[2018] IEHC 147

THE HIGH COURT

Record No. 2016/952JR

Between:

THOMAS MURPHY and HELEN NOLAN

Applicants

– and –

WICKLOW COUNTY COUNCIL

Respondent

JUDGMENT of Mr Justice Max Barrett delivered on 21st March, 2018

I

Overview

1. The applicants come to court seeking, *inter alia*, an order of *certiorari* setting aside an order made by the respondent on 21st October, 2016, pursuant to Art. 33(3) of the Planning and Development Regulations 2001-2015. That order declares an application for retention permission (ref. 15/1065) to be withdrawn because a period of six months elapsed following a further information request of 4th April, 2016, without reply being received. The applicants maintain that the said information request was responded to in a timely manner.

II

Background

2. Pursuant to planning application (ref. 03/8050), the applicants applied to the respondent council for planning permission for, *inter alia*, a bungalow and domestic garage on their lands at Baltinglass, Co Wicklow. When it came to the proposed garage, it (at 114m2) was considered to be excessive in size and other than ancillary to the main dwelling. So the applicants were invited to submit a revised proposal for a garage no greater than 50m2 in size. Subsequently, the applicants responded to the said request for further information and, *inter alia*, submitted revised plans for a garage of 40m2 in size. Planning permission was granted in January 2004, subject to various conditions. Among these conditions was the following condition (Condition 2(a)):

> *"The use of the proposed dwelling shall be restricted to the applicant or to other persons primarily employed or engaged in agriculture in the vicinity or to other such class of persons as the Planning Authority may agree to in writing. This requirement shall be embodied by a legal undertaking that shall be registered as a burden against the title of the land in the Land Registry or Registry of Deeds and shall be of ten years' duration from the date of this registration. Evidence of this registration shall be submitted to the Planning Authority within twelve months of the commencement of development on the site."*

3. The court notes in passing that it is obvious from the wording of this condition that what was to be provided to the Council within the 12-month timeframe was evidence of the fact that registration had been completed.

4. For some years no inspection of the property, that was the subject of the above-referenced permission, was carried out by the Council to ensure that the applicants had honoured the terms of the permission. However, in circumstances where the financial contribution required under the permission had not been paid, a letter was sent in this regard to the applicants on 13th November, 2012. There was no response to this letter; however, a decision was made by the Council that before enforcement proceedings were commenced, an inspection should be carried out in order to ascertain whether any outstanding issues should be included in the enforcement proceedings. The inspection was duly carried out by Ms. Lucy Roche (Assistant Planner) on 21st March, 2013, during which she identified what she considered to be a number of breaches of the applicable planning conditions. Thereafter, a warning letter was sent in relation to each of the said perceived breaches.

5. During the course of 2013, various submissions were made to the Council (by Mr Vincent Cronin, a planning and design consultant) for the respondents. As a result of these submissions the Council was able to satisfy itself that a number of the outstanding conditions had been satisfied. Also during 2013, an application for retention (ref. no. 13/8612) was made. However, that application was not in accordance with the planning code and accordingly could not be considered. This was duly communicated to the applicants.

6. Because there continued to be non-compliance with a number of conditions, a fresh warning letter was sent to the applicants in October 2013. While Mr Cronin subsequently indicated that he had been instructed by the applicants to prepare a planning application to address the alleged unauthorised development, no such application had been lodged by the time Ms. Roche carried out a further inspection on 12th December, 2013, following which she recommended that an enforcement notice be sent.

7. Another application for planning permission (bearing ref. no. 14/1043) was purportedly made in January 2014. Again, however, this application was not made in accordance with the planning code and could not be considered by the Council. This was duly communicated to the applicants.

8. On 8th May, 2014, the Council wrote to the applicants warning that proceedings would issue by reason of non-compliance with the enforcement notice. Following the issuance of this notice, Mr Murphy placed a telephone call with the Council. Arising from the substance of this telephone call, and following a further review of the enforcement notice, the Council took the view that the enforcement notice as previously issued did not adequately address the full extent of the unauthorised development on-site. Consequently a fresh enforcement notice (with explanatory letter) dated 14th July, 2014, issued from the Council to the applicants.

