my opinion a planning permission covers work which is specified in the detailed plans and any immaterial variations therein. I do not use the words '*de minimis'* because that would be misleading. It is obvious that, as the developer proceeds with work there will necessary be variations from time to time. Things may arise which were not foreseen. It should not be necessary for the developers to go back to the planning authority for every immaterial variation. The permission covers any variation which is not material.

41. It can be difficult to say when a variation between plans, as approved by the planning authority, and what is actually built, can be described as immaterial. If a court is exercising its jurisdiction under s. 160 of the Planning and Development Act 2000 to grant an injunction, it would not exercise its equitable powers in relation to matters which are trivial. In its entirety, the legislation governing planning is important. Firstly, buildings should be built, and enterprises developed, in accordance with the plans approved for planning permission; secondly, the rights of neighbours are important since an especial regard is had to the effect on them of any development, allowing parties affected to appeal, under s. 37(6) of the Act, a grant of planning permission even though they have not put in any observations at the initial stage; and, lastly, the development plan should not be disregarded through deviations from approved plans which are material to it. In general, what is material in relation to a densely occupied suburban area, or a block of flats, may not be material where one is dealing with an extensive site. What is material where neighbours are affected due to the proximity of a development, may become immaterial where they are unaffected. It is difficult to see variations which materially affect neighbours to a development, which trespass outside a site boundary, which exercise rights of easement without permission by supporting structures on a third party property, or which materially affect existing rights of easement, as being minimal. Nor could it be regarded as necessarily immaterial where a letter in support of a planning application promises to obtain agreement as to the way a building proposed may be joined to a neighbouring property, but in fact agreement is absent. This is not to attempt to cut down in anyway the court's discretion in approaching its equitable jurisdiction to grant injunctive relief. Each case must be looked at carefully because orders of this kind are very serious.

42. I cannot regard the way in which this site has been developed as a whole as being anything other than a deviation in a material way from the plans as originally submitted to Wicklow County Council.

Residual Matters

43. A number of small residual points remain. As regards the wedged-shaped building near the old N11 road, there is undoubtedly a default permission granted by the Circuit Court in 1994. This is for the sale and display of relevant products. There is no permission to use this area as an office.

44. When the new N11 road was built, it caused the demolition of a number of buildings. A small triangle of those buildings remains. I am satisfied that retention permission was granted by Wicklow County Council in respect of those buildings. The condition attached to it, however, was that the permission should endure for three years. On the face of it, that permission related to both the activity and the buildings. It made sense to impose a three year limit because the new N11 roadway was due to be built over that site then. Everybody knew this. That time has expired and the application for an injunction has been made within time.

Discretion

45. It is urged on me that I should not grant injunctive relief against this developer by reason of factors which include the longstanding nature of the business conducted on the site, the effect that it will have on the livelihood of the respondents/appellants, the destruction of the employment of the several employees engaged by them, and the overall circumstances within which the development came about. I have looked at every argument in relation to this development, out of deference to the work of counsel but, more particularly, because I have to now exercise a discretionary power.

46. In entirely opposite circumstances, the court could be asked to exercise its equitable jurisdiction, pursuant to a claim for a declaration that there is planning permission, where a developer has been found to have received a default decision but where the defence of the planning authority is that the court is urged not to grant a declaration that a planning permission exists, in that

regard. I would approve of the sentiments expressed by O'Leary J. in *Illium Properties v. Dublin City Council* where at pp. 26-27 of his judgment, he condemned the idea that a court might refuse a declaration that planning permission had been granted when the clear operation of s. 34(8) of the Act was to cause such a decision to be issued by default. The provision of which he was speaking, namely s. 26(4) of the Local Government (Planning and Development) Act, 1963 is to the same effect. He stated at p. 26:-

> "The Courts have been reluctant to implement this rather crude instrument of control notwithstanding the clear terms of the statute. In the leading, yet unreported, case of *State (Conlon Construction Limited) v. The County Council of the County of Cork* 31/7/1975, Butler J. found that the request made by the planning authority, in that case, was invalid but he did not make the order sought concerning the default permission. He based his decision on the discretion which he felt attached to all state side applications and used that discretion to refuse the default permission. It is difficult to understand how a legal procedure such as judicial review (which in this context is only a process used by the courts to process disputes) can set aside the clear provision of the statute. Yet the difficulties of not doing so are immense. The courts recognise the necessity for some protection for the public from far reaching decisions arising from errors within a planning authority. However, the courts can only work within their mandate and it appears to this court that a difficulty might arise in this area in the future. It is a matter for others to asses whether the present law is sufficiently protective of the public good …. Such an outcome would be contrary to the clear intent of the provision dealing with time limits. The Oireachtas has legislated, very restrictively, in a way which prevents a planning authority extending time for the consideration of an application except on the application in writing of the applicant."

47. I note also that in *Maye v. Sligo Borough Council* [2007] IEHC 146, Clarke J. expressed a similar view at para. 7.1 of his decision:-

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

48. These remarks apply to situations where a default permission to develop a site was found by the Court to exist. Here I find that no default permission ever existed in favour of the respondents/appellants. The Court must approach this matter in a balanced way. It should look to how the parties have approached the planning process, and if there are errors, whether these are deliberate of accidental, material or unimportant, explicable or evidence of bad faith.

49. The balance of authority is in favour of the Court exercising its discretion to make a declaration that planning permission has been granted where the Court has found as a fact that there is a default permission in favour of a developer. The Court is there to uphold the law. Its discretion should not be used to change the law or to its operation. A similar principle, to that outlined in the separate judgments of O'Leary J. and Clarke J., should apply in the opposite circumstances, such as here, where the Court has found that there is no default permission: where the developer has, on the contrary, developed the site entirely in accordance with his own wishes and with little or no reference even to the plans in respect of which he once sought permission. The discretion of the Court, in this context, is very limited. The balancing of that discretion must start with the duty of the court to uphold the principle of proper planning for developments under clear statutory rules. Then, the Court should ask what might allow the consideration of the exercise of its discretion in favour of not granting injunctive relief.

50. To fail to grant injunctive relief in these circumstances, on these facts, would be to cause a situation to occur where the Court is effectively taking the place of the planning authority. The Court should not do that. This is a major development, for which there is no planning permission. It is in material contravention of the County Wicklow Development Plan. It is built entirely to suit the developer and with almost no reference to legal constraint. I am obliged to decide in favour of the injunctive relief sought.

Result

51. In the result, I will grant injunctive relief pursuant to s. 160 of the Planning and Development Act 2000; as to the first notice of motion with the exception of the first two paragraphs, which are no longer sought; and as to the second notice of motion in its entirety.