APPROVED **[2024] IEHC 342**

THE HIGH COURT
CIRCUIT APPEAL

2023 96 CA

IN THE MATTER OF SECTION 160 OF THE PLANNING AND DEVELOPMENT ACT 2000

BETWEEN

STEPHEN MCCANN

APPLICANT

AND

PATRICK FURLONG

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 18 June 2024

INTRODUCTION

1. This judgment is delivered in respect of an application for a planning injunction. The application is made pursuant to the provisions of Section 160 of the Planning and Development Act 2000. The matter comes before the High Court by way of an appeal from the Circuit Court. The Circuit Court had made orders directing the cessation of the unauthorised development and the reinstatement of the relevant lands.

2. It is accepted on behalf of the respondent in these proceedings that the development complained of represents unauthorised development. Accordingly, there is no substantive defence put forward to the proceedings. Rather, the principal issue for determination in this judgment is whether the orders should be stayed by reference to discretionary factors.

CHRONOLOGY

June / July 2020	Unauthorised development commences
18 August 2020	Planning authority serves warning letter
9 December 2020	Planning authority serves enforcement notice
11 March 2021	First application for retention permission
30 April 2021	Retention permission refused
8 July 2021	Moving party's appeal to An Bord Pleanála withdrawn
16 July 2021	Enforcement proceedings issued before Circuit Court
3 September 2021	Second application for retention permission
22 October 2021	Retention planning permission refused
25 May 2022	Respondent convicted under section 154 of PDA 2000
21 June 2022	Circuit Court trial date: part-heard and adjourned
24 January 2023	Third application for retention permission
14 March 2023	Retention planning permission rejected
26 April 2023	Circuit Court grants planning injunction (12 month stay)
4 May 2023	Appeal to High Court filed
11 June 2024	Appeal heard by High Court

PLANNING HISTORY

3. These proceedings relate to lands at Gurteen, Templeshambo, County Wexford. The respondent is the registered owner of the lands: see Folio WX17383 County Wexford. The overall lands comprise an existing farmyard (circa 1.2 acres) and an adjoining dairy farm (circa 24.7 acres).

4. The unauthorised development is described as follows in the originating notice of motion: (a) a cattle shed with slatted tank; (b) extension to a previously constructed slatted tank to provide for external agitation point; (c) underground tanks for slurry storage; (d) underground tank for parlour washings; (e) structure for milking parlour, dairy, plant room, machinery storage and slatted cubicles; (f) entrance gates and walls; and (g) associated site works.

5. The respondent has conceded, on affidavit, that he commenced building a milking parlour (and associated works) on his lands without planning permission in or around June 2020. The lands had previously been used for dry stock farming.

6. Wexford County Council ("*the planning authority*") served a warning letter on 18 August 2020. Thereafter, the planning authority served an enforcement notice on 9 December 2020. The respondent has since been prosecuted before the District Court for his failure to comply with this enforcement notice.

7. The respondent made a series of applications for retention planning permission. The first application was made on 11 March 2021. This application was refused by the planning authority on 30 April 2021. The planning authority cited three reasons for refusal as follows:

> "1. Based on the information submitted with the planning application, it has not been demonstrated that there is sufficient effluent storage capacity available on site, and it is not clear that the development would comply with the EU

Nitrates Directive, and therefore may present a public health hazard. As such, the proposed development would be prejudicial to public health, and contrary to the proper planning and sustainable development of the area.

2. The development requiring retention is located on a County road where sightlines of not less than 65 m in each direction from the proposed access/egress point are required at a setback of 3.0 m, in accordance with Sections 18.29.2 and 18.29.3 of the Wexford County Development Plan 2013-2019 (as extended). Insufficient sightlines are available presently to the north of the entrance, and provision of adequate sightlines would require alteration of the roadside boundary at this location. These works have not been included in the site edged red, nor are they in the full ownership or control of the applicant. The proposed development would therefore be prejudicial to public health by reason of a traffic hazard, would be contrary to Sections 18.29.2 and 18.29.3 of the Wexford County Development Plan 2013-2019 (as extended), and contrary to the proper planning and sustainable development of the area.