9. When Ms. Roche carried out a further inspection on 28th August, 2014, it was noted that the issues of non-compliance raised in the warning letter of 14th July, 2014, had not been addressed. In addition, it was noted that the applicants had recently constructed a new detached timber structure to the north-east corner of the site, without any planning permission having been granted for same. Accordingly, yet another warning letter was sent to the applicants dated 1st September, 2014.

10. Following further site inspections in October and November 2014, Ms. Roche recommended the issue of a fresh enforcement notice to the applicants in respect of certain of perceived breaches of the planning conditions aforesaid and the construction of the timber structure aforesaid.

11. By letter dated 8th December, 2014, Mr Murphy claimed that the house and garage had been constructed well in excess of the 7-year period required for enforcement proceedings and that he was not aware that the timber structure required planning permission. He also proposed that he pay a standing order of €40 monthly in respect of planning fees; the Council by letter of 18th December, 2014, very reasonably accepted this proposal. By letter of 9th January, 2015, the Council issued a further letter addressing various points raised by Mr Murphy; it is not necessary to recount the substance of that letter.

12. In the enforcement proceedings, the Council will, the court understands, be alleging, *inter alia*, that: (i) the ridge height of the dwelling-house is 56cm higher than it should be; (ii) the dwelling-house contains first-floor accommodation when it was intended as a bungalow; (iii) instead of a house with a floor space of 275m2, the applicants have constructed a house with a floor space of 467m2; (iv) the ridge height of the garage is 192cm higher than it should be; (v) instead of a garage with a floor space of 40m2, the applicants have constructed a garage with a floor space of 108m2; (vi) a timber shed has been constructed for which planning permission is required but no such permission has been obtained.

13. The enforcement proceedings were initially listed for hearing by the District Court on 3rd September, 2015, but were adjourned in circumstances in which it was understood that the applicants were going to submit a fresh retention permission application in relation to the garage, house and shed. In October 2015, the retention application was made. Of some significance as regards the within application is the fact that in the retention application materials, Mr Cronin is expressly identified by the applicants, at their election, as the party acting for the applicants for the retention permission:

"Person/Agent Acting on behalf of the Applicant (if any)
Name Vincent Cronin
Address MUST be supplied at the end of this form. (Question 25)
"

14. The page showing Question 25 has not been exhibited before the court but it does not appear to be disputed that the address was provided; this must be so as there are several letters exhibited before the court in which the Council writes to Mr Cronin at a given address and there is no suggestion that this was a wrong address.

15. The effect of the foregoing is that when it came to the retention side of matters, the applicants wanted the Council to deal with their agent; and obviously they wanted their agent to deal with the Council. That agent was Mr Cronin. Not a single affidavit has been sworn by Mr Cronin in the context of the within proceedings.

16. Following the commencement of the District Court proceedings, *inter alia*, the following correspondence was exchanged:

> (i) in a letter of 3rd December, 2015, the Council sought further information of the applicants. This included a request that they "*submit evidence of registration of burden in compliance with the requirements of Condition 2 of PRR 03/8050.*" The court does not accept that what was sought by the Council in this regard was evidence of the commencement, or continuation of a still incomplete, process of registration. What the Council was clearly seeking, having regard to the plain wording just quoted, was evidence that the registration had been effected.

(ii) **THE FIRST WARNING**

> the County Council, in a letter dated 4th April, 2016, addressed to the applicants to *the within proceedings c/o Mr Cronin, sought further information. This letter was headed "RE: Planning Register Reference 15 1065 RETENTION for retention of dwelling house and garage as constructed, retention also for existing entrance and all ancillary site works at…Baltinglass Co Wicklow*". It is useful to quote the last segment of this letter which reads as follows:
>
> *"…Accordingly as previously requested:*
>
> 4. Please submit evidence of registration of burden in compliance with the requirements of Condition 2 of PRR 03/8050.
>
> *This information is essential in order to fully assess the proposal. If it is not received within 6 months from the date of this notice the application will be automatically declared withdrawn.* ***Please ensure your response is clearly marked with the above planning register reference number otherwise it may not be considered as a response to this request and may be declared withdrawn as above****.*
>
> *This information is required in pursuance of Article 33 of the Planning and Development Regulations 2001-2015.*
>
> *Mise, le meas…"*
>
> [Emphasis in original].
>
> The paragraph "*This information is essential…declared withdrawn as above*" is entirely clear both in what it states and in what it wants. The warning contained therein is highlighted and underlined to draw the reader's attention to this important point. Additionally, the warning text is placed almost immediately above the signature block; it is difficult to see how it could be more clearly positioned.
>
> (iii) by letter dated 13th July, 2016, Reidy Stafford, Solicitors, acting for the applicants in the enforcement proceedings, wrote a letter to the Council. The letter was headed "*Planning Register 15/1065 Retention of Planning House & Garage as constructed, Retention also for existing entrance and all ancillary site works at…Baltinglass, Co. Wicklow*." The letter robustly challenged the need for the registration of the burden. By letter of 14th July, 2016, to Reidy Stafford, which contains the reference "15/1065" at the top, followed by the heading "*RE: Planning & Development Acts 2000 to 2015 retention of dwelling house and garage as constructed, retention also for existing entrance and all ancillary site works at…Baltinglass, Co. Wicklow*", the Council referred to the letter of the 13th July, 2016, (as received on the 14th July, 2016) and continues as follows:
>
> *"I note your comments in relation to item no 2 of our clarification request and await full response to same within six months of the date of our clarification request of the 4/4/2016."*

What is clear from the just-quoted text is that the Council was satisfied to address an aspect of the retention process with Reidy Stafford. However, what is notable about the letter is that Mr Cronin was copied on it, along with the applicants. And that, it seems to the court, indicates that while the Council quite properly answered the letter from the solicitors, it nonetheless saw Mr Cronin as the central figure in the retention process, being the agent nominated by the applicants in their retention application documentation.

(iv) what happened next makes clear that Mr Cronin was still centrally involved as agent on the retention side of matters. Thus at some point after point (iii), Mr Cronin sent a further copy of the letter of the 13th to the Council; this was received on 20th April, 2016, and receipt was acknowledged on the same date.

(v) on 4th May, 2016, a Council official had a telephone call with Reidy Stafford explaining why the requirement as to the registration of the burden could not be waived and suggesting another way in which the applicants in the within proceedings, at their election, might wish to proceed. Again, it is quite clear from this e-mail that the Council viewed Mr Cronin as central to the process. Thus the Council official wrote, *inter alia*:

"The applicant's agent should be in a position to deal with this matter and send in the necessary documentation with the other information he is submitting as part of the Further Information response. There will be a need for re-advertising the expanded application, but this can be given to the agent following submission of the response".

It is entirely clear from the foregoing (and cannot but have been clear to Reidy Stafford that the Council viewed Mr Cronin) as the applicants' nominated agent as the person central to the retention process.

(vi) **THE SECOND WARNING**

by letter of 11th May, 2016, to Mr Cronin (and copying the applicants), which letter contains the reference "15/1065" at the top and the heading "RE: Planning & Development Acts 2000 to 2015 retention of dwelling house and garage as constructed, retention also for existing entrance and all ancillary site works at…Baltinglass, Co. Wicklow", the Council stated as follows:

"I wish to acknowledge receipt on 20/04/2016 of letter and enclosures which are receiving attention.

AS stated in letter dated the 14th April 2016 [to Reidy Stafford] a full response has not been submitted in respect of the further information request and if a full response is not submitted within six months of the date of further information request i.e. 4/4/2016 the application will be automatically withdrawn."

The above-quoted text comprises the entirety of the substance of the letter. Unlike the letter of 4th April, 2016, the (repeat) warning is not highlighted and underlined. However, the warning forms the bulk of the text in what is but a two-paragraph letter. It cannot have been missed. It put Mr Cronin and the applicants to the within proceedings on the clearest of notice as to what needed to be done…and as to the consequences if the necessary was not done within the six-month timeframe. The court does not accept that the reference to the reply letter of 14th April, 2016 involves an acknowledgement that Mr Cronin's role as nominated agent of the applicants had been supplanted or supplemented.

(vii) by letter of 14th June, 2016, to the Council, under the heading "*Re: Planning Register Reference 15/1065 Helen Nolan & Thomas Murphy",* Mr Cronin advised that "*I have been instructed by the above applicants to inform you that they have instructed their solicitor to register the burden in compliance with the requirements of Condition 2 of PRR 03/8050. Evidence of this registration will be submitted you when it is completed*." In a letter of 21st June, 2016 to Mr Cronin, the Council acknowledged receipt of Mr Cronin's letter of the 14th and indicated that "*We await receipt of the registration confirmation from the Land Registry*." Again, it is quite clear from the foregoing that Mr Cronin sees himself and was perceived by the Council to be central to the retention process. And Reidy Stafford was not copied on the letter, unlike the previous correspondence to Reidy Stafford, on which Mr Cronin was copied. There is no suggestion or acceptance that the evidence of registration will be sent direct from Reidy Stafford.

(viii) in a letter of 16th August, 2016, under the heading "*Re: Wicklow County Council – v. – Helen Nolan; Wicklow County Council – v. – Thomas Murphy*", Reidy Stafford wrote as follows to Coughlan White & Partners, the solicitors acting for the Council in the enforcement proceedings:

"We see that this matter is listed again on 1st September next. We understand that there has been no determination of the planning issues as of yet and you might confirm that this matter will be adjourned again for a period of three months awaiting a response."

This is correspondence written in the context of the enforcement proceedings. It is not correspondence concerned with the retention application. Yes, it offers the ongoing "*determination of the planning issues*" as a reason for seeking the further adjournment but that does not transform what is a letter concerned with the enforcement proceedings into something else, nor does it endow on Coughlan White some role in the retention process.

(ix) **THE THIRD WARNING**

in a letter of 24th August, 2016, from Coughlan White to Reidy Stafford, under the heading "*RE: Wicklow County Council – v. – Helen Nolan and Thomas Murphy, Carlow District Court – 1st September 2016"* – so yet another letter concerned with the enforcement proceedings – Coughlan White indicate that their client (the Council) is amenable to the enforcement proceedings being put back to the start of November, and they indicate why this is so:

"We have taken instructions and confirm that a decision [regarding the retention application] will not have been made prior to the court date as we understand that your clients have not responded in full to the further information requested. If the full response is not submitted within the six months of the date for the further information request then the application will be automatically withdrawn.

In those circumstances we would suggest it is in your clients' interest to respond in a timely fashion.

For the purposes of our client's prosecution we are suggesting that the matter will be put back to the start of November. However, we would clarify that in the event of your clients' application being withdrawn a hearing date will be

sought hereafter."

That (i) Coughlan White should relay its instructions as it did, (ii) the Council was polite enough to agree to an adjournment and offered good reason for so doing, (iii) the Council was generous enough to have Coughlan White relay to the applicants to the within proceedings a third warning as to the need for them to proceed in a timely manner (and the potential consequences for them if they did not), none of that transforms what is a letter concerned with the enforcement proceedings into something else, nor does it endow on Coughlan White some role in the retention issue process.

(x) in a letter of 30th August, 2016, under the heading "*Re: Wicklow County Council – v. – Helen Nolan; Wicklow County Council – v. – Thomas Murphy; Carlow District Court 1st September 2016"*, Reidy Stafford wrote as follows to Coughlan White:

"I understand that this matter is being adjourned. I enclose herewith a copy of the Property Registration Authority Deed duly completed by our clients and a copy of our application for the registration of same in the Land Registry. You might be good enough to note same and inform your clients of same."

This is correspondence written in the context of the enforcement proceedings. It is not correspondence concerned with the retention application. It does mention that the process of the registration of the burden has been commenced and asks that this be relayed to the Council. But that is a matter that is as much of interest in the enforcement proceedings as it is in the retention process. The court does not accept that because Reidy Stafford, in correspondence concerned with the enforcement proceedings, mentioned a matter that was of interest in the retention process that this was a good communication for the purposes of the latter process in which Mr Cronin (who is not copied on the Reidy Stafford letter) remained the applicants' nominated agent. Moreover, the court cannot but note that what was being communicated in the above-quoted message was, in any event, something of a nothing: the Council wanted proof of the registration of the burden; that application had been made for the registration of the burden was, in reality, neither here nor there; as practitioners well know, the mere fact that a person applies to register a burden entails absolutely no assurance that that application will eventually be successful.

