Neutral Citation No. 2005 IEHC 306

THE HIGH COURT
COMMERCIAL
JUDICIAL REVIEW

2005 No. 404 JR

IN THE MATTER OF SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT, 2000 (AS AMENDED) AND IN THE MATTER OF AN APPLICATION BY WAY OF JUDICIAL REVIEW

BETWEEN

DESMOND MULHOLLAND AND DONAL KINSELLA

APPLICANTS

AND
AN BORD PLEANÁLA

RESPONDENT

AND
COVERFIELD DEVELOPMENTS LIMITED, THE CARROLL VILLAGE (RETAIL) MANAGEMENT SERVICES LIMITED (OTHERWISE KNOWN AS CARROLL VILLAGE (RETAIL) MANAGEMENT SERVICE), DUNDALK RETAILERS ASSOCIATION, DUNDALK TOWN COUNCIL

NOTICE PARTIES

Judgment of Mr. Justice Kelly delivered the 4th day of October, 2005

Introduction
1. On 25th February, 2005, the respondent, An Bord Pleanála (the board) decided to grant planning permission for a development at Dowdall's Hill, Dundalk, Co. Louth.

2. The development is a substantial one. It involves the construction of what is described as a factory outlet centre for 81 retail units on a 13.06 hectare site. The development will include a mall, snack bars, covered playground, crèche, parking for 1,120 cars and 20 coaches.

3. The applicants seek leave to judicially review the decision of the board with a view to obtaining *certiorari* to quash its decision.

4. Although no fewer than 28 grounds (some of which have as many as a dozen particulars appended to them) are set forth in the statement grounding the application for judicial review, in fact they reduce themselves to three.

5. They can be stated as follows:-

> (a) alleged insufficient reasons given by the board for departing from its inspectors recommendation that the Environmental Impact Statement (EIS) prepared by the developer (Coverfield) was inadequate and that the board was therefore precluded from considering granting permission,
>
> (b) inadequacy of the EIS, and
>
> (c) the attachment of conditions by the board to its decision which involves an unlawful delegation of its responsibilities.

6. Each of these contentions will have to be considered in turn but before doing so I ought to deal briefly with the criteria which must be met by the applicants if they are to succeed on this application.

Substantial Grounds
7. This application is made pursuant to s. 50 of the Planning and Development Act, 2000, (the 2000 Act).

8. Under this provision the applicants must establish that they have substantial grounds for contending that the decision of the board is invalid.

9. This concept of having to establish "substantial grounds" is not new.

10. The necessity to establish substantial grounds was imposed originally by s. 82 (3B) of the Local Government (Planning and Development) Act, 1963, as amended by s. 19 of the Local Government (Planning and Development) Act, 1992.

11. In that statutory context the term fell to be considered by Carroll J. in *McNamara v. An Bord Pleanála* [1995] 2 I.L.R.M 125. There she held that 'substantial grounds' within the meaning of s. 82 (3B) meant as follows:-

> *"In order for a ground to be substantial it must be reasonable, it must be arguable, it must be weighty. It must not be trivial or tenuous. However, I am not concerned in trying to ascertain what the eventual result would be. I believe I should go no further than satisfying myself that the grounds are 'substantial'. A ground that does not stand any chance of being sustained (for example, where the point has been decided in another case) could not be said to be substantial. I draw a distinction between the grounds and the arguments put forward in support of those grounds. I do not think I should evaluate each argument and say whether I consider it sound or not. If I consider a ground, as such, to be substantial, I do not also have to say that the applicant is confined in this argument at the next stage to those which I believe may have some merit".*

12. That approach of Carroll J. was considered and approved in numerous subsequent judgments. See for example the decision of Morris P. in *Drogheda Port Company v. Louth County Council* [unreported 11th September, 1997] and Laffoy J. in *Hynes v. An Bord Pleanála* [unreported 10th December, 1997].

13. In *Jackson Way Properties Limited v. Minister for the Environment* [unreported, Geoghegan J. 2nd July, 1999] that judge expressed the view that there had to be "real substance in the argument and not merely that it is just about open to argument".

14. The matter was considered again by McKechnie J. in *Kenny v. An Bord Pleanál*a (No. 1) [2001] 1 I.R. 565. After considering the decisions of Carroll J. and Geoghegan J. from which I have just quoted that judge went on to say:-