3. The development may be prejudicial to public health and the viability of nearby water supplies serving private residential development. Insufficient information has been submitted with the planning application to allow a full assessment of the potential for any negative impact to nearby water supplies, where the location of nearby private wells has not been identified on the plans submitted. The planning authority is unable to make a full assessment of the proposal, and therefore [it] may be prejudicial to public health."

8. The moving party in these proceedings lodged an appeal against the planning authority's decision to An Bord Pleanála. This appeal had been brought notwithstanding that the moving party had been successful in the sense that planning permission had been refused by the planning authority. The moving party has explained that he considered that there were *additional* reasons for refusal, over and above those which had been stated by the planning authority, which would justify the refusal of retention planning permission. The moving party also appears to have apprehended that the respondent would bring a first

party appeal. This did not happen. The moving party subsequently withdrew his planning appeal on 8 July 2021.

9. The fact that a planning appeal had been made had the legal consequence that, during the pendency of the appeal before An Bord Pleanála, the respondent was precluded from making a second application for retention planning permission. This is because Section 37(5) of the Planning and Development Act 2000 provides that an application for permission for the same development cannot be made during the pendency of an appeal.

10. The respondent has made the complaint that he was precluded from submitting a second application for retention planning permission during the period between 30 April and 8 July 2021. With respect, there is little merit to this complaint in circumstances where the second retention planning permission was ultimately refused. The supposed loss of the opportunity, for a number of weeks, to make a planning application has not caused any actual prejudice to the respondent in circumstances where he has continued to operate the unauthorised development.

11. The second application for retention planning permission was made on 3 September 2021. This was refused by the planning authority on 22 October 2021 for four reasons. Three of these reasons for refusal replicate those stated in the decision refusing the first retention application. An additional (fourth) reason reads as follows:

> "Notwithstanding the established use of the site and the desirability of expanding, diversifying and improving facilities on the site, the Planning Authority is not satisfied, on the basis of the information contained in the planning application, that an appropriate assessment of the effects of the proposed & existing developments seeking permission on the environment can be carried out. It is considered that there is insufficient information in relation to the receiving environment to predict the likely significant impacts of the proposed development, such as drainage design,

> management of surface water run-off, stocking numbers, the volume and nature of disposal of slurry from the slatted tanks and frequency of spreading. The likely significant effects of the proposed development in relation to the impact on the receiving waters which are hydrologically connected to the nearby River Slaney candidate SAC have not been adequately addressed in the application. It is considered, therefore, that the proposed development would seriously injure the amenities of the area and would be contrary to the proper planning and sustainable development of the area."

12. The respondent did not seek to appeal this decision to An Bord Pleanála. Instead, the respondent made a third application for retention planning permission on 24 January 2023. This application was rejected as invalid, on 14 March 2023, in circumstances where the planning authority considered that the proposed development was of a type which would have triggered the requirement for an appropriate assessment for the purposes of the Habitats Directive (Directive 92/43/EEC).

13. It should be explained that, following the judgment of the European Court of Justice in *Commission v. Ireland*, Case C-215/06, EU:C:2008:380, the domestic legislative regime in relation to retention planning permission was radically amended. Relevantly, it is not now possible to apply for retention planning permission in respect of development which has been carried out in breach of the Habitats Directive and/or the Environmental Impact Assessment Directive (Directive 2011/92/EU). See, generally, *Suaimhneas Ltd v. Kerry County Council* [2021] IEHC 451. Instead, the only form of retrospective development consent which is, potentially, available is by way of an application for "*substitute consent*" pursuant to Part XA of the Planning and Development Act 2000 (as inserted).

14. It would have been open to the respondent in March 2023 to make an application for leave to apply for substitute consent (under the then legislative regime).