(xi) in a letter of 5th September, 2016, to Reidy Stafford, which letter references planning reference 03/8050, the Council (apprised by Coughlan White of the development referenced at (x)), the Council references the letter of 30th August, indicates that proof of registration, when obtained, should be sent to the Council "*for a letter of compliance to issue*". This is correspondence written in the context of the enforcement proceedings. It is not correspondence concerned with the retention application.

(xii) in a letter of 30th September, 2016, under the heading "*Re: Wicklow County Council – v. – Helen Nolan; Wicklow County Council – v. – Thomas Murphy; Carlow District Court 1st September 2016"*, Reidy Stafford wrote as follows to Coughlan White:

"We refer to previous correspondence in relation to this matter and we enclose herewith a copy of a letter received from the Property Registration Authority confirming that the Application has now been completed and we would be very grateful if you would notify your clients of this."

This is correspondence written in the context of the enforcement proceedings. It is not correspondence concerned with the retention application. The letter does not appear to have been forwarded to the Council by Coughlan White until 17th October, 2016.

(xiii) on 21st October, 2017, under the reference "*Re Planning Register 15/1065"*, the Council issued an Order stating "*In accordance with Article 33(3) of the Planning & Development Regulations 2001-2015, this application is declared withdrawn, as a period of six months has elapsed since the further information request of 4th April 2016."* The substance of this order was communicated to the applicants.

(xiv) in a letter of 7th November, 2016, Reidy Stafford sent a further letter to Coughlan White, this time under the heading "Re: Our Clients: Helen Nolan and Thomas Murphy C/O Cronin Planning & Design Consultancy, Station Road, Dunlavin, Co. Wicklow. Your Client: Wicklow County Council". That letter stated, *inter alia*, as follows:

"We now enclose a letter dated 28th October last addressed to our clients from your clients in relation to their Retention Application.

We note that your clients have indicated that the application is 'declared withdrawn' as a period of six month has elapsed since the further information of the 4th April 2016.

We do not agree that the Further Information Request was not complied with fully."

(xv) in a letter of 17th November, 2016, sent from Coughlan White (for the Council) to Reidy Stafford, under the heading "*RE: Wicklow County Council –v – Helen Nolan & Thomas Murphy; Carlow District Court – Hearing – 5th January 2017*", Reidy Stafford's letter of 7th November met with a comprehensive response which reads, *inter alia*, as follows:

"We are instructed that your clients were granted planning permission for a 275m2 house under planning register reference 03/8050. They then applied for retention permission for a 467m2 [house] that was built under planning register reference 15/1065.

On the 3rd December, 2015, a further information request was issued by our client in respect of 15/1065 to your clients and their agent, Cronin Planning and Design (CPD). Item 4 of that request required the submission of evidence of the registration of burden in compliance with the requirements of Condition 2 of 03/8050.

On the 24th February 2016, a response to the further information requested was received from CPD. In relation to item 4 of the request, the response stated that the issue was addressed at a recent court case. An acknowledgment of the further information response issued and further public notices were required as the further information submitted was deemed significant.

On the 10th March 2016, the revised public notices were submitted and acknowledged.

*On the 4th April 2016, our client sought clarification in relation to Items 2 and 4 as set [out] in [its] letter of the 3rd December 2015 in respect of 15/1065. This letter clearly stated: '**Please ensure your response is clearly marked with the above planning register reference number otherwise it may not be considered as a response to this request and may be declared withdrawn as above.'***

On the 14th April 2016, a letter dated the 13th April 2016v was received by our client from your office in relation to our client's letter of 4th April and specifically the item relating to the request for evidence that the registration of the burden as required by Condition 2 of 03/8050. You indicated that our client was imposing the condition 'again' or requiring your client to 'complete another undertaking'. That is incorrect. Our client was simply requesting evidence that it had been complied with in the first instance.

Your letter was acknowledged on 14th April 2016 by our client setting out 'I note your comments in relation to item no 2 of the clarification request and await a full response to same within six months of date of our clarification request of 4/4/2016'.

On the 20th April 2016, a further copy of your letter of the 13th April was received with a cover letter that you had sent same to CPD. This letter was also acknowledged by our client on this date.

Another letter issued from our client on the 11th May 2016 in relation to your letter of the 13th April, again stating 'As stated in our letter dated 14th April 2016, a full response has not been submitted in respect of the further information request and if a full response is not submitted within six months of the date of the further information request (under 15/1065), i.e. 4/4/2026, the application will be automatically withdrawn.

On the 30th August 2016, we received a letter from you (no planning references included) enclosing a copy of an application to register the undertaking. On the 5th September 2016 our client acknowledged this letter of 30th August 2016 in respect of 03/8050 and stated that once registered with [the] Land Registry, the folio and map should be submitted. A compliance letter would only issue once same had been received. There was no reference however to 15/1065.

No submission was made in response to the clarification of further information under 15/1065. The onus was on your clients and/or their agent to ensure that they submit responses to further information referencing the relevant planning register reference.

While a letter was received from you (no planning references included) on the 3rd October 2016 enclosing notification of the registration of the burden, our client did not receive a direct response to the clarification on or before 3rd October 2016 and therefore the application was deemed to be withdrawn.

An email was received from CPD on 26th October 2016 by our client stating that a submission had been made on the planning application 15/1065. This was not the case. No documentation was received by our client with reference to 15/1065. An email was sent by our client to CPD on 28th October 2016 with regard to same…".

[Emphasis in original].

17. The following conclusions flow inexorably from the foregoing:

(i) Mr Cronin was the nominated agent for the purpose of the retention process;

(ii) certain information was requested of the applicants to be provided to the Council in the context of that process;

(iii) it fell to Mr Cronin (and it would have sufficed for the applicants) to provide that information to the Council;

(iv) the applicants were warned three times, and failed at all times, to provide the requested information in the requested manner.

18. What the applicants want the court to conclude is that provided the requisite information was somehow communicated to the Council then, regardless of the means whereby this was done, the information was provided to and known by the Council. However, as counsel for the Council touched upon at hearing, local authorities perform all manner of functions and can sometimes, for example, be treating with the same person in respect of different functions and even different planning matters at one and the same time. It would demand the administratively impossible of a local authority for it to have to sit back every time it received information of a person in one context and ask itself 'Does that have implications for any of my other dealings with this person in any other context?' And where does such tolerance end? Would it suffice, e.g., for information to be provided in a casual manner in a chance conversation with a Council official? The applicants (and, more particularly, Mr Cronin) had, with respect, the simplest of tasks to perform in the matter at hand: to register the burden and send in a letter to the planning department with the right reference indicating that this had been done. This simply was not done. The applicants now seek to persuade the court that by having a different agent advise of the registration in the context of the enforcement proceedings that was good enough. The court does not accept that this was so.

III

Reliefs Now Sought

19. By notice of motion dated 14th February, 2017, the applicants come now to court seeking, *inter alia*, the following reliefs:

"1. An order of certiorari by way of judicial review, quashing the decision of the respondent dated 20th October 2016, whereby the respondent declared the applicants' application for planning permission for, amongst others, retention of their garage and dwelling house as constructed, to be withdrawn on account of the applicants' purported failure to respond to a request for further information dated 4 April 2016, notwithstanding that the further information sought had, in fact, been supplied to the respondent, its servants or agents within the time allowed;

2. An order remitting the applicants' application for planning permission for, amongst others, retention of their garage and dwelling house as constructed, to the respondent to be determined in accordance with law".

IV

Article 33 of the Planning and Development Regulations 2001

20. Article 33 of the Planning and Development Regulations 2001 provides as follows:

> *"33. (1) Where a planning authority acknowledges receipt of a planning application in accordance with article 26, it may, by notice in writing, within 8 weeks of receipt of the planning application, require the applicant—*
>
> > *(a) to submit any further information (including any plans, maps or drawings, or any information as to any estate or interest in or right over land), which the authority considers necessary to enable it to deal with the application, or*
> >
> > *(b) to produce any evidence which the authority may reasonably require to verify any particulars or information given in, or in relation to, the application.*
>
> *(2) A planning authority shall not require an applicant who has complied with a requirement under sub-article (1) to submit any further information or evidence save --*
>
> > *(a) as may be reasonably necessary to clarify the matters dealt with in the applicant's response to a requirement to submit further information or evidence or to enable them to be considered or assessed, or*
> >
> > *(b) where a request for further information is made under article 108(2) or 128(1).*
>
> *(3) Where a requirement under sub-article (1) or sub-article (2) is not complied with within the period of 6 months from the date of the request for further information under sub-article (1), or such additional period, not exceeding 3 months, as may be agreed by the planning authority, the planning application shall be declared to be withdrawn and the planning authority shall, as soon as may be, notify the applicant that the application has been declared to be withdrawn and enter an indication that the application has been declared to be withdrawn into the register."*