"…There can be no doubt but that the threshold of 'substantial grounds' was intended, in my humble view, to result in a different and higher threshold, than that normally applicable to an application for judicial review under the Rules of the Superior Courts, 1986. That a ground had to be reasonable, before it could be substantial, could never be disputed. That such a ground also had to be arguable, equally in my view, could not be challenged. Such tests on their own however, may not be adequate as both of these descriptions equally apply when one seeks leave in an ordinary judicial review case under O. 84, r. 20: see the judgment of Denham J. in G. v. Director of Public Prosecutions [1994] 1 I.R. 374. Indeed, in a consideration of these words, one can think of grounds which could be both reasonable and arguable and yet fall significantly short of meeting the threshold of being 'substantial'. The words 'trivial' or 'tenuous', are undoubtedly helpful, but probably more so as words of elimination rather than qualification. The description of being 'weighty' and of 'real substance' are in my view of considerable importance in the interpretation of this threshold phrase. However, it must also be remembered that, from a base say, opposite substantial, namely insubstantial, an applicant must navigate the considerable distance in between, and in addition, must arrive at and meet the threshold whilst still afloat and on course. In truth I feel, whilst many attempts have been made to explain or convey 'the equivalent of its meaning' I am not certain that one can better the original phrase itself. In any event these observations of mine are purely an aside as the Supreme Court has, once again, in the Illegal Immigrants (Trafficking)Bill 1999, [2002] 2 I.R. 360, endorsed the McNamara test.

In approaching this application in accordance with the above principles it seems to me that there is one further distinction between a hearing of this nature and/or an ex parte application for relief under O. 84, r. 20. It is, that with this procedure, both or all parties are heard, usually a considerable body of evidence, though in affidavit form, is submitted and usually full argument takes place. Some difference of approach may therefore be justified though one should see R. v. I.R.C. Exp Fed .of Self Employed [1982] A.C. 617 at pp. 643 and 644, which passages were quoted with approval by Denham J. in G v. Director of Public Prosecutions [1994] 1 I.R. 374. Whether or not and which ever, it seems to me that whilst obviously I should not attempt to resolve conflicts of fact or express any concluded view on complex questions of law or indeed anticipate the long term result, nonetheless within existing limitations, I should, I feel make some evaluation of the factual matrix and should, where with certainty I can, form some view of the appropriate statutory provisions and the relevant and material case law. On a separate though related point, could I say that simply because matters of fact and law may be traversed again, if leave is granted, should not in any way take from, reduce or lessen the appropriate threshold."

15. There is no doubt but that the Supreme Court endorsed the McNamara test in the *Illegal Immigrants (Trafficking) Bill 1999*, case. There that court said at p. 395:

'Although the meaning of the words 'substantial grounds' may be expressed in various ways, the interpretation of them by Carroll J. is appropriate'."

16. I propose to adopt the approach of these authorities in considering the case made by the applicants.

Earlier Ruling
17. I should record that during the opening of the case objection was taken by counsel for both the board and Coverfield at what they perceived to be an attempt to expand upon the challenge to the decision of the board as specified in the statement grounding the application. I shared that view and ruled that it was impermissible for the applicants so to do. Thereafter the case proceeded in accordance with that ruling. The case is therefore confined to the three grounds which I have already identified.

Insufficiency of Reasons
18. The board's inspector reported to it in February of this year. He recommended that permission for the development be refused. He set forth three reasons and considerations in support of his recommendation. The board did not follow his recommendation but granted the permission. In coming to that conclusion it was obliged to give reasons for it. As it is contended that some of the reasons given are insufficient in law I must first consider what precisely is the legal obligation in respect of the giving of reasons.

Reasons – The Legal Position
19. Section 34 (10) of the Act of 2000 is the governing provision. It provides as follows:-

34 (10) (a):-

"A decision given under this section (i.e. by the Planning Authority) or under s. 37 (i.e. by the board) and the notification of the decision shall state the main reasons and considerations on which the decision is based, and where conditions are imposed in relation to the grant of any permission the decision shall state the main reasons for the imposition of any such conditions…"

(b) "Where a decision by a planning authority under this section or by the board under s. 37 to grant or refuse permission is different, in relation to the grant or refusal of permission from the recommendation in - …

(ii) a report of a person assigned to report on an appeal on behalf of the board,a statement under para. (a) shall indicate the main reasons for not accepting the recommendation in the report or reports to grant or refuse permission."

20. These provisions brought about a number of changes to the pre-existing statutory regime. Prior to the 2000 Act a planning authority did not have to give reasons for the decision to grant planning permission although the Board did have such an obligation. An obligation is now imposed on both the planning authority and the Board regardless of whether the decision is to grant or refuse permission.

21. The previous statutory obligation regarding a decision was that it and the notification of it, should comprise a statement specifying the reasons for the decision. That obligation has now been expanded because

22. s. 34 (10)(a) requires not merely a statement of the main reasons to be given but also the considerations upon which the decision in question was based.

23. Finally a new obligation was imposed by s. 34 (10)(b). It *inter alia* deals with the situation which applies in the present case namely, where the Board does not accept the recommendation of its inspector. In such circumstances the Board is obliged to indicate

the main reasons for not accepting the recommendation in the report or reports to grant or refuse permission. The applicants contend that that goes beyond the obligation which is imposed under 34 (10)(a). They contend that these legislative changes seek to address and indeed abolish the giving of perfunctory and uninformative statements of reasons. This, it is contended, is reflective of a policy decision to expand the prior statutory obligation, as informed by the relevant case law, so as to put beyond doubt the entitlement of a relevant party to access in a meaningful way, not merely the actual reasons for a decision but also to make an assessment of whether the Board took into account (or failed to take into account) proper considerations in arriving at its decision.