Instead, the respondent sought to challenge the legality of the planning authority's decision. The respondent instituted judicial review proceedings on 8 May 2023: *Furlong v. Wexford County Council* High Court 2023 463 JR. Notwithstanding that the respondent continues to operate the unauthorised development, these judicial review proceedings have not been pursued with any urgency. Some thirteen months after the proceedings were first instituted, the application for leave to apply for judicial review has not yet been moved.

ENFORCEMENT PROCEEDINGS

15. These enforcement proceedings were instituted by the moving party before the Circuit Court on 16 July 2021. The moving party is the owner of the lands which immediately adjoin the respondent's farm. The moving party's family home is immediately adjacent to the unauthorised development.

16. The proceedings were adjourned from time to time before the Circuit Court to allow for the filing of affidavits and to afford time to the respondent to pursue his applications for retention planning permission. The proceedings had been allocated a hearing date for 21 June 2022. On that date, the proceedings were part-heard and then adjourned peremptorily to afford the respondent "*one last chance*".

17. The Circuit Court (Her Honour Judge Doyle) ultimately made substantive orders in the proceedings on 26 April 2023. These orders required the cessation of the unauthorised development and the restoration of the land to its condition prior to the unauthorised development. A stay of twelve months was placed on the order.

18. The respondent filed an appeal to the High Court against the judgment and order of the Circuit Court on 4 May 2023. The appeal was filed by a firm of solicitors.

19. It should be explained that the respondent had the benefit of legal representation for part of the period during which the proceedings were pending before the Circuit Court. It seems that this (first) firm of solicitors came off record prior to any substantive hearing before the Circuit Court. Thereafter, it seems that a different firm of solicitors came on record for the purpose of the appeal to the High Court.

20. The appeal had initially been listed for hearing before the High Court on 21 March 2024. Shortly before the scheduled hearing date, the firm of solicitors then acting on behalf of the respondent made an application to come off record. As is apparent from the affidavit grounding the application, same was advanced on the basis that the firm of solicitors were unable to obtain instructions from their client. The firm of solicitors was allowed to come off record by order dated 14 March 2024. The respondent did not attend on this date.

21. The proceedings were next listed before the High Court on 21 March 2024. The respondent again failed to attend. The moving party then brought an application, by way of notice of motion, seeking to have the appeal dismissed for want of prosecution. That motion came on for hearing before me on 29 May 2024. On that occasion, the respondent, Mr. Furlong, attended in person and indicated that he wished to pursue his appeal. I decided that the balance of justice lay in allowing the respondent a final opportunity to pursue his appeal, on the grounds that it was preferable that the proceedings be resolved on their merits rather than on a peremptory basis by reason of the respondent's previous non-attendance. This was done in anticipation of the appeal being allocated an early hearing date.

The presiding judge (Hyland J.) subsequently scheduled the proceedings for hearing before me on 11 June 2024.

22. Having regard to the fact that the respondent is a litigant in person, certain accommodations were made at the hearing. The respondent was allowed time to consult with his engineer during the course of the hearing; the respondent was allowed to refer to matters which were not on affidavit; and the respondent's son, Michael Furlong, was permitted to address the court. Judgment was reserved until today.

FACTORS RELEVANT TO EXERCISE OF DISCRETION

23. A court has a statutory discretion to defer, or even withhold, relief under Section 160 of the Planning and Development Act 2000. The existence of this discretion represents an important counterweight to the fact that there is no *locus standi* requirement under the section: an application may be brought by "*any person*" irrespective of whether they are directly affected by the impugned development or not.

24. The factors relevant to the exercise of this statutory discretion have been authoritatively summarised by the Supreme Court as follows in *Meath County Council v. Murray* [2017] IESC 25, [2018] 1 I.R. 189, [2017] 2 I.L.R.M. 297 (at paragraph 92 of the reported judgment):

> "(i) the nature of the breach: ranging from minor, technical, and inconsequential up to material, significant and gross;
>
> (ii) the conduct of the infringer: his attitude to planning control and his engagement or lack thereof with that process:-
>
> • acting in good faith, whilst important, will not necessarily excuse him from a s. 160 order;

- acting *mala fides* may presumptively subject him to such an order;

(iii) the reason for the infringement: this may range from general mistake, through to indifference, and up to culpable disregard;

(iv) the attitude of the planning authority: whilst important, this factor will not necessarily be decisive;

(v) the public interest in upholding the integrity of the planning and development system;

(vi) the public interest, such as:-

- employment for those beyond the individual transgressors; or

- the importance of the underlying structure/activity, for example, infrastructural facilities or services;

(vii) the conduct and, if appropriate, personal circumstances of the applicant;

(viii) the issue of delay, even within the statutory period, and of acquiescence;

(ix) the personal circumstances of the respondent; and

(x) the consequences of any such order, including the hardship and financial impact on the respondent and third parties."

SUBMISSIONS OF THE PARTIES

25. The respondent seeks to resist the application for a planning injunction on the grounds of hardship. The respondent, during the course of his oral submissions on 11 June 2024, outlined the financial difficulties which he has faced, making reference to the significant borrowings which he says he has incurred. The respondent explained that the land had originally been used for dry stock farming, but this proved not to be profitable. He then decided to engage in dairy

farming. The respondent says that "*foolishly*" he did not seek planning permission in advance. The respondent has acknowledged that he continued to carry out the development notwithstanding that, as early as August 2020, he had been warned by the planning authority that it constituted unauthorised development. The development was not, seemingly, completed until January 2021.

26. The respondent is critical of the planning authority, saying that the authority did not raise the concerns in relation to the Habitats Directive in its first decision to refuse retention planning permission. The respondent is also critical of the moving party, saying that the level of submissions/objections made to the planning authority "*really went over the top*".

27. The respondent says that these proceedings have caused him and his family stress and that their mental health has been adversely affected. These submissions were supported by a short oral submission made by the respondent's son, Michael Furlong. Mr. Furlong Jnr referred to the toll which the proceedings have had on his mental health and that of the family.

28. The respondent indicated that he now intends to apply for "*substitute consent*" from An Bord Pleanála. This is to be done in the hope of being allowed to retain the unauthorised development. The respondent requests the court to allow him a further period of time within which to attend to this intended application.

29. This request for a stay on any enforcement order is resisted by counsel on behalf of the moving party in his written and oral submissions. The point is made that the respondent has been shown considerable indulgence to date; that the unauthorised development is causing hardship to the moving party in the use and

enjoyment of his land; and that there are issues in relation to water pollution and environmental protection.

DISCUSSION AND DECISION

30. It is accepted by the respondent that the development complained of is "*unauthorised development*" within the meaning of the Planning and Development Act 2000. This much has been conceded on affidavit.

31. The concession that the development is unauthorised is one which was sensibly made. There are no credible grounds for suggesting that the erection of agricultural structures of this scale might reasonably have been thought to have constituted exempted development. The classes of agricultural building which are exempt under the Planning and Development Regulations 2001 are all subject to size limitations. The structures the subject of these proceedings far exceed these limitations. The exemptions are capped at an aggregate gross floor space not exceeding 200 square metres. The structures at issue in these proceedings measure 916.8 square metres. The structures also breach the 100 metre separation distance prescribed for third party houses. Moreover, the respondent was warned by the planning authority, as early as August 2020, that the development was unauthorised, but he chose to continue to carry out the works regardless.

32. In deciding whether or not to exercise its discretion to grant a stay, the court is entitled to attach some weight to the views of the planning authority. This follows from the judgment in *Meath County Council v. Murray* (cited above). The issue has been considered, more recently, by the Court of Appeal in *Tesco Ireland Ltd v. Stateline Transport Ltd* [2024] IECA 46. The Court of Appeal

confirmed that it is appropriate for a court, hearing an enforcement action, to have some regard to the reasons stated by the planning authority for the refusal of retention planning permission. This is so even in circumstances where the planning authority's decision is under appeal.