21. Notably, Art.33 (3) is mandatory in its terms. Thus in the circumstances that it describes "*the planning authority shall, as soon as may be, notify the applicant…*". The court does not understand it to be contended that Art.33(3) is other than mandatory; if that is contended, this is not accepted by the court; it would fly in the face of the clearest of provision in Art.33(3) to conclude that it is other than mandatory in what it provides. As to any notion that any failure on the part of the applicants (and there has been a complete failure) to make a timely response in respect of the retention application (ref. 15/1065), the court recalls in this regard the following renowned observation of Henchy J. in *Monaghan UDC v. Alf-a-Bet Promotions Ltd* [1980] ILRM 64, 68-9:

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

22. In the within case, the applicants have failed to establish a *de minimis* deviation from the requirements. They were required to provide information in a certain manner to the Council and they failed to do so. There is complete non-compliance on their part. The request was not met in full or on time. Thanks to the mandatory wording of Art.33, the Council cannot overlook this failing. No application was ever made for an extension of the 6-month period. There are, and it is obvious why there are, strict procedures for the receipt of planning documentation: the granting or refusal of planning or retention permission is a serious matter for persons seeking such permissions and persons who fall directly to be impacted by such permissions, as well as the wider community; in that context, clarity, certainty and compliance assume an especial importance. Not having received a reply to the request made in the within application, the Council's planning department had nothing to stamp and had nothing to place on the planning file or to record on the register for the purposes of public perusal. Instead, the applicants proceeded in a manner akin to the applicant in *O'Reilly v. County Council of the County of Wicklow* [2014] IEHC 537, allowing the clock to tick and time to run out, instead of providing the information within time in the manner requested (and despite being warned three times as to the consequences if they did not).

23. The applicants contend that the respondent did not have power to ignore the further information submitted to it because it did not cite a register reference number. The court does not accept that this is what happened. Leaving that quibble to one side, however, the court notes that in making the just-mentioned contention the applicants have sought to rely, *inter alia*, on *Carrigaline Community Television Broadcasting Co. Ltd v. Minister for Transport, Energy and Communications (No 2)* [1997] 1 ILRM 241, *and Dunne v. Donohoe* [2002] 2 IR 533, claiming that what is at play on the facts of the within proceedings is a situation in which the Council closed its mind to the facts of the case and/or adopted a rigid and inflexible policy that would preclude consideration of such matters. There are, it seems to the court, three problems with this contention:

> (1) as mentioned, what is stated to have occurred is not in fact what occurred. The Council simply sought that requested information be provided to it in a particular manner in order that it might be considered. It never closed its mind to a consideration of that information. In fact, it expressly and repeatedly reminded the applicants of the need to communicate to it in the manner sought, and the potential perils of failing to do so.

(2) it conveniently overlooks the fact that it was the applicants who identified Mr Cronin as their agent (and thus the man to deal with) in the context of the retention process: is it seriously contended that the Council is to be criticised because it sought in its actions to honour the agency arrangement that the applicants had put in place and which they expressly advised to the Council in their retention permission application documentation?

(3) what the applicants contend for, in truth, is an entirely unworkable planning process in which no matter how, or in what context, information is provided to a planning authority, just so long as information is communicated, that suffices by way of communication of same. This proposition is not accepted by the court, nor has any case been cited to it, nor does the court know of any authority (and it would be rather surprised if there is any responsible authority) that supports a proposition that in its practical effect would appear conducive to administrative chaos, not just in the planning context but right throughout government, both at the local and central levels.

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Conclusion

24. For the reasons aforesaid, the court does not consider that this is a case in which any issue arises as to how it should exercise its discretion in the context of the reliefs sought. This is because there is simply no question of the applicants succeeding in the within application: when it comes to the retention permission process, they did not provide the requested information within the required timeframe. That being so, the order which it is sought to impugn issued, as it had to issue, under Art. 33(3). There is no legal deficiency of any nature presenting in the foregoing. As a consequence, all of the reliefs sought are respectfully refused.