24. It seems to me that the provisions of the Act of 2000 have certainly brought about an expansion to the obligations which existed under the earlier legislation. As already indicated there is now an obligation imposed on both the planning authority and the Board to give reasons irrespective of whether their decision is to grant or refuse permission. Under s. 34 (10)(a) there is now an obligation to state the main reasons and considerations on which the decision is based which was not the case previously. There is also the new obligation imposed under

25. s. 34 (10)(b) to indicate the main reasons for not accepting the recommendation of the Board's inspector.

The purpose of reasons
26. Long before the Act of 2000 became law the courts had addressed the purpose of the pre-existing statutory obligation imposed on the Board to give reasons.

27. In *O'Donoghue v. An Bord Pleanála* [1991] ILRM 750 Murphy J. said:

> *"It is clear that the reasons furnished by the board (or by any other Tribunal) must be sufficient first to enable the courts to review it and secondly to satisfy the persons having recourse to the Tribunal that it directed its mind adequately to the issues before it. It has never been suggested that an administrative body is bound to provide a discursive judgment as a result of its deliberations."*

28. Likewise in *State (Sweeney) v. Minister for the Environment* [1979] ILRM 35 Finlay P. stated that the purpose of the requirement for reasons was:

> *"To give to an applicant such information as may be necessary and appropriate for him, firstly, to consider whether he has got a reasonable chance of succeeding in appealing against the decision of the planning authority and, secondly, to enable him to arm himself for the hearing of such an appeal."*

29. Nobody suggests that these decisions do not apply with equal force to the statutory obligations imposed under the Act of 2000. The applicants contend however that the obligation to state not merely the reasons but also the considerations under s. 34 (10)(a) requires somewhat more than is envisaged in these decisions. They say that that is particularly so in circumstances where a decision of the Board differs from its inspector's recommendations.

30. In such circumstances they contend that in assessing whether or not the statement of reasons is adequate, support cannot be gained from the inspector's report. So, it is argued, that decisions such as that of Finnegan J. (as he then was) in *Fairyhouse Club Limited v. An Board Pleanála* (Unreported July 18th 2001) have no application. In that case that Judge rejected an argument that the Board ought to be required to give a reasoned judgment in the following terms. He said:

> *"Notwithstanding that the reasons given are terse, the applicants have not in anyway been prejudiced thereby. Likewise, in this application I have not in anyway been restricted in evaluating An Bord Pleanála's procedures and reasoning for the purposes of this application. The applicant's submission, if correct, would result in an obligation on the Board in every such case to give what would amount to a reasoned judgment… In any event, the report of the inspector amounts to nothing less than a reasoned judgment. Ideally, perhaps the decision should have expressly adopted the inspector's report as the basis of its decision and that it did not do. However, in the circumstances of this case, I am not satisfied that this omission alone would justify me in holding that this ground is substantial as I am satisfied that the inspector's report is the basis of the Board's decision and the reasons for that decision clearly appear from the report which is to be read in conjunction with that decision. I refuse leave on this ground."*

31. There, of course, the court was dealing with a situation where the Board did not depart from its inspector's recommendation. In such circumstances it was not unreasonable to assume that, although the Board did not expressly say so, it had adopted the inspector's report as the basis of its decision. That approach is consistent with the approach of the English courts. In a very recent decision of R. *(Hereford Weight Watchers Limited) v. Hereford Council* (18th February, 2005) Elias J., said:

> *'The recommendation of the planning officer was that permission should be granted subject to a number of conditions. That was the decision taken by the planning authority which adopted almost without change the conditions suggested by the planning officer. By adopting the officer's report, the members must be taken to have approved the planning permission for the reasons given by the planning officer, since there is no indication to the contrary; see R. (Richardson) v. North Yorkshire County Council [2003] EWCA C iv 1860; 2004 (1WLR 1920) per Simon Browne LJ at para 35."*

32. The applicants argue that where the Board differs from its inspector the adequacy of the statement of reasons and considerations falls to be assessed by the language the Board itself has used in the decision. They contend that support cannot be gained from the inspector's report in such a circumstance. Secondly, they contend that the change in legislation is a recognition by the legislature of the heightened importance of the Board explaining why, in a given case, it chooses to disagree with its inspector's recommendation. In such circumstances it must give its reasons and considerations in a way which not only explains why it has taken a different course but must do so in a cogent way so that an interested party can assess in a meaningful fashion whether or not the Board's decision is reasonably capable of challenge.

