Neutral Citation No. [2006] IEHC 192

THE HIGH COURT
COMMERCIAL
JUDICIAL REVIEW

[2006 No. 124JR]

BETWEEN

CORK CITY COUNCIL

APPLICANT

AND
AN BORD PLEANÁLA

RESPONDENT

AND
O'FLYNN CONSTRUCTION LIMITED

NOTICE PARTY

Judgment of Mr. Justice Kelly delivered the 1st day of June, 2006

Introduction
1. Cork City Council (the council) seeks to quash a decision of the respondent (the board) made on 2nd December, 2005. The effect of the decision was to reduce from €4,316,208 to €2,606,048 the amount payable by the notice party (the developer) to the council pursuant to a condition of a planning permission granted by it on 6th July, 2005.

History
2. On 8th October, 2004, the developer applied to the council for planning permission for a mixed use residential, office and retail development on a site measuring 1.24 hectares. The site was bounded by Eglinton Street, Albert Street and Old Station Road, Cork.

3. The development was planned to comprise buildings of 6 to 8 storeys above street level apart from what is described as a landmark building in the south western corner of the site which will rise to 17 storeys above street level. Parking for 553 cars, mainly in a double level basement but also at ground level within the building, was provided for.

4. On 6th July, 2005, the council granted permission for the development subject to 25 conditions.

5. It is the 24th of those conditions and it alone which was the subject of an appeal to the board and which in turn has led to this litigation.

Condition Number 24
6. The condition reads as follows:-

> *"Prior to the commencement of the proposed development, the developer shall pay a contribution to Cork City Council in respect of the following classes of public infrastructure and facilities benefiting development in the City of Cork and that is provided or that is intended to be provided by or on behalf of Cork City Council:*
>
> > *Class 1 Roads, transportation, infrastructure and facilities,*
> >
> > *Class 2 Water and drainage infrastructure and facilities,*
> >
> > *Class 3 Parks, recreation, amenity and community facilities.*
> >
> > The present value of the contribution as determined under the General Development Contribution Scheme made by Cork City Council on 12th January, 2004, (the GDC Scheme) is €4,316,208 subject to indexation in accordance with the Consumer Price Index prevailing at the date of payment and subject further to such exemptions or reductions as apply to the proposed development having regard to the provisions of Table 5 of the GDC Scheme and to such partial refund of 64% of the contributions paid in respect of first time buyers of residential property, not exceeding 108 square metres, as set out in Table 5 of the GDC Scheme."

7. The reason given for applying this provision was stated to be as follows:-

> *"To comply with the General Development Contribution Scheme which was adopted by Cork City Council on 12th January, 2004 and in the interests of proper planning and sustainable development of the area."*

The Appeal
8. On 28th July, 2005, the developer appealed against condition 24 of the permission.

9. In the course of the appeal letter it argued that the term "*gross floor area*" as used in the GDC Scheme should be synonymous with the term "*gross floor space*" as used and defined in Article 3 of the 2001 Planning Regulations (the regulations). It sought a decision from the board to amend the contribution required under condition 24 by recalculating the amount based on "*gross floor space*" as defined by Article 3 of the regulations. The effect of that "*would mean excluding the two levels of underground parking and the covered parking area and service yard at ground floor level*".

10. The appeal was decided by the board on 2nd December, 2005.

11. In its decision the board concluded that the terms of the GDC Scheme for the area had not been properly applied by the council in respect of condition no. 24 of the planning permission. Accordingly, it directed the council to amend the conditions so as to reduce the amount of the contribution to the sum which I have already mentioned in this judgment. The reduction amounts to €1,710,160.

12. The council takes the view that the board was wrong in this decision, hence these proceedings. They were commenced by motion on 28th February, 2006, were transferred into the commercial list on 13th March, 2006 and leave was given to seek judicial review on 15th March, 2006.

Relevant Statutory Provisions
13. Section 34 of the Planning and Development Act, 2000, (the Act) makes provision for the granting of planning permission by planning authorities such as the council.

14. Section 48(1) of the Act provides that a planning authority may, when granting a permission under s. 34, include conditions for requiring the payment of a contribution in respect of public infrastructure and facilities benefiting development in the area of the planning authority that are or will be provided.

15. The basis for the determination of such a contribution is dealt with under s. 48(2).

16. Subsection (a) of s. 48(2) provides that the basis for the determination of a contribution *"shall be set out in a development contribution scheme made under this section"*. A planning authority is authorised to make one or more schemes in respect of different parts of its functional area.

17. Section 48(2)(b) provides that a scheme may make provision for payment of different contributions in respect of different classes or descriptions of development.

18. Section 48(3) provides that a scheme must state the basis for determining the contributions to be paid in respect of public infrastructure and facilities in accordance with the terms of the scheme.

19. Section 48(3)(b) requires that in stating the basis for determining the contributions, the scheme must indicate the contribution to be paid in respect of the different classes of public infrastructure and facilities which are provided or to be provided by any local authority. Furthermore, the planning authority is obliged to have regard to the actual estimated cost of providing the classes of public infrastructure and facilities. Any benefit which accrues in respect of existing development may not be included in any such determination.

20. Section 48(3)(c) provides that a scheme may allow for the payment of a reduced contribution or no contribution in certain circumstances, in accordance with the provisions of the scheme.

21. Sections 48(4), (5), (6), (7), (8) and (9) prescribe an elaborate procedure which must be followed by a planning authority in making a scheme under the section. It is not necessary to deal with any of these since no challenge is made either to the scheme which was made by the council or the procedures which were followed in so doing.

22. The scheme was prepared during 2003 and was adopted by the council on 12th January, 2004. The adoption of such a scheme is a matter reserved to the members of the planning authority.

Section 48(10)
23. This is the subsection which deals with appeals to the board. It provides as follows:-

> *"(a) Subject to paragraph (b), no appeal shall lie to the Board in relation to a condition requiring a contribution to be paid in accordance with a scheme made under this section.*
>
> *(b) An appeal may be brought to the Board where an applicant for permission under section 34 considers that the terms of the scheme have not been properly applied in respect of any condition laid down by the planning authority.*
>
> *(c) Notwithstanding section 34(11), where an appeal is brought in accordance with paragraph (b), and no other appeal of the decision of a planning authority is brought by any other person under section 37, the authority shall make the grant of permission as soon as may be after the expiration of the period for the taking of an appeal, provided that the person who takes the appeal in accordance with paragraph (b) furnishes to the planning authority security for payment of the full amount of the contribution as specified in the condition."*

24. The effect of these statutory provisions is that no appeal lies to the board in relation to a condition requiring a contribution to be paid in accordance with a scheme made under the section. But that prohibition is subject to a limited and specific exception. An appeal may be brought in circumstances where an applicant for planning permission considers that the terms of a scheme adopted under s. 48 have not been properly applied by a planning authority.

A Contrast
25. It is clear that the function of the board in an appeal under s. 48(10) is extremely limited. It has no entitlement to consider or review the merits of the scheme under which the contribution is required. Its remit is confined solely to the question of whether or not the terms of the relevant scheme have been properly applied.

26. The appellate jurisdiction provided under s. 48(10) is in marked contrast to the board's function in what may be described as ordinary planning appeals. In such appeals the board is obliged to consider applications for planning permission *de novo* (see s. 37(1)(b) of the Act). Such a power is not given to the board in an appeal under s. 48(10).

27. All parties to this litigation agree that in considering an appeal under s. 48(10) the board is confined to a consideration of whether or not the terms of the relevant scheme have been properly applied.

The Scheme in Suit
28. As I have said the GDC Scheme was adopted by the council on 12th January, 2004. A single scheme for Cork City was adopted to ensure both clarity and fair and equitable implementation (see para. 1 of the scheme).

29. The GDC Scheme provides that development contributions will be levied only in respect of new developments which avail of a particular service or proposed service, identified in the scheme.

30. It sets out the basis for determining contributions as follows:-

> *"The basis for the determination of a contribution under the Cork City Council's General Development Contribution Scheme is as follows:-*

31. A detailed study carried out by the City Council established the following:-

(a) the amount of the actual estimated costs which are attributable to the period 1997 – 2010 of providing public infrastructure and facilities (listed in the Table 1 overleaf and Appendix II attached) excluding any benefit which accrues in respect of existing development,

(b) the aggregated floor areas in square metres of existing development and probable development (2004 -2010), in respect of residential and non-residential are set out in Table 2 below, and

(c) the development contributions payable per square metre of residential/non-residential development, are determined by dividing the eligible cost by the relevant floor space.

The results of carrying out the division exercises are given in the Table 3 of this Scheme below."

32. It is not necessary to set out the remaining parts of the scheme, the tables contained in it or the exempted and reduced contributions.

33. It is however necessary to set out in full that part of the scheme which is pivotal to this case. It is note number 3. It reads as follows:-

"Note 3: The floor area of proposed development shall be calculated as the gross floor area. This means the gross floor area determined from external dimensions of the proposed buildings, including the gross floor area of each floor, including mezzanine floors."

Standard of Review

34. The sole issue for determination in this case is whether the decision of the board was correct in law or not. The council does not make the case that the decision of the board was unreasonable in the sense indicated in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39.

35. Such being the case, there is agreement between the council and the board that the standard of review to be applied is not that specified in *O'Keeffe's* case. Rather it is a standard which is derived from a line of authority commencing with Tennyson v. Dun Laoghaire Corporation [1991] 2 I.R. 527, which antedated *O'Keeffe's* case but which continued on notwithstanding it. Many subsequent cases applied this standard. They include the decision of Geoghegan J. in *Gregory v. Dun Laoghaire/Rathdown County Council* (Unreported, 16th July, 1996; Supreme Court, 28th July, 1997); the decision of McGuinness J. in *Wicklow Heritage Trust Limited v. Wicklow County Council* (Unreported, 5th February, 1998); the decision of O'Neill J. in *O'Connor v. Dublin Corporation* (No. 2) of 3rd October, 2000 and *Kenny v. An Bord Pleanála* (No. 1) [2001] 1 I.R. 565.

36. I will cite relevant extracts from just a few of these post-O'Keeffe decisions.

37. In *Gregory's* case Geoghegan J. said:

"… I must consider whether the applicant is entitled to the declarations and order of certiorari sought if I consider that the council's interpretation of the condition was wrong or whether, as a matter of law, the applicant has to go further and satisfy this court that no reasonable council could have interpreted the condition in the way it did. In my view I have only to consider whether the council acted ultra vires. That is to say whether it adopted an incorrect interpretation of the condition."

38. That decision went to the Supreme Court and in the course of his judgment Murphy J. said:

"It was argued on behalf of the council that the interpretation of condition 2 as requiring only internal changes was at least a reasonable construction of the condition and, even if erroneous, it was a construction which the council were entitled to put on the condition in the proper and bona fide exercise of their functions. In my view this argument is unsustainable. The proper function of the council was the implementation of the condition imposed by the board. If they erred in that regard the error was as to the nature of their duty rather than the performance of it. The only power exercisable by the council was to agree details in relation to the revised plan on the basis of the implementation of the condition imposed by the board. Any agreement reached without that condition having been fulfilled was necessary ultra vires the council."

39. In the *Wicklow Heritage* case McGuinness J. said:

"As I have already stated, the matters which I have to decide are matters of law. In considering whether the County Council's decision is or is not a material contravention of the County Development Plan I should not approach the question by looking at the opinion of the senior executive planner that the decision is not a material contravention and decide whether his opinion is 'unreasonable' in the Keegan v. Stardust sense. On the contrary, I must consider the Ballynagran siting in the light of the County Development Plan itself, in the light of statute law, and in the light of the case law already laid down by this court and the Supreme Court. The question is not whether the senior executive planner or the county manager were unreasonable in thinking that the Ballynagran site was not a material contravention; the question is whether they were correct in law in this opinion."

40. In *O'Connor's* case O'Neill J. dealt extensively with the argument which has been repeated here on the part of the developer that the only test which is applicable is the *O'Keeffe* test. Having considered, inter alia, the cases which I have cited, he rejected that proposition without hesitation. He said that the authorities *"appear to me to be unequivocally against the proposition advanced by counsel. I accept therefore, that the appropriate test to be applied is that the conclusion or decision of the respondents must be looked at to see if it is correct in law and not reasonable in the sense of the test laid down in O'Keeffe and An Bord Pleanála*."

41. In the course of his ruling O'Neill J. said he considered himself bound by the authority of the Supreme Court decision in *Gregory's* case.

42. The argument which is made in the present case by the developer rests upon a decision of the Supreme Court which antedates that in *Gregory's* case by some five months. It was given in the case of *O'Reilly and Ors. v. O'Sullivan and Ors*. The judgment was delivered by Keane J., as he then was. The case involved an appeal from an order of Laffoy J. given on 25th July, 1996.

43. In the course of her decision Laffoy J. said:

> *"There are undoubtedly situations, as the cases cited illustrate, in which the O'Keeffe principles have no part to play in determining whether a proposal would constitute a material breach of a development plan."*

44. She went on to say:

> *"Where a controversy arises on judicial review as to the application of the relevant policies, standards and requirements stipulated in a development plan, that controversy must be resolved by reference to the O'Keeffe principles."*

45. Her decision was reversed on appeal but in the course of his judgment Keane J. said that he was satisfied that Laffoy J. had correctly applied the principles of law laid down in *O'Keeffe's* case. He makes that statement at p. 16 of his judgment, having in the preceding paragraph set out the conclusion reached by the High Court Judge where she said:

> *"I have come to the conclusion that the applicants have not surmounted the difficult hurdle which the O'Keeffe principles place before a person who seeks to challenge an administrative decision on the grounds of irrationality and they have not discharged the onus of establishing that the decision of 23rd June, 1995 was irrational in accordance with those principles."*

46. It is asserted by the developer that the expression of opinion by Keane J. amounts to a determination by the Supreme Court, binding upon me, that in a case such as the present one the only applicable test is that set out in *O'Keeffe's* case.

47. I have no hesitation in rejecting that line of argument.

48. I am satisfied that the passage relied upon from the judgment of Keane J. is no more than an assertion by him that the High Court judge was correct in her application of the *O'Keeffe* principles to the case before her. That was a case where it was alleged that an order made by the relevant county manager was unreasonable and irrational so as to require its being set aside.

49. It is also clear from the passage from the judgment of the High Court which I have quoted that Laffoy J. expressly acknowledged that there are cases where the *O'Keeffe* principles are inapplicable.

50. The judgment of Keane J. is not authority for the proposition argued by counsel on behalf of the developer in the present case.

51. Even if it were, it is clear that a differently constituted Supreme Court delivered judgment five months later in *Gregory's* case and expressly approved of the approach of Geoghegan J. in this court. He did not apply the *O'Keeffe* principles in circumstances where he was dealing with the council's interpretation of a condition.

52. I do not perceive any conflict between these two decisions of the Supreme Court. If there is, then, in accordance with precedent, I propose to follow the latter which, in any event, I find much more to the point and persuasive insofar as this case is concerned.

53. The proposition which was argued by counsel for the developer here appears to me to involve a misunderstanding of the observations of Keane J.

54. Accordingly, the standard I will apply is that identified by McGuinness J. in the *Wicklow Heritage Trust* case, namely, was the board correct in law in its decision?

Proper Approach to the Construction of the Scheme

55. All parties to this litigation accept that the decision of the Supreme Court dealing with the proper construction of development plans as set forth in the judgment of McCarthy J. in *Re XJS Investments Limited* [1986] I.R. 75-- is the correct approach to the construction of the GDC Scheme. There he said:

> *"Certain principles may be stated in respect of the true construction of planning documents:-*
>
> > *(a) To state the obvious, they are not Acts of the Oireachtas or subordinate legislation emanating from skilled draughtsmen and inviting the accepted canons of construction applicable to such material.*
> >
> > *(b) They are to be construed in their ordinary meaning as it would be understood by members of the public without legal training as well as by developers and their agents, unless such documents, read as a whole, necessarily indicate some other meaning."*

56. That is the approach which is appropriate in the construction of the relevant provisions of the GDC Scheme.

The Board's Decision and the Reasons for It.

57. In its decision the board said:

> *"The board considered, based on the reasons and considerations set out below, that the terms of the Development Contribution Scheme for the area had not been properly applied in respect of condition No. 24 and directs the said council under sub-section 10(b) of section 48 of the Planning and Development Act, 2000 to AMEND condition No. 24 so that it shall be as follows for the reasons stated.*
>
> > *24. The developer shall pay to the planning authority a financial contribution of €2,606,048 (two million, six hundred and six thousand and forty-eight euro) in respect of public infrastructure and facilities benefiting development in the area of the planning authority that are provided or intended to be provided by or on behalf of the authority, in accordance with the terms of the Development Contribution Scheme made under section 48 of the Planning and Development Act, 2000. This contribution shall be paid prior to the commencement of development or in such phased amounts as may be facilitated by the planning authority. The actual amount(s) to be paid shall be determined at the time(s) of payment in accordance with any indexation provisions of the said contribution scheme which shall be applied from the date of the making of the scheme.*
> >
> > *Reason: It is a requirement of the Planning and Development Act, 2000, that a condition requiring a*

contribution in accordance with the Development Contribution Scheme made under s. 48 of the Act be applied to the permission."

58. The board then set out its reasons and considerations for this decision. It said:

> *"The Board considered that in calculating the amount to be paid with respect to public infrastructure and facilities benefiting development in the area of the planning authority, the relevant terms of the Cork City Council Development Contribution Scheme had not been properly applied in that the gross floor area of basement level car parking provision and ground floor car parking to the building was not excluded from the reckonable gross floor area for development charges in accordance with the relevant terms of the Cork City Council General Development Contribution Scheme, 2004. Accordingly, in order to render the application of charges under the said scheme consistent with the provisions of s. 48 of the Planning and Development Act, 2000, the Board concluded that the relevant gross floor area of the proposed development properly liable for assessment in accordance with the terms of the said scheme is 34,956 metres square plus 3,234 metres square for parking, which is not ancillary to the building (allocated to No. six Lapps Quay), giving a total area of 38,190 square metres. The Board considered that the appropriate rate of payment to be applied is that set out in the scheme (as adopted) subject to any indexation provisions and exemptions/reductions specified therein. Accordingly, it concluded that the contribution applicable to the proposed development is €2,385,074 plus €220,974 = €2,606,048 (two million, six hundred and six thousand and forty-eight euro)".*

59. Since the coming into operation of s. 34 of the Act, it is clear that the board is under a statutory obligation to state the main reasons and consideration on which its decision was based.

60. As I pointed in in *Mulholland v. An Bord Pleanála* [2006] 1 I.L.R.M. 287, the legislature made no attempt in the Act to alter the existing jurisprudence on what is required in order that reasons for a decision may be considered as adequate at law. Thus, cases such as the decision of Murphy J. in *O'Donoghue v. An Bord Pleanála* [1991] I.L.R.M. 750 continue to apply. In that case he held that reasons for a decision of the board must be sufficient to enable the courts to review it and to satisfy the persons having recourse to the board that it had directed its mind adequately to the issue before it.

61. There is a wider obligation since the Act to state not merely the reasons but also the considerations on which a decision is based.

62. In Mulholland's case I said:

> *"The obligation 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.*
>
> *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."*

63 Of particular concern in the present case is requirement No. 3 from the above quotation. Can the court (or indeed any other interested party) know if the board directed its mind adequately to the issues which it has considered or is obliged to consider?

64. The only issue which it was entitled to consider, having regard to the extremely limited form of appeal which is permitted under s. 48(10)(b), is whether the terms of the GDC Scheme had been properly applied in respect of the permission laid down by the planning authority.

65. It is clear that the board was of the view that the relevant terms of the scheme:

> *"had not been properly applied in that the gross floor area of basement level car parking provision and ground floor car parking to the building was not excluded from the reckonable gross floor area for development charges in accordance with the relevant terms of the Cork City Council General Development Contribution Scheme, 2004"*

66. But nothing is said by way of reasons or considerations as to why it so concluded.

67. The board simply says that in order to render the application of charges under the scheme consistent with the provisions of s. 48 it concluded that the relevant gross floor area of the proposed development liable for assessment in accordance with the terms of the scheme is the figure fixed by it.

68. The board had no jurisdiction to decide any question other than whether the council applied the terms of the scheme properly or not. It is not concerned with whether the application of charges under the scheme or indeed the scheme itself is consistent with the provisions of s. 48 of the Act.

69. I must confess that I am left very much in the dark as to the reasons and considerations which led the board to reach its conclusions.

70. The board contends that its reasons and considerations may be gleaned from a consideration of both its decision and its inspector's report. Assuming that to be so, an examination of the inspector's report is instructive.

The Inspector's Report

71. It is dated 21st October, 2005. It sets out the general background to the appeal. It goes into some detail in describing the

grounds of appeal made on behalf of the developer and the response by the council.

72. Under the heading "Assessment" the inspector points out that the developer requested the board to determine the charge to be applied under the GDC on the basis of the "*gross floor area*" as defined under Article 3 of the regulations and in accord with a precedent set in an earlier appeal decision. The board was invited to take an approach that was consistent with that taken by the planning authority in application of charges under the supplementary development contribution scheme. It was also asked to bear in mind the ancillary nature of car parking.

73. Under the heading "The Appeal" the inspector says the following:-

> *"The claim in the appeal that the interpretation of 'gross floor area' by the planning authority in application of scheme (sic) under condition 24 is inconsistent with the definition provided under Article 3 of the Planning and Development Regulations, 2001 is supported."*

74. She then sets out the definition contained in Article 3 and says:-

> *"The interpretation of the term 'gross floor area' in the submission of the planning authority received on 31st August, 2005, differs in that it is stated that parking areas are not excluded from the reckonable gross floor area for calculation purposes in the contribution schemes."*

75. She then refers to note 3 of the scheme where it is stated that the gross floor area is to be determined from external dimensions including the gross floor area of each floor, including mezzanine floors. She says:-

> *"There is no evidence within the adopted Contributions Schemes to support the claim in the planning authority submission that parking areas should be included within the reckonable gross floor area for calculation purposes."*

76. She continues:-

> *"The claim in the appeal that the car parking areas are 'ancillary' in nature and therefore should be excluded from the reckonable area for calculation purposes is also supported. The interpretation of the General Development Contribution Scheme recommended to and accepted by the board in the case referred to in the appeal (PL 28208098) excluded the gross floor area of decked parking from calculations on the basis that it was ancillary to retail warehouse and office development at Polefield. These spaces were therefore regarded as an ancillary facility to serve the subject development and an adjoining development."*

77. A final matter is referred to by her where she says:-

> *"A further consideration to be taken into consideration in relation to the adopted Contributions Schemes is that exclusion of areas taken up by surface parking and inclusion of areas taken up by internal basement or deck car parking would be illogical and unreasonable and, contrary to land use efficiency and sustainable development interests."*

78. The inspector recommended that the appeal should be upheld and condition 24 of the permission amended. She annexed a draft decision to her report which does not differ materially from that adopted by the board.

79. In view of the fact that the board did not differ from the recommendation made by the inspector and in the absence of any dissent from her line of thought, it is reasonable to conclude that it adopted her reasoning in arriving at its decision and in furnishing its own reasons and considerations for so doing.

A Critique of the Board's Reasoning

80. A fair reading of the inspector's report leads one to conclude that the argument made at the outset by the developer to the effect that the definition of *"gross floor area"* when referred to in the GDC Scheme should be synonymous with the term *"gross floor space"* as used in the regulations was accepted by her.

81. Such an argument may have much to recommend it from the point of view of consistency but had nothing to do with the task being undertaken by the board under s. 48(10)(b) of the Act.

82. It was, of course, open to the council when making its scheme to include a provision in relation to car parking spaces identical to that contained in Article 3 of the regulations. But it was not obliged to do so. Whether it did so or not was a matter exclusively within the jurisdiction of the council.

83. The definition of "*gross floor space*" in the regulations has nothing to do with the making of a scheme under s. 48 of the Act. It certainly does not oblige a planning authority in making such a scheme to follow that definition.

84. In the present case the council chose to adopt a different approach and not to apply the definition of "*gross floor space*" as used in the regulations to its GDC Scheme. Neither the Act nor the regulations require a planning authority to exclude incidental or ancillary car parking from the ambit of a scheme made by it.

85. It was not open to the board to disregard the provisions of the GDC Scheme and effectively substitute the definition of "*gross floor space*" as contained in the regulations for what the scheme actually says. That is not to interpret the scheme but to rewrite it.

86. The board appears to have taken the view that "ancillary" or "incidental" car parking ought to have been excluded. By so doing it was not carrying out the very limited function conferred upon it by s. 48(10)(b) of the Act.

87. The inspector also made the point that the exclusion of areas taken up by surface parking and inclusion of areas taken up by internal basement or deck car parking would be illogical and unreasonable and contrary to land use efficiency and sustainable development interest. Again it appears to me that in taking this approach the inspector and the board were wrong. Whilst they may very well be correct to say that the scheme is contrary to land use efficiency and sustainable development interests, such a view has no part to play in the statutory function being undertaken by the board under s. 48(10)(b) of the Act. Its sole task is to consider whether the terms of the scheme have or have not been properly applied in respect of any condition laid down by the planning authority. Policy considerations touching upon land use efficiency or the maintenance of consistency between the definition of "*gross floor area*" as used in the GDC Scheme and "*gross floor space*" as defined in the regulations play no part in the task which falls to be

undertaken by the board in an appeal of the type in suit.

Construction of the GDC Scheme
88. As I have already indicated the provisions of this GDC Scheme fall to be construed in accordance with their ordinary meaning (see *XJS Investments Limited* [1986] I.R. 750).

89. The scheme provides that a contribution as a rate of €68.25 per square metre floor area is payable in respect of residential and non residential development. The construction of car parking spaces is clearly development within the meaning of s. 3 of the Act. It follows that unless there is a provision to the contrary contained in the scheme a contribution is payable in respect of the construction of car parking spaces.

90. I can find no provision in the GDC Scheme which exempts, in whole or in part, the construction of car parking spaces from payment of the development contribution. There are provisions in the scheme which exempt certain categories of development from payment of contributions, either in whole or in part, but they do not extend to the development of car parking spaces.

91. The provisions of note 3 to the GDC Scheme make the position crystal clear. That note provides that the floor area of proposed development shall be calculated as the "*gross floor area*". That is to be determined from the external dimensions of the proposed building, including the gross floor area of each floor, including mezzanine floors. This is in marked contrast to the definition of "*gross floor space*" in the regulations which refers to internal measurement and disregards any floor space provided for the parking of vehicles by persons occupying or using the building where such floor space is incidental to the primary purpose of the building.

92. I do not accept the proposition that there is any ambiguity in the definition of "*gross floor area*" as set forth in the GDC Scheme. The reason why it is said to be ambiguous is because it allegedly does not address a distinction between floor area provided for car parking spaces incidental to the primary purpose of the building and all other floor areas. Indeed the scheme does not make any such distinction but that does not amount to an ambiguity. The council could have made such a distinction in adopting the scheme but chose not to do so. That does not render the scheme ambiguous.

93. The plain fact is that the definition of "*gross floor space*" in the regulations is not the same as that of "*gross floor area*" in the GDC Scheme. The definition from the regulations is not to be imported into the scheme and thus supplant the scheme's own definition of "*gross floor area*". They involve two different considerations. The term "*gross floor space*" as used in the regulations excludes incidental parking space whereas such is included in the definition of "gross floor area" under the scheme.

94. It follows that the floor area of the proposed car parking must be included as it falls within the definition of "*gross floor area*" and is reckonable for payment of the contribution.

95. I am of the view that the exercise engaged in by the board as demonstrated from the inspectors report and the board's decision was not that prescribed under s. 48(10)(b) of the Act but amounted to a rewriting of the GDC Scheme to include in it provisions which were not there. Indeed the provisions which are sought to be superimposed upon the scheme run entirely counter to the meaning and definition of "*gross floor area*" as used in the scheme.

96. I am of the view that in reaching its decision the board misinterpreted the scheme, misapplied its functions and was wrong in law in so doing.

Other Decisions
97. It is suggested that the decision of the board was consistent with an earlier decision referred to by the inspector in her report. This was decision PL 28/28098. Even if the decision of the board in the present case was consistent with that, it counts for nothing insofar at this application is concerned.

98. Likewise is the suggestion that the council itself on a previous occasion gave a decision inconsistent with the proposition which it puts to the court now. There was such a decision but the council has explained that it was arrived at as a result of what it describes as human error. How that error was made is set forth in some detail in an affidavit of Anne Bogan which is not controverted. I am satisfied that that case constituted a single instance of an error being made by the council. Apart from that one instance, it appears that the GDC Scheme has been applied in a manner consistent with what the council contends for in this case. A single previous miscalculation due to inadvertence would not in my view create any bar or estoppel to the entitlement of the council to seek relief in the present case.

Conclusion
99. The council succeeds and the decision of the board is quashed.