33. Here, the planning authority has identified significant planning and environmental reasons for the refusal of planning permission. The respondent has not sought to challenge either of the first two decisions by way of an appeal to An Bord Pleanála. In the circumstances, the court is entitled to have regard to these factors. This is not a case where the unauthorised development is inconsequential. Rather, in the view of the planning authority, it gives rise to serious issues in relation to traffic safety, water pollution and public health.

34. For the reasons which follow, the application for a stay, pending the making and determination of an application for "*substitute consent*", is refused. The respondent's request for yet further time must be seen in the context of the procedural history. The respondent is, in effect, asking for time to be allowed to make what will be a *fourth* attempt to obtain a form of retrospective development consent. With respect, no developer is entitled to this level of indulgence.

35. The previous culture whereby a developer, who carried out unauthorised development, could expect to be allowed time to make an application for retention planning permission has come to an end. Section 162 of the Planning and Development Act 2000 expressly provides that the making of an application for retention planning permission is not a reason to adjourn enforcement proceedings.

36. It follows *a fortiori* that a developer cannot expect, under the new regime, to be allowed time to make *multiple* retention planning applications. The position has

been stated as follows by the High Court (Clarke J.) in *Cork County Council v. Slattery Pre-Cast Concrete Ltd* [2008] IEHC 291 (at paragraph 12.5):

> "[…] It cannot be the case that a party should be given indulgence by the court to make a series of successive retention applications in the hope that one day it will tailor its requirements in a manner that persuades the relevant planning authorities to give a permission. At the end of the day the only reason why the party is in difficulty in the first place is that it carried out the development concerned without planning permission. The proper way to do things is to get planning permission first and then carry out the development. If a party puts the cart before the horse it may, in certain circumstances, be able to persuade the court to give it one chance at structuring an appropriate retention application. It would, in my view, require very considerable extenuating circumstances for a court to have sympathy for a party who has already failed on a retention application and, who wishes to continue on with an unauthorised development in the hope that a second and more modest retention application might succeed."

37. There are no such "*extenuating circumstances*" in the present case. The fact of the matter is that the respondent engaged in large scale unauthorised development. There can have been no reasonable basis for his having thought that the development was exempted. Moreover, the uncontroverted evidence establishes that the unauthorised development is interfering with the amenity of the neighbouring dwelling house and appears to have polluted its water supply.

38. In the circumstances, the Circuit Court should have ordered the *immediate* cessation of the unauthorised development. In the event, the respondent was shown remarkable indulgence. The respondent was allowed time to make not just one, but three applications for retention planning permission. It was only when the third application was rejected, on jurisdictional grounds, that an order was finally made by the Circuit Court. Even then, the respondent was shown yet further indulgence in that a stay on execution of twelve months was placed on the Circuit Court's order. The practical effect of this is that a developer, who

had acted in flagrant breach of the planning legislation, had been allowed to continue to operate an unauthorised milking parlour for a period of three and a half years. The respondent should not have been shown this level of indulgence. It brings the planning system into disrepute.

39. There is an additional factor militating against any further delay in these proceedings. There is a substantial issue as to whether the unauthorised development represents not only a breach of domestic law, but also a breach of EU law. The planning authority has taken the view, as evidenced in its decision on the third application for retention planning permission, that the unauthorised development is of a type which requires an appropriate assessment for the purposes of the Habitats Directive. If this is correct, then the development had been carried out in breach of EU law. Moreover, it can only now be regularised, if at all, by an application for "*substitute consent*".