33. In support of this contention they rely not merely on the wording of the Act but also on a body of case law from the English Courts.

34. In *R. (Ermakov) v. Westminster City Council* [1996] 2 All ER 302 Hutchinson LJ said:

> *"It is well established that an obligation, whether statutory or otherwise, to give reasons for a decision is imposed so that the persons affected by the decisions may know why they have won or lost and in particular, may be able to judge whether the decision is valid and therefore unchallengeable or invalid, and therefore open to challenge. There are numerous authoritative statements to this effect...*

It is possible to state two propositions which the judgments in ex parte Graham support.

> *1. If the reasons given are insufficient to enable the court to consider the lawfulness of the decision, the decision itself would be unlawful; and*
>
> *2. The court should, at the very least, be circumspect about allowing material gaps to be filled by affidavit evidence or otherwise"*

35. In *The London Residuary Body v. The Secretary of State for the Environment* 58 JPL 637 Simon Brown J. (as he then was) in dealing with a reasons "challenge" said:-

> *"The duty of the Secretary of State to give reasons arises under Rule 30(1) of the 1974 Enquiry Procedure Rules'. As to the nature of the obligation the authorities are clear: see particularly Re Poiser and Mills Arbitration [1964] 2 QB 467 and Westminster Council v. Great Portland Estates Plc [1985] 1AC 661 at p. 673. In all cases the reasons had to be intelligible, proper and adequate. They could be briefly stated, but they had to deal with the substantial points that had been raised. A decision would only be challengeable for breach of Rule 13 if there was something substantially wrong or inadequate in the reasons given. Very often this ground was invoked in a last desperate effort to unseat a decision when all else failed. It was a basis of challenge which should be advanced sparingly, scrutinised critically and not readily acceded to. That certainly was the approach to be adopted in the general run of cases."*

36. Then the judge turned to the case before him and said:-

> *"Here, where the Secretary of State had disagreed with his inspector's recommendation, the obligation to give clear and cogent reasons assumed particular importance. This was both a matter of common sense and supported by authority: see, for instance, Rogeland Building Group Limited v. Secretary of State for the Environment [1981] JPL 506, where Glidewell J. said:-*
>
> *'But where, as here, the Secretary of State on advice decided to disagree with the recommendation of his inspector, it was particularly important that he should make his reasons for such disagreement clear'.*
>
> *Also relevant to the extent of the duty in the instant case were further considerations which had already been touched upon when dealing with the other grounds of challenge: First, the cogency, clarity and comprehensiveness of this very experienced inspector's analysis, and the strength of his conclusions and recommendation…"*

37. It is in this era of the extended statutory obligation that I am invited to adjudicate on the applicant's case. They contend that the obligations imposed under s. 34 (10) are wider than what existed beforehand. The obligation to state reasons and considerations must therefore be viewed in a new light. It is not sufficient to rely upon case law which deals exclusively with the pre-existing statutory provisions or the position where the Board does not differ from its inspectors recommendations (such as in the Fairyhouse Club case). They contend that more is required and that the approach exemplified by the two English decisions from which I have quoted is appropriate and goes further than the Irish jurisprudence on the topic and ought to be followed.

Conclusions

38. I accept, and indeed it is not seriously argued otherwise, that s. 34 (10)(a) and (b) brought about changes to the pre-existing statutory position which I have already identified. These changes were by way of expansion to that position. That expansion involved, insofar as relevant:-

> (a) an obligation on both the planning authority and the Board to give reasons irrespective of whether the decision is to grant or refuse permission
>
> (b) an obligation to state the main reasons *and considerations* on which a decision is based and
>
> (c) an obligation to state the main reasons for not accepting the recommendation of the Board's inspector.

39. It is noteworthy that the legislature made no attempt in the 2000 Act to alter the existing jurisprudence on what is required for reasons to be considered as adequate at law. Thus the pre-existing case law on adequacy of reasons (*O'Donoghue v. An Bord Pleanála* [1991] I.L.R.M 750 and *State (Sweeny) v. Minister for the Environment* [1979] I.L.R.M. 35) continues to apply. That is so whether the reasons are those mentioned in (a), (b), or (c) supra.

40. Thus, there is no obligation to provide a discursive judgment but the reasons given must, if they are to be considered adequate, comply with the requirements set forth in the two Irish cases cited in the previous paragraph.

41. Insofar as the reasons at (c) *supra* are concerned the test remains the same. I do not accept that the English authorities which I have quoted from create a more onerous obligation than what is required in this jurisdiction. Both *Ermakov's* and *The London Residuary Body* cases, in my view, do no more than apply pre-existing, well established principles to their particular facts. These pre-existing principles are no different to those that were identified in the Irish cases of *O'Donoghue and Sweeney*. It is no more than common sense that if reasons of the type specified in (c) above are to pass the O'Donoghue and Sweeney cases test they must be clear and cogent. I do not read the English cases as saying more than that. This is no different to what is required in Irish law.

