Neutral Citation: [2014] IEHC 238

THE HIGH COURT

[2013 No.809 J.R.]

In the Matter of the Roads Acts 1998-2007 and in the Matter of the Planning and Development Acts 2000-2010 and in the Matter of Sections 50 and 50A of the Planning and Development Act 2000 (as amended)

Kerry County Council

Applicant

-and-

An Bord Pleanála

Respondent

Judgment of Mr Justice Peter Charleton delivered on the 11th day of April 2014

1. Kerry County Council seeks to judicially review the decision of An Bord Pleanála to refuse permission for the widening and straightening of the busy road in West Kerry between Tralee and An Daingean. Leave to commence this case was given by Peart J. on the 5th November, 2013. The decision of An Bord Pleanála was given on the 4th September, 2013. The decision and reasons are in the following terms:

> At a further meeting held on 4th of September 2013, the Board further considered the report of the inspector and the information and submissions on file, including further information and submissions from Kerry County Council (received by ABP [An Bord Pleanála] on June 18th, 2013) including various reports and documents relating to scheme amendments, landscaping details, cycle route alternatives and road design standards etc.
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> The board's [An Bord Pleanála] decided, by majority of 3:2, to refuse to approve the E.I.S. [Environmental Impact Statement], in accordance with the following reasons and considerations.
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> Reasons and Considerations
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> The Board acknowledged the demonstrated need to upgrade the N86 Tralee to Dingle route, as identified in the National Secondary Roads Needs Study 2011 (N.R.A.), and accepted the 'online' approach to such improvement. However, it is considