

**THE HIGH COURT
JUDICIAL REVIEW**

[2006 No. 639 JR]

BETWEEN**FIONUALA SHERWIN****APPLICANT**

**AND
AN BORD PLEANÁLA**

RESPONDENT

**AND
FINGAL COUNTY COUNCIL**

NOTICE PARTY**Judgment delivered by Mr. Justice John Edwards on the 3rd day of July, 2007.****General Outline**

1. This is an application brought by the applicant for an order of *certiorari* quashing the decision of the respondent (An Bord Pleanála) bearing reference 06F R.L. 2291 and dated 5th April, 2006, wherein the respondent declared, pursuant to s.5 (3)(a) of the Planning and Development Act, 2000, that certain works to provide for changes to the internal layout of the Church of St. Peter and St. Paul, Balbriggan, County Dublin, (a protected structure) are development and are exempted development. The grounds upon which the said order of *certiorari* is sought are that the respondent, having taken the view that the works in question would materially affect the character of the sanctuary of the church and the structure as a whole, granted the said declaration in disregard of the terms of s. 57 (1) of the Planning and Development Act, 2000 and accordingly acted unlawfully and *ultra vires* its powers under that Act. In addition to seeking an order of *certiorari* the applicant further seeks an order from this court remitting the matter to An Bord Pleanála with the direction that the decision be taken again in accordance with the judgment of the High Court herein. She also claims the costs of these proceedings.

2. It is necessary to rehearse the facts of the case in a little more detail. However before doing so it may be useful to set out relevant provisions of the Planning and Development Act, 2000.

The Legislation

3. Part III of the Planning and Development Act, 2000 is entitled "Control of Development". Section 32(1) of that Act is in the following terms:-

"Subject to the other provisions of this Act, permission shall be required under this part –

(a) in respect of any development of land, not being exempted development, and

(b) in the case of development which is unauthorised, for the retention of that unauthorised development."

4. Development is defined in general terms in s. 3(1) of the Planning and Development Act, 2000. That subsection states:-

"In this Act, 'development' means, except where the context otherwise requires, the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land."

5. Section 4(1) of the Planning and Development Act, 2000 specifies what shall be exempted developments for the purposes of that Act. There is a long list of categories of developments that are exempted, designated sub-paras. (a) to (l) inclusive and it is not necessary for the purposes of this judgment to recite them all. However, it is appropriate to refer to sub-para.(h) of s. 4(1) which is the following terms:-

"4 – (1) The following shall be exempted developments for the purposes of this Act –

(h) Development consisting of the carrying out of works for the maintenance, improvement or other alteration of any structure, being works which affect only the interior of the structure or which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures."

6. "Structure" is defined in s. 2 of the Planning and Development Act, 2000 as meaning any building, structure, excavation, or other things constructed or made on, in or under any land, or any part of the structure so defined, and –

(a) Where the context so admits, includes the land on, in, or under which the structure is situate, and

(b) In relation to a protected structure or proposed protected structure, includes –

(i) the interior of the structure,

(ii) the lands lying within the curtilage of the structure,

(iii) any other structures lying within that curtilage and their interiors, and

(iv) all fixtures and features which form part of the interior or exterior of any structure or structures referred to in subparagraph (i) or (iii)."

7. The expression "protected structure" is also defined in s. 2 as meaning –

"(a) a structure, or

(b) a specified part of a structure.

which is included in a record of protected structures, and, where that record so indicates, includes any specified feature which is within the attendant grounds of the structure and which would not otherwise be included in this definition."

8. Part IV of the Planning and Development Act, 2000 deals with "Architectural Heritage" and Chapter I of that part of the Act deals with protected structures. Section 51 of the Planning and Development, 2000 provides for the establishment of a record of protected structures which shall include every structure which is, in the opinion of the Planning Authority, of special architectural, historical, archaeological, artistic, cultural, scientific, social or technical interest within its functional area.

9. Other provisions of Part IV of the Planning and Development Act, 2000 and in particular ss. 52 and 53 are of relevance in this case but I will return to those presently. In the meantime it is appropriate at this point to consider the provisions of s. 57 of the Planning and Development Act, 2000. It is proposed to recite this section in its entirety. The section, which has been amended by s. 13 of the Planning and Development (Amendment) Act, 2002 now provides:-

"(1) Notwithstanding s. 4 (1)(h), the carrying out of works to a protected structure, or a proposed protected structure, shall be exempted development only if those works would not materially affect the character of –

(a) the structure or,

(b) any element of the structure which contributes to its special architectural, historical, archaeological, artistic, cultural, scientific, social or technical interest.

(2) An owner or occupier of a protected structure may make a written request to the planning authority, within whose functional area that structure is situated, to issue a declaration as to the type of works which it considers would or would not materially affect the character of the structure or of any element, referred to in subsection (1)(b), of that structure.

(3) Within twelve weeks after receiving a request under subsection (2), or within such other period as may be prescribed, a planning authority shall issue a declaration under this section to the person who made the request.

(4) Before issuing a declaration under this section, a planning authority or the board shall have regard to –

(a) any guidelines issued under section 52, and

(b) any recommendations made to the authority under section 53.

(5) If the declaration relates to a protected structure that is regularly used as a place of public worship, the planning authority or the Board –

(a) in addition to having regard to the guidelines and recommendations referred to in subsection (4), shall respect liturgical requirements, and

(b) for the purposes of ascertaining those requirements shall –

(i) comply with any guidelines concerning consultation which may be issued by the Minister for Arts, Heritage, Gaeltacht and the Islands, or

(ii) if no such guidelines are issued, consult with such person or body as the planning authority considers appropriate.

(6) When considering an application for permission for the development of land under section 34 which –

(a) relates to the interior of a protected structure, and

(b) is regularly used as a place of public worship, the planning authority, and the Board on appeal, shall, in addition to any other requirements of the Act, respect liturgical requirements.

(7) A planning authority may at any time, review a declaration issued under this section but the review shall not affect any works carried out in reliance on the declaration prior to the review.

(8) Any person to whom a declaration under subsection (3), or a declaration reviewed under subsection (7) has been issued, may, on payment to the Board of such fee as may be prescribed, refer the declaration for review by the board within four weeks from the date of the issuing of the declaration, or the declaration as reviewed, as the case may be.

(9) A planning authority shall cause –

(a) the details of any declaration issued by that authority, or of a decision by the Board on a referral, to be entered on the register kept by the authority under section 7 and

(b) a copy of the declaration or decision, as appropriate, to be made available for inspection by members of the public, during office hours, at the office of the authority, following the issue of the declaration or decision.

(10) (a) for the avoidance of doubt, it is hereby declared that a planning authority or the Board on appeal –

(i) in considering any application for permission in relation to a protected structure, shall have regard to

the protected status of the structure, or

(ii) in considering any application for permission in relation to a proposed protected structure, shall have regard to the fact that it is proposed to add the structure to a record of protected structures.

(b) A planning authority, or the Board on appeal, shall not grant permission for the demolition of a protected structure or proposed protected structure save in exceptional circumstances."

10. For completeness it should be stated that s. 34 of the Planning and Development Act, 2000 (referred to in s. 57(6) of that Act) provides for the granting by a planning authority, to whom an appropriate application has been made, of permission for development subject to or without conditions, or a refusal to grant permission for development.

11. Section 5 of the Planning and Development Act, 2000 is of central importance in this case and it is also appropriate that I should set that section out in full:-

"(1) If any question arises as to what, in any particular case, is or is not development or is or is not exempted development within the meaning of this Act, any person may, on payment of the prescribed fee, request in writing from the relevant planning authority a declaration on that question, and that person shall provide to the planning authority any information necessary to enable the authority to make its decision on the matter.

(2)(a) subject to paragraph (b), a planning authority shall issue the declaration on the question that has arisen and the main reasons and consideration on which its decision is based to the person who made the request under subsection (1), and, where appropriate, the owner and occupier of the land in question, within four weeks of the receipt of the request.

(b) A planning authority may require any person who made the request under subsection (1) to submit further information with regard to the request in order to enable the authority to issue the declaration on the question and, where further information is received under this paragraph, the planning authority shall issue the declaration within three weeks of the date of the receipt of the further information.

(c) a planning authority may also request persons in addition to those referred to in paragraph (b) to submit information in order to enable the authority to issue the declaration on the question.

(3)(a) Where a declaration is issued under this section, any person issued with a declaration under subsection (2)(a) may, on payment to the Board of such fee as may be prescribed, refer a declaration for review by the Board within four weeks of the date of the issuing of the declaration.

(b) Without prejudice to subsection (2), in event that no declaration is issued by the planning authority, any person who made a request under subsection (1) may, on payment to the Board of such fee as may be prescribed, refer the question for decision to the board within four weeks of the date that a declaration was due to be issued under subsection (2).

(4) Notwithstanding subsection (1), a planning authority may, on payment to the Board of such fee as may be prescribed, refer any question as to what, in any particular case, is or is not development or is or is not exempted development to be decided by the Board.

(5) The details of any declaration issued by a planning authority or of a decision by the Board on a referral under this section shall be entered in the register.

(6)(a) The Board shall keep a record of any decision made by it on a referral under this section and the main reasons and considerations on which its decision is based and shall make it available for purchase and inspection

(b) The Board may charge a specified fee, not exceeding the cost of making the copy, for the purchase of a copy of the record referred to in paragraph (a).

(c) The Board shall, from time to time and at least once a year, forward to each planning authority a copy of the record referred to in paragraph (a)

(d) A copy of the said record shall, at the request of a member of a planning authority, be given to that member by the manager of the planning authority concerned.

(7) A planning authority, before making a declaration under this section, shall consider the record forwarded to it in accordance with subsection (6)(c)."

12. At this point, and for completeness, it is appropriate to return to ss. 52 and 53 of the Planning and Development Act, 2000 which are, as I have stated previously, in Part IV of the Act which deals, inter alia, with protected structures.

13. Section 52 is in the following terms:-

"(1) The Minister for Arts, Heritage, Gaeltacht and the Islands, shall, after consulting with the Minister issue guidelines to planning authorities concerning development objectives –

(a) for protecting structures, or parts of structures, which are of special architectural, historical, archaeological, artistic, cultural, scientific, social or technical interest, and

(b) for preserving the character of architectural conservation areas,

and any such guidelines shall include the criteria to be applied when selecting proposed protected structures for inclusion in the record of protected structures.

(2) The Minister for Arts, Heritage, Gaeltacht and the Islands may, after consulting with the authorities of any religious denominations which he or she considers necessary, issue guidelines to planning authorities concerning –

(a) the issue of declarations under section 57 in respect of protected structures which are regularly used as places of public worship, and

(b) the consideration by planning authorities of applications for development affecting the interior of such protected structures.

(3) In considering development objectives, a planning authority shall have regard to any guidelines issued under this section.

(4) In this section, “development objective” means an objective which, under section 10, a planning authority proposes to include in its development plan.”

14. Section 53 of the Planning and Development Act, 2000 is in the following terms:-

“(1) The Minister for Arts, Heritage, Gaeltacht and the Islands may, in writing make recommendations to a planning authority concerning the inclusion in its record of protected structures of any or all of the following –

(a) particular structures;

(b) specific parts of particular structures;

(c) specific features within the attendant grounds of particular structures.

“(2) A planning authority shall have regard to any recommendations made to it under this section,

“(3) A Planning Authority which, after considering a recommendation made to it under this section, decides not to comply with the recommendation, shall inform the Minister for Arts, Heritage, Gaeltacht and the Islands in writing of the reason for its decision.”

15. Finally, it is worth noting that prior to the enactment of the Planning and Development (Amendment) Act, 2002, what was then subs. (9) of s. 57 of the Planning and Development Act, 2000 read as follows:-

“A declaration under this section shall not prejudice the application of section 5 to any question that arises as to what, in a particular case, is or is not exempted development.”

16. This provision was expressly deleted by s. 13 of the Planning and Development (Amendment) Act, 2002 which amended s. 57.

Relevant Facts

17. The Roman Catholic Church of St. Peter and St. Paul is located at the southern end of Balbriggan. Included in the papers that I have had to consider is a report from a Ms. Jane Dennihy, a Senior Planning Inspector with An Bord Pleanála, dated 8th February, 2006. As far as I can gather from Ms. Dennehy’s report the church in question was constructed in the 19th century and it can be described as being in the Gothic revival style with a seven bay side elevation, designed by Patrick Byrne. It has a two-bay chancel designed by George Coppinger Ashlin which was added to the rear, circa 1890. The interior is divided into three aisles by columns supporting a groin vaulted ceiling, erected in 1897. There is also an organ gallery and sacristy which were added in the early 20th century along with some of the interior fittings. There is a mortuary chapel located on the south side. It has a number of stained glass windows and some of these windows are from the Harry Clarke Studio, two by Harry Clarke himself representing “The Widow’s Son at Naim” and “The Visitation”. Other stained glass windows are by the Mayers of Munich.

18. The church is included as a “protected structure” within the current Fingal County Development Plan.

19. Arising out of significant changes to the liturgy of the Roman Catholic Church as a result of the second Vatican Council, the owners and occupiers of the Church of St. Peter and St. Paul, Balbriggan have considered it necessary to make changes to the interior layout of the structure. The changes to the internal layout included the bringing forward of the sanctuary area on a raised platform, curved in shape with white marble steps, into the nave; the removal and relocation of the remaining altar rails; the relocation of the baptismal font to the front; the removal of several pews; the installation of a tabernacle on a raised dais, contemporary in design, between the reredos and the altar table, the latter of which is repositioned further forward from its current position and the installation of new celebrant seating and lighting. The evidence before me does not clearly establish when exactly the works in question were carried out but it does clearly establish that they have been carried out. Further, the evidence establishes that the works were carried out without planning permission because the owners and occupiers of the Church in question believed, rightly or wrongly, that the works in question constituted exempted development.

20. In addition to the works specified above other works have been carried out to the Church in question. The owners and occupiers of the Church applied for, and were successful in obtaining, planning permission for those additional works. The relevant planning authority issued a decision to grant planning permission on the 18th January, 2005 for those works. It is not necessary for the purposes of this judgment to particularise the works in question. It is sufficient to state that the applicant herein appealed against the said grant of planning permission and that appeal was determined by the respondent herein, An Bord Pleanála. The applicant is not a parishioner of the church of St. Peter and St. Paul, Balbriggan but rather is a resident of Foxrock. However, she has expressed herself in an affidavit before the court to be person greatly concerned about changes to the interiors of churches where they are protected structures. The respondent confirmed the planning authority’s decision to grant permission but imposed two conditions. Once again, it is not necessary for the purposes of this judgment to specify what the conditions in question were. The relevance of this aspect of the matter is that at the time at which the owners and occupiers of the church in question applied to the relevant

planning authority for the planning permission which was subsequently granted, and substantially upheld on appeal, they concurrently lodged with the same planning authority an application for a declaration under s. 57 (2) of the Planning and Development Act, 2000 in respect of the aforementioned alterations to the sanctuary of the church and certain repairs to the roof. The planning authority considered the said application and granted it. The actual s. 57 declaration has not been exhibited before me but it is described in the inspector's report as being in terms that the works would not materially affect the character of the structure. It is presumed that it also declared that the works would not materially effect the character of any element of the structure which contributed to its special architectural, historical, archaeological, artistic, cultural, scientific, social or technical interest, which is the other element of s. 57 (1). In any event the propriety or otherwise of the s. 57 declaration is not an issue that I have to decide in this case. Nevertheless it is an important fact that the applicant in the present proceedings then sought to refer the s. 57 declaration to An Bord Pleanála for review. However, An Bord Pleanála declined to entertain an appeal from the applicant as the entitlement to refer a s. 57 declaration to the Board is confined to persons to whom the declaration was issued and does not include third parties.

21. What happened next was that the applicant then invoked the provisions of s. 5 of the Planning and Development Act, 2000 on the basis that a question had arisen as to whether changes to the internal layout of the Church of St. Peter and St. Paul in Balbriggan constituted development and, if so, whether the changes in question constituted exempted development, within the meaning of the Planning and Development Act, 2000. The application was contained in a letter written on her behalf by her solicitors, Michael Campion and Company to the relevant Planning Authority, namely Fingal County Council, dated 26th August, 2005. On 21st September, 2005 the Planning Authority issued a declaration under s. 5(1) of the 2000 Act to the effect that the works in question were exempted development under Class 50 of Part I, Schedule II of the Planning and Development Regulations, 2001 to 2002. It is common case between both the applicant and the respondent in this case that that declaration was made wholly in error in as much as Class 50 of Part I, Schedule II of the Planning and Development Regulations, 2001 to 2002 deals with demolition. In any event the applicant then invoked s. 5(3)(a) of the Planning and Development Act, 2000 and sought to refer the Planning Authority's s. 5 declaration to An Bord Pleanála for its consideration. This was done by means of a letter from the applicant's solicitors, Michael Campion and Company, to An Bord Pleanála dated 10th October, 2005. On 5th April, 2006 the respondent issued its determination in respect of the review requested by the applicant. As it is highly contentious it is appropriate that I should recite the order in full. The order is entitled:

Planning and Development Act, 2000 to 2004

Fingal County

An Bord Pleanála, ref. no. 06F R.L. 2291.

"WHEREAS a question has arisen as to whether the works to provide for changes to the internal layout of Church of St. Peter and St. Paul, Balbriggan, County Dublin (a protected structure) are or are not development or are or are not exempted development:

AND WHEREAS Fionuala Sherwin care of Michael Campion and Company of Kreston House, Arran Court, Smithfield, Dublin requested a declaration on the said question from Fingal County Council and the said Council issued a declaration on 21st day September, 2005 stating that the said works were exempted development.

AND WHEREAS the said Fionnuala Sherwin referred the declaration for review to An Bord Pleanála on 10th day October, 2005:

AND WHEREAS an Bord Pleanála, in considering this referral, had regard particularly to –

- (a) sections 2, 3 and 4 of the Planning and Development Act, 2000,
- (b) section 57(1)(a) and (b), section 57(5)(a) and (b), section 57(6)(a) and (b) of the said Act,
- (c) the status of the church in question as a protected structure that is regularly used as place of public worship, and
- (d) the Architectural Heritage Protection Guidelines for Planning Authorities issued by the Department of the Environment, Heritage and Local Government in December, 2004;

AND WHEREAS An Bord Pleanála has concluded that –

- (a) the said changes to the internal layout that include the bringing forward of the sanctuary area on a raised platform, curved in shape with white marble steps, into the nave, the removal and relocation of the remaining altar rails; the relocation of the baptismal font to the front, the removal of several pews, the installation of a tabernacle on a raised dais, contemporary in design between the reredos and the altar table, the latter of which is repositioned further forward from its current position and the installation of new celebrant seating and lighting, materially affect the character of the sanctuary and the structure as a whole, but
- (b) having regard to the nature of the changes involved and to need to respect liturgical requirements, the changes come within the scope of section 57 of the Planning and Development Act, 2000:

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5(3)(a) of the 2000 Act, hereby decides that the said works to provide for changes to the internal layout of the Church of St. Peter and St. Paul, Balbriggan, County Dublin (a protected structure) are development and are exempted development."

22. The applicant seeks an order of *certiorari* quashing the decision of An Bord Pleanála just recited and, if necessary, an order remitting the matter to An Bord Pleanála with the direction that the decision be taken again in accordance with the judgment of the High Court herein.

The Applicant's case

23. The applicant contends that the respondent, having taken the view that the works materially affect the character of the sanctuary and the structure as a whole, could not then under any circumstances hold that the works were exempted development

because to do so would be contrary to the express terms of s. 57(1). The applicant contends that s. 57(1) is a stand alone provision and that it is crystal clear in its terms. It provides that the carrying out of works to a protected structure shall be exempted development only if those works would not materially affect the character of the structure or any element of the structure which contributes to its special architectural, historical, archaeological, artistic, cultural, scientific, social or technical interest. Once a view is taken that works would materially affect the character of the structure or a relevant element of the structure such works cannot be considered to be exempted development. In the course of his argument counsel for the applicant, Mr. Colm MacEochaidh, contended that the respondent had approached the matter incorrectly and had engaged in an unnecessary conflation of two separate ideas. The respondent had approached the matter, according to Mr. MacEochaidh, by considering both whether the proposed works would affect materially the character of the structure, including its interior, and thereafter whether the proposed alterations were necessitated by the liturgical requirements of worship. According to Mr. MacEochaidh both the Planning Authority, and indeed An Bord Pleanála, were perfectly entitled, and perhaps even obliged, in the context of a s. 5 reference, to respect liturgical requirements, in considering the question as to whether or not the works would materially affect the character of the structure or a relevant element of the structure but that once they had decided that the works would materially affect the character of the structure or a relevant element of the structure, they were not entitled to have further regard to the liturgical requirements of worship. In particular, they were not entitled to effectively imply an additional exemption not provided for in the legislation on the grounds that the works in question were necessitated by the liturgical requirements of worship.

24. Mr. MacEochaidh made the further point that it is clear from the order of An Bord Pleanála that it took into account the Architectural Heritage Protection Guidelines for Planning Authorities issued by the Department of the Environment, Heritage and Local Government in December, 2004 in arriving at the decision that it did. Mr. MacEochaidh contended that section 5.2 of those Guidelines which section is entitled "Respecting Liturgical Requirements", misstates the law in para. 5.2.3 thereof. The guidance material in question forms an exhibit in the affidavit of Gerard Egan, on behalf of the respondent. Moreover in his affidavit, Mr. Gerard Egan refers specifically to para. 5.2.3 of those Guidelines (which is the exact portion of those guidelines in which, Mr. MacEochaidh contends, the law is misstated) and it is clear that the respondent seeks to rely, inter alia, on that, in support of its decision. As this is a matter of some importance I think it is necessary, and appropriate, to recite in full the guidance provided in section. 5.2 of the document in question under the heading "Respecting Liturgical Requirements".

5.2 Respecting Liturgical requirements

"5.2.1. Church buildings are used for the public worship of their congregations which includes many forms such as traditional services according to established rites, freer forms of a charismatic and evangelical form, experimental, occasional and devotional expressions of worship, teaching and mission. Respecting liturgical requirements includes recognising that churches may wish to adapt places of public worship in the light of contemporary revisions of their worship and mission. Thus church authorities may, in their places of public worship, require flexibility in the provision and arrangement of seating, in the openness of space, for example, for a baptismal font area; for the enlargement of an existing sanctuary or chancel or for the relocation of the altar table and lectern. A church authority may also seek flexibility in the associated use of buildings and spaces within the curtilage, such as for access to another space or building for processions, children's liturgy and Sunday school.

5.2.2. The essential character of a church expressed in its fabric and features arises from its function as a place of public worship. When considering a declaration relating to a protected structure that is regularly used as a place of public worship or an application for planning permission for development to the interior of a protected structure that is regularly used as a place of public worship, the legislation provides that the planning authority shall respect liturgical requirements.

5.2.3. In relation to declarations, this may mean that some works which are necessitated by liturgical requirements and which have a material effect on the character of the structure do not require planning permission. Careful consideration should be given to the scale and potential impact of the works on the specific character of the individual structure. This is a matter of judgment to be made by the individual planning authority following consultation with the relevant church authority (see para. 5.3.1 below).

5.2.4. Many factors should be considered by a planning authority before issuing a declaration as to the type of works it considers would or would not materially affect the character of a protected structure that is regularly used as place of public worship. The basic considerations are the effects, if any, of proposed works on the special interest of the structure, including its interior, and whether proposed alterations are necessitated by the liturgical requirements of worship. Planning authorities should consider whether any substantial structural changes or alterations to the existing plan-form are required for the proposed alterations, for example, the sub-division of important existing spaces, as well as any consequential effects in other parts of the building. Any proposed removal or alteration/destruction of important fixtures and fittings, for example, galleries, box pews or fixed seating will require careful consideration. The age, rarity, and craftsmanship of the internal fixtures and fittings can contribute to the architectural co-herence of the whole building and, even where not original to the building, the internal fixtures and fittings can be an important part of a later remodelling of the interior. Impact on decoration, for example any interesting decorative schemes such as stencilled decoration, tiling or panelling, should be taken into account. It would also be appropriate to consider any proposals to minimise the impact of proposed changes. Any proposals to store or salvage fixtures and fittings proposed for removal should also be assessed carefully.

5.2.5. Where the planning authority determines that the proposed works to the interior of a protected structure that is regularly used a place of public worship require planning permission, it shall respect liturgical requirements in reaching a decision on the application for permission.

5.2.6. In a changing environment, the use that will generally give the greatest protection to a church that is a protected structure is as a church serving the community. Where works are proposed that are not required by the liturgy, but would facilitate a religious use continuing in a place of worship, the planning authority should respect the architectural heritage of the structure. In addition, it should consider whether the proposed works are directed at accommodating other compatible activities within the building or in its curtilage. This may help to ensure its continued viability in community use, particularly as a place of public worship. Such alterations would require a grant of planning permission."

25. The particular part of the guidance in question that Mr. MacEochaidh contends misrepresents the law is the first sentence of para. 5.2.3 wherein the guidelines state "In relation to declarations, this may mean that some works which are necessitated by liturgical requirements and which have a material effect on the character of the structure do not require planning permission." Once again Mr. MacEochaidh says that this is a conflation of ideas. His argument is that it is legitimate, and indeed appropriate, to take into account liturgical requirements in deciding whether or not the character of the structure is materially affected by works but once a

view is taken that the character of the structure is in fact materially affected by works the planning authority has no choice but to apply s. 57(1) which is, he contends, clear and unequivocal in its terms.

The Respondent's case

26. Counsel for the respondent, Ms. Nuala Butler, argued that s. 57 of the Planning and Development Act, 2000 had to be considered in its entirety and that s. 57 (1) should not be considered as a stand alone provision. Ms. Butler argued that the intention of the legislature was to be inferred from the section read as a whole and that it is clear, when the section is read as a whole, that a planning authority, or An Bord Pleanála, is required to respect liturgical requirements in considering whether or not works to a protected structure, which happens to be a place of public worship, are exempted development. Once again, the written submissions filed on behalf of the respondent draw the court's attention specifically to para. 5.2.3 of the 2004 Guidelines issued by the Minister for the Environment, Heritage and Local Government. It was submitted on behalf of the respondent that the guidelines correctly state the appropriate harmonious interpretation of s. 57(1) and 57(5). It is argued that the Board correctly applied this interpretation in considering the character of the works, the guidelines, the submissions of the church and of the applicant, as well as respecting liturgical requirements in arriving at an ultimate decision as to whether or not the works were exempted works. In para. 10 of the written submissions filed on behalf of the respondent it is submitted as follows:-

"The applicant's case appears to rest on the single and deceptively simple contention that s. 57(1) should be read in isolation that is, the applicant contends that once the Board decided that the works affected the character of the sanctuary and the structure as the whole, the Board was thereby precluded from reaching any conclusion other than that the works required planning permission. Such a view, however, ignores the crucial import of ss. 57(4) and (5). The Board is not entitled to ignore statutory requirements in this way. The Board is required to respect liturgical requirements, to have regard to the guidelines, and to comply with the guidelines for the purpose of identifying any liturgical requirements. Having regard to this schema of obligations, it is submitted that the Board acted validly within its discretion in concluding that the works, notwithstanding their material effect, came within s. 57 and did not require planning permission."

27. Much of the remainder of the written submissions filed on behalf of the respondent are directed at addressing an irrationality argument that the respondent appears to have understood the applicant to be making. However, it was clarified at the outset of the hearing that the applicant was relying solely on the ground of *ultra vires* and was not pursuing an irrationality argument. Accordingly, it is not necessary for me to consider an irrationality argument or any response put forward to an irrationality argument.

Conclusions.

28. The first thing to be said is that it is not for this court to express any view as to whether the works in question are or are not exempted development. It is well established that such an issue should be exclusively determined by the planning authority and, on appeal, by An Bord Pleanála. See the decisions of the Supreme Court in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 and *Grianan an Aileach Interpretative Centre Co. Limited v. The County Council of the County of Donegal* [2004] IESC 41. Also the decisions of the High Court in *McMahon v. Dublin Corporation* [1997] 1 I.L.R.M.. 227 and *Palmerlane Limited v. An Bord Pleanála and Another* [1999] 2 I.L.R.M. 514. Nevertheless, this court is not precluded in the context of a judicial review from considering whether or not such a decision was made *intra vires* and in accordance with law or, alternatively, *ultra vires* and contrary to law. In *Criminal Assets Bureau v. Hunt* [2003] 2 I.R. 1768 Keane C.J. made this point when he stated:

"There is today in existence a huge range of tribunals and other bodies, of which the Appeal Commissioners in Revenue cases are just one example, which determine matters in controversy between parties and whose functions and powers are properly characterised as "limited functions and powers of a judicial nature" [within the meaning of Article 37.1 of the Constitution]. It is not uncommon for the legislation establishing such tribunals to provide for a limited form of appeal to the High Court from its decisions, usually confined to questions of law. However, in every case, the High Court retains its power under the Constitution to determine whether such bodies have acted in accordance with the Constitution and the law and such jurisdiction cannot be removed from the High Court by statute."

29. I regret that I cannot accept the arguments advanced by the respondent in this case. It seems to me that the provisions of s. 57(1) of the Planning and Development Act, 2000 are crystal clear. The carrying out of works to a protected structure shall be exempted development only if those works would not materially affect the character of the structure or a relevant element of the structure (i.e. an element of the structure which contributes to its special architectural, historical, archaeological, artistic, cultural, scientific, social or technical interest). It is also clear to me that subs. 2, 3, 4 and 5 of s. 57 are to be read together. These relate to a situation where an owner or occupier of a protected structure elects to make a written request to the planning authority for a declaration as to the type of works which it considers would or would not materially affect the character of the structure or of any element, referred to in subs. (1)(b), of that structure. Clearly, by virtue of subs. 4 before issuing a declaration under s. 57(2) the planning authority must have regard to any guidelines issued under s. 52 of the 2000 Act and any recommendations made under s. 53 of the 2000 Act. Moreover, by virtue of subs. (5) of s. 57 if the declaration relates to a protected structure that is regularly used as a place of public worship, the planning authority must, in addition to having regard to the guidelines and recommendations referred to in subs. 4, respect liturgical requirements and for the purpose of ascertaining those requirements comply with any guidelines concerning consultation issued by the Minister for Arts, Heritage, Gaeltacht and the Islands or in the absence of such guidelines consult such person or body as they consider appropriate. It is clear to me that the situation contemplated, and provided for, in subs. 2-5 inclusive of s. 57 is one in which the planning authority, or as the case may be, An Bord Pleanála, has not yet made a decision as to whether or not works would materially affect the character of the structure or a relevant element of the structure. It is in the making of that decision that the planning authority, or the Board, as the case may be, is required to have regard to the guidelines and recommendations referred to (and if the structure under consideration is a protected structure that is regularly used as a place of public worship, the further mandate to respect liturgical requirements). However, once a decision has been made on that issue it seems to me that s. 57(1), which is clear in its terms, must be applied.

30. If I had any doubt about this matter I am reinforced in my view by a consideration of subs. 6 of s. 57 which is clearly also a stand alone provision. It deals with a situation where either a planning authority, or the Board, as the case may be, is required to consider an application for permission for the development of land under s. 34 which relates to the interior of a protected structure that is regularly used as a place of public worship. The subsection goes on to provide that in considering such an application the planning authority, and the Board, on appeal, shall in addition to the other requirements of the Planning and Development 2000 respect liturgical requirements. Section 57(6) is clearly a stand alone provision and is not intended to be read with s. 57(1) or with subs. 2-5 inclusive of s. 57. It does not depend on those provisions in any way for its effect.

31. Finally, I should say something about the guidance material relied upon by An Bord Pleanála. Nobody is suggesting for a second that An Bord Pleanála were not entitled to have regard to the guidance material in question. However, they ought to have borne in mind that guidance cannot alter or displace substantive and established law. Legislation cannot be altered by guidance. The guidance must be with respect to how to proceed in a particular legal context. The guidance cannot itself alter or seek to alter that particular

legal context. In other words a Minister cannot amend or add to existing legislation in the course of issuing guidance. If purported guidance mis-states the law, as it appears to have done in this particular case, with the result that the persons who are entitled, or even obliged, to have regard to that guidance are, or may be, misled then that is most unfortunate and unsatisfactory. I take the view that the sentence in paragraph 5.2.3 of the Minister's 2004 guidelines with regard to respecting liturgical requirements to the effect that "In relation to declarations, this may mean that some works which are necessitated by liturgical requirements and which have a material affect on the character of the structure do not require planning permission" is incorrect in law. Accordingly, I have some sympathy with the respondents in this case. Nevertheless, the law must be upheld and applied as it is.

32. In all the circumstances I am disposed to grant to the applicant the relief sought by her in paragraph D(1) of her Statement of Grounds. I am also disposed to grant the applicant an order pursuant to paragraph D(2) of her Statement of Grounds remitting the matter to An Bord Pleanála with a direction that the decision in respect of the applicant's s. 5 application be taken again in accordance with the judgment of the High Court herein. It will be a matter for the planning authority to consider what, if anything, it ought to do in consequence of that in respect of the s. 57(2) declaration already granted by it to the owners and occupiers of the church. That is not a matter for me. However, I do note that it is open to them, should they consider it necessary to do so, to review the declaration that they have granted, pursuant to s. 57(7). Moreover, it is clear from the terms of s. 57(7) that were the planning authority to carry out such a review it would not affect works carried out in reliance on the declaration prior to the review.