42. The obligation at (b) above to state the considerations on which a decision is based is of course new. I am of opinion that in order for the statement of considerations to pass muster at law it must satisfy a similar test to that applicable to the giving of reasons. The statement of considerations must therefore be sufficient to:-

> (1) give to an applicant such information as may be necessary and appropriate for him to consider whether he has a reasonable chance of succeeding in appealing or judicially reviewing the decision,
>
> (2) arm himself for such hearing or review,
>
> (3) know if the decision maker has directed its mind adequately to the issues which it has considered or is obliged to consider, and

(4) enable the courts to review the decision.

43. Thus the criteria which must be met for the statement of considerations are precisely the same as those which apply in respect of the statement of main reasons.

44. I am also satisfied that the approach of the Supreme Court in O'Keeffe v. An Board Pleanála [1993] 1IR 39 at 76 is equally applicable to the approach which the court should take in conducting an examination of the reasons given and considerations expressed under the 2000 Act. There Finlay CJ said:-

> *"Firstly, I am satisfied that there is no substance in the contention made on behalf of the plaintiff that the Board should be prohibited for relying on a combination of the reasons given for the decision and the reasons given for the conditions, together with the terms of the conditions. There is nothing in the statute which would justify such a rigid approach and would be contrary to common sense and to fairness. What must be looked at is what an intelligent person who had taken part in the appeal or had been appraised (sic) of the broad issues which had arisen in it would understand from this document, these conditions and these reasons."*

45. This approach applies with equal force to the stating of considerations as it does to the giving of reasons. Whether that has been done is capable of being examined by reference to the documents which have been placed before the court which consist of all of the material which was before the Board. I now turn to this material.

This Case

46. There can be no doubt but that the decision of the board to grant permission was diametrically opposed to the recommendation of its inspector. He recommended that permission be refused for three reasons and considerations. He set them forth as follows:-

> *"Reasons and Considerations*
>
> *1. It is the policy of the Planning Authority, as expressed in the current Dundalk and Environs Development Plan, to favour proposals for retailing within Dundalk town centre where such proposals would enhance the vitality and viability of the town centre. Furthermore, the plan states that the preferred location for the siting of factory outlet centres is a brown field site within the urban fabric of the town. Having regard to the distance of the site from the centre of Dundalk town on lands zoned for future strategic uses, the isolated nature of the proposed development, the lack of any association with the strategic development of the lands at this location, the nature of the comparison retailing proposed, and the inaccessibility of the proposed development by a choice of means of transport, it is considered that the proposed retail development would directly compete with the town's retailing and commercial centre, would lack commercial synergy with the town centre, and would undermine established uses, facilities and the viability of the existing town centre. The proposed development would, therefore, conflict with the policy of the Planning Authority and the provisions of para.65 and 85-88 inclusive of the Retail Planning Guidelines for Planning Authorities issued by the Department of the Environment and Local Government in December, 2002. The proposed development would, thus, be contrary to the proper planning and sustainable development of the area.*
>
> *2. The site is accessed from the N52 national secondary road at a point where the general speed limit of 100km/h applies. Notwithstanding any re-grading of the road to regional status following the opening of the M1 western bypass for the town of Dundalk, it is considered that the proposed development would endanger public safety by reason of traffic hazard because the development would access the public road at a point where the maximum speed limit would apply for that standard of road and where the significant additional traffic turning movements which would be generated by the development would seriously interfere with the safety and free flow of traffic on the public road.*
>
> *3. The Environmental Impact Statement accompanying the application, which was lodged with the Planning Authority on 4th March, 2004, does not comply with the requirements of Article 94 and schedule 6 of the Planning and Development Regulations, 2001, due to the lack of details of material significance and substance, with particular regard to :*
>
> *(a) the failure to consider the trans boundary effects;*
>
> *(b) the restricted scope of the retail impact assessment;*
>
> *(c) the inadequacy of the traffic impact assessment;*
>
> *(d) the limited approach to the consideration of alternative sites. The Board is, therefore, precluded from considering a grant of planning permission in this case."*

47. It is this third recommendation that is of concern in this case.

48. The board in refusing to accept the inspector's recommendation and deciding to grant permission subject to conditions set out its reasons and considerations as follows:-

> *"Reasons and Considerations*
>
> *The proposed development is located on zoned lands within the development boundary of Dundalk where the policy as set out in the current development plan for the area is 'to provide a strategic land reserve' and where in exceptional circumstances, there is a possibility to permit a use or development which would be considered of strategic importance to the development of Dundalk as a regional gateway, which uses include a factory outlet centre. Having regard to:-*
>
> *· The zoning objectives for these lands,*
>
> *· The substantial improvements to the roads infrastructure currently underway and the planned road improvements to both the national and local road networks in the vicinity,*
>
> · The public transport links proposed, it is considered that, subject to the conditions as set out below,

the proposed development would be an appropriate form of development at this location and in keeping with the designation of Dundalk as a Gateway town in the National Spatial Strategy, 2002 -2020, would enhance 'retail offer' of the town, would be acceptable in terms of its impact on the vitality and viability of the town centre of Dundalk and towns within its retail catchment area, would not be contrary to the Retail Planning Guidelines, would be acceptable in terms of traffic safety and convenience and would therefore be in accordance with the proper planning and sustainable development of the area.

In deciding not to accept the inspector's recommendation to refuse permission, the board considered:-

1. That the location of the proposed factory retail centre on zoned lands within the development boundary of Dundalk (a gateway town) where the policy is set out in the current development plan for the area is 'to provide a strategic land reserve' and where in exceptional circumstances, there is a possibility to permit a use or development which would be considered of strategic importance to the development of Dundalk as a regional gateway, which uses include a factory outlet centre, and the provisions for public transport connections to the site, that the proposed factory outlet centre would expand the overall shopping offer of Dundalk, would be acceptable in terms of the vitality and viability of the town centre, would not materially conflict with the Retail Planning Guidelines issued by the Department of the Environment and Local Government in December, 2002 and would therefore be in accordance with the proper planning and sustainable development of the area.

2. The board did not agree that the proposed development would constitute a traffic hazard, having regard to its location and access points within the development boundary of Dundalk, the major road improvements currently underway in the vicinity, and the planned road improvements to both the national and local road networks in the vicinity and the time scale for their implementation (some of which will be completed prior to the opening of this facility).

3. The board considered that the EIS and additional information was adequate, in particular:-

(a) in context of varying patterns of cross border shopping movements, the board is of the opinion that the proposed factory outlet centre would not have significant effects on the environment requiring activation of the inter governmental procedures as set out in Article 124 of the Planning and Development Regulations, 2001. In particular, having regard to the restricted nature of the factory outlet shopping facilities involved (as defined by conditions attached to this permission) it is considered that the development proposed would not have significant trans-boundary effects. In this context the Board noted the recent notification of intention to approve a larger factory outlet centre, near Banbridge in Northern Ireland in conjunction with a major business park and major retail warehouse development. Furthermore, the board did not concur with the inspector's view that the factory outlet centre should be regarded as a major retail centre for comparison shopping of regional significance.

(b) the board considered that the EIS and additional information was adequate in the context of a factory outlet centre and was satisfied that the proposed development would be acceptable in terms of its impact on the vitality and viability of Dundalk town centre or other towns in the area (including the town of Newry) and that it would be consistent with proper planning and sustainable development.

(c) the board considered that the EIS and additional information was adequate to show that the proposed development would not have an unacceptable impact in terms of traffic safety and convenience having regard in particular to the major improvements under way and planned to national and local road networks in the area, bearing in mind that the proposed development is located on zoned land within the development boundary and town boundary of Dundalk.

(d) the board was of the opinion that the consideration of alternatives outlined in the planning application and the EIS meets the statutory requirements and was generally adequate in terms of the type of development proposed."

49. Again it is with number 3 that the court is concerned.

50. There then followed 28 conditions each of which had a reason appended to it.

51. There was put in evidence before me a copy of the board direction which is reproduced in its entirety in the decision of the board under the legend 'Reasons and Considerations' with one exception. At the end of the board direction there is contained the following note:-

"Note: The board noted changing trends which point to a weakening of the direct link between factory retail outlets and the location of manufacturing facilities and considers it appropriate to interpret the relevant part of the Retail Planning Guidelines in the light of these trends. It is considered that, subject to stringent restrictions on type of goods permissible for sale, factory outlet centres should not be considered or assessed as normal retail developments for the sale of comparison goods."The Three Grounds

52. The applicants criticized the above formulation of reasons and considerations as being substandard to the statutory requirements and the jurisprudence which has built up on foot of it.

53. They also allege that the EIS was for a variety of reasons inadequate.

54. Detailed arguments in response to these criticisms were made by the board and the developer. Indeed I suspect that probably much the same arguments will be made at a full hearing if leave is given to proceed.

55. I am constrained by the legislation not to do other than decide if "substantial grounds" (as judicially defined) have been made out by the applicants.

56. In the case of the first two grounds of complaint I am of opinion that they have made out substantial grounds and ought to be given leave to apply. I am not so convinced in respect of the third.

57. Insofar as the third ground is concerned I will give detailed reasons for so finding. But I cannot see any benefit in so doing in respect of the first two. To do so would in many respects be a waste of time and contrary to the approach of Carroll J. in *McNamara's* case.

58. In any event, as she pointed out, the applicants are not confined in their arguments at the full hearing to those which I believe may have merit. It is sufficient therefore to state my conclusion in respect of these two grounds.