40. The respondent has challenged the planning authority's decision on the third retention planning application by way of judicial review proceedings. The existence of such a challenge is not, however, a reason to allow the unauthorised development to continue unabated pending the determination of that challenge. This is especially so in circumstances where the respondent has not sought to expedite the judicial review proceedings. Some thirteen months after the judicial review proceedings were instituted, the respondent has still not moved the application for leave to apply for judicial review. It behoved the respondent to seek to progress those judicial review proceedings with urgency if he wished to rely on the existence of same as a reason to stay enforcement orders. It seems that the respondent does not now intend to pursue these judicial review

proceedings. His solicitors are in the process of coming off record pursuant to Order 7 of the Rules of the Superior Courts.

41. The position of the respondent can be contrasted unfavourably with the position of the developer in *Krikke v. Barranafaddock Sustainability Electricity Ltd* [2020] IESC 42. There, the Supreme Court granted a stay on enforcement orders pending an appeal to the Court of Appeal. The Supreme Court attached significance to the fact that the core development had the benefit of planning permission; the developer had acted in good faith; and had immediately applied for retention planning permission. The absence of equivalent factors in the present case militates against the imposition of a stay.

42. For all of the foregoing reasons, then, the application for a planning injunction will be granted, and a stay upon execution, pending the making of an application for "*substitute consent*", refused.

CONCLUSION AND PROPOSED FORM OF ORDER

43. This is a clear-cut case of unauthorised development and orders should be made requiring (i) the cessation of the use of the unauthorised structures, and (ii) the reinstatement of the lands. For the reasons explained under the previous heading, it would be inappropriate to impose a stay upon the enforcement orders pending the making of an application for "*substitute consent*". The respondent has already been allowed ample opportunity to attempt to regularise the status of the lands. The public interest in upholding the integrity of the planning and development system demands that flagrant breaches of the planning legislation not be allowed to continue unrestrained for years after enforcement proceedings have been instituted. This is especially so in the present case having regard to

the negative environmental impact of the unauthorised development and its adverse effect on the amenity of the neighbouring lands.

44. Whereas the fact that the making of enforcement orders will have negative financial implications for the respondent is unfortunate, it cannot be a reason to defer making the orders. The negative financial implications are the inevitable consequence of the respondent's own failure to comply with the planning legislation and his reckless decision to press on with the unauthorised development in the teeth of the warning letter from the planning authority.

45. Accordingly, the appeal from the Circuit Court is dismissed but the order is varied as follows. Orders will be made directing the cessation of the use and operation of the milking parlour (and the other structures identified in the notice of motion) by midnight on 21 July 2024. The tanks should also be cleaned out by that date. The only reason that an earlier date has not been specified is in the interests of animal welfare. This later date will allow time for the dairy herd to be removed from the lands to a different farm which has a lawful facility for milking. An order will also be made directing that the unauthorised structures are to be removed, and the lands reinstated to their condition prior to the commencement of the unauthorised development, within a period of three months, i.e. by midnight on 19 September 2024. Both parties have liberty to apply. The High Court Registrar is asked to perfect, i.e. draw up, these substantive orders as soon as reasonably practicable. The allocation of legal costs will be dealt with in a *supplemental* order.

46. As the respondent is a litigant in person, it should be explained that any failure to comply with these orders would leave him liable to an application for attachment and committal for contempt of court.

47. As to legal costs, these proceedings are subject to the special costs rules under Part 2 of the Environment (Miscellaneous Provisions) Act 2011. My *provisional* view is that the moving party, Mr. McCann, is entitled to recover his legal costs against the respondent, Mr. Furlong. The moving party has been entirely successful in these proceedings. The proposed costs order would include the costs incurred before both the Circuit Court and the High Court; the costs of the written legal submissions; and all reserved costs.

48. If the respondent wishes to contend for a different form of costs order than that proposed, he should prepare written submissions. These written submissions should be sent to the moving party's solicitor and to the High Court registrar by 1 July 2024. A copy of the written submissions should also be filed in the Central Office of the High Court. A written ruling on costs will issue as necessary.

Appearances

David Browne SC for the applicant instructed by FP Logue LLP
The respondent represented himself