59. Nonetheless I think I should identify in a general way what I perceive to be the background against which the grounds upon which leave is granted have to be viewed.

The Fundamental Difference

60. It seems clear that the inspector and the board characterised the development in suit in a fundamentally different fashion. The inspector did not regard the application as being truly one for a factory outlet centre at all. Rather he took the view that it was a normal retail centre and in that regard he is supported by what is contained in the Retail Planning Guidelines of 2000. Those Retail Planning Guidelines state that they provide a comprehensive framework to guide both local authorities in preparing development plans and assessing applications for a planning permission and retailers and developers in formulating development proposals. They point out in their wording that they update and replace the policy on retail development set out in a general policy directive of 1998.

61. They go on to provide as follows:-

> *"These guidelines are being issued as ministerial guidelines under s. 28 of the Planning and Development Act, 2000. Section 28 provides that planning authorities and An Bord Pleanála shall have regard to ministerial guidelines in the performance of their functions."*

62. In dealing with factory outlet centres the guidelines have this to say at paras.85 and 86:-

> *"85 - At its simplest, this form of retailing involves the selling of products at discount prices in an individual factory shop usually located as part of or adjacent to the production facility. Such shops, which are an ancillary use to the main manufacturing activity, are not an established part of the retail scene in Ireland, though examples of tourism related outlets for craft products (e.g. crystal) may be found. Proposals for individual factory shops may be appropriate, provided the scale of the shop does not affect the viability of nearby town centres or raise significant traffic and transport issues.*
>
> *86 - The concept of factory outlet centres originated in the United States. During the 1990's purpose built factory outlet centres have been developed in Europe, remote from manufacturing facilities. These include a grouping of factory outlets and other shops, focusing mainly on branded fashion and other specialist goods and generally in out of centre locations. Initially devised as a means of disposing of seconds or surplus stock at the end of the season, they can become a mechanism for manufacturers to sell current products direct to the customer if appropriate controls are not exercised. Unless the sale of goods can be regarded as a use incidental to the manufacturing process, such outlets should be treated as normal retail developments and assessed accordingly."*

63. There is no dispute but that the development in suit involves shops which are remote from the manufacturing facility which produce the goods to go on sale. As the inspector pointed out the development is not located as part of or adjacent to any production facility nor is it an ancillary use to any main manufacturing activity anywhere in the Dundalk area or in the region.

64. It is clear therefore that the inspector treated this as a normal retail development and carried out his assessment on that basis. The board, on the other hand assessed the application as being for a factory outlet centre to sell discounted brand name goods. The criteria applicable to the siting of a factory outlet centre are different from the criteria which apply to the siting of normal retail outlets. Normal shopping outlets should be located within existing urban areas whereas a factory outlet centre is required to be placed some distance from such normal shopping.

65. The board's inspector conducted a detailed assessment on whether the proposal complied with annexe 4 of the Retail Planning Guidelines whereas the board did not.

66. Many of the detailed criticisms which have been made in respect of the reasons given and the adequacy of the EIS really have their genesis in this difference of approach. More than this I need not and indeed ought not to say. It is regrettable that having had detailed argument made to me of the type and depth that will be reproduced at the full hearing I am precluded from deciding the case. But such is the scheme of the Act.

Unlawful Delegation of Responsibility

67. The decision to grant permission by the board was subject to 28 conditions. In the statement of grounds complaint is made in respect of 12 of those conditions. The essence of the complaint is that these conditions unlawfully delegate decisions about the eventual scope of the development to third parties in a manner not authorised by statute or by law.

68. Although 12 conditions are mentioned, the applicants' particular fire is directed at two, namely conditions 4 and 8.

69. Condition 4 reads as follows:-

> *"Prior to commencement of any retail trading, details of the internal subdivision and layout of the units within and a schedule of internal floor space measurements for each unit shall be submitted for the written agreement of the Planning Authority. No subsequent extension, amalgamation or subdivision of these specified units shall occur without a prior grant of planning permission.*
>
> *Reason: In the interest of orderly development and to ensure that the development is in strict accordance with the permission."*

70. Condition no. 8 reads as follows:-

> *"In the event that the new junction on the proposed link road between the N1 and the N52 shall be constructed during the construction period of the Dundalk Western Bypass project, an agreement with Celtic Roads Group shall be required. Prior to commencement of development, evidence of consultation and a copy of any agreement shall be submitted to*

the Planning Authority for agreement in respect of alterations to the link road.

Reason: In the interest of traffic safety and pedestrian safety."

71. Prior to the Act of 2000, there was no express power which would permit the imposition of conditions such as the ones in suit. However the Supreme Court had no difficulty in accepting that such a power was implied. It did so in the case of Boland v. An Bord Pleanála [1996] 3 I.R 435. There that court said as follows:-

"(1) The board is entitled to grant permission subject to conditions.

(2) The board is entitled in certain circumstances, to impose a condition on the grant of a planning permission in regard to a contribution or other matter and to provide that such a contribution or other matter be agreed between the planning authority and the person to whom the permission or approval is granted.

(3) Whether or not the imposition of such a provision in a condition imposed by the board is an abdication of the decision making powers of the board depends on the nature of 'other matter', which is to be the subject matter of the agreement between the developer and the planning authority.

(4) The 'matter' which is permitted to be the subject matter of agreement between the developer and the planning authority must be resolved having regard to the nature and the circumstances of each particular application and development.

(5) In imposing a condition that a matter be left to be agreed between the developer and the planning authority the board is entitled to have regard to:-

(a) the desirability for leaving to a developer who is hoping to engage in a complex enterprise a certain limited degree of flexibility having regard to the nature of the enterprise;

(b) the desirability of leaving technical matters or matters of detail to be agreed between the developer and the planning authority, particularly when such matters or such details are within the responsibility of the planning authority and may require redesign in the light of practical experience;

(c) the impracticability of imposing detailed conditions having regard to the nature of the development;

(d) the functions and responsibilities of the planning authority;

(e) whether the matters essentially are concerned with off site problems and do not affect the subject lands;

(f) whether the enforcement of such conditions require monitoring or supervision.

(6) In imposing conditions of this nature, the board is obliged to set forth the purpose of such details, the overall detail to be achieved when the matters which have been left for such agreement, to state clearly the reasons therefore and to lay down criteria by which the developer and planning authority can reach agreement."

72. The legality of conditions of the type identified by the Supreme Court in Boland's case has now been put beyond doubt by the provisions of s. 34 of the Act of 2000. Section 34(1) provides that planning permission may be granted subject to conditions. Section 34(5) provides:-

"The conditions under subs. 1 may provide that points of detail relating to a grant of permission may be agreed between the Planning Authority and the person to whom the permission is granted and that in default of agreement the matter is to be referred to the board for determination."

73. Before turning to the specific complaints which are made in respect of conditions 4 and 8, I should deal with a general complaint concerning these and the ten other conditions which are mentioned in the statement of grounds. The complaint which is made in respect of them is that although these conditions require some form of agreement to be made, no provision is specified for the matter to be referred to the board in default of any such agreement being reached.

74. It is contended that the absence of an express provision in those conditions to the effect that in default of agreement the matter may be referred to the board renders the conditions invalid for that reason alone.

75. I am satisfied that the applicants have not satisfied the statutory obligation to demonstrate a substantial ground so as to permit me to grant leave to them to seek judicial review on this basis.

76. The wording of s. 34(5) does not make it mandatory to include terms allowing for a reference to the board in default of agreement. I do not think that the absence of a "default of agreement" wording in a condition could make the permission invalid on that account alone. It might well have been more prudent for the board to have included that particular formula but it was not obligatory for it to do so. The failure to do so cannot make the permission invalid. The failure may create some practical difficulties for the developer at some stage in the future if it cannot reach agreement with, for example, the planning authority. The result might well be an inability to proceed on foot of the permission but that cannot be a basis for saying that the permission is invalid.

77. Turning then to condition no. 4, I am quite satisfied that, in the light of the major development proposed, this condition concerns matters of detail relating to the internal layout of the development. The agreement which is required to be reached pursuant to this condition has to be reached in accordance with the scope of the planning permission as a whole. If matters were to be agreed beyond the scope of the permission such agreement would be open to challenge (see *O'Connor v. Dublin Corporation* [2000] 3 I.R 420).

78. Furthermore condition no. 4 has to be read in the context of the entire decision and the other conditions imposed. Of particular significance are conditions 2 and 3. These require measures to be put in place to ensure that a high number of individual units are maintained in the centre. The development cannot therefore turn into one consisting of a small number of large units.

79. I am not satisfied that the applicants have shown substantial grounds to challenge condition no. 8 either.

80. Insofar as the applicants seek to suggest that this condition imposes an obligation on a third party, namely Celtic Roads Group, I am satisfied that that is a misconstruction of the condition. The obligation which the condition imposes is laid fairly and squarely on the developer. It will be up to the developer to obtain agreement from Celtic Roads Group so as to be able to submit it to the planning authority in order to obtain its agreement in respect of alterations to the link road. If the condition purported to impose an obligation on Celtic Roads Group there might be something in the argument that the applicants make; but it does not. In my view the condition as drafted does not offend the provisions of s. 34(5) of the Act and merely ensures that prior to the commencement of development, the developer and the planning authority will have to reach agreement in respect of alterations to the link road, if such is required. That is an unremarkable form of condition. Substantial grounds have not been shown to warrant leave being granted in respect of it.

Conclusion
81. In the result, leave will be granted to proceed to apply for judicial review in respect of the grounds relating to adequacy of reasons and the EIS but will be refused in respect of the grounds which are advanced concerning the conditions attached to the board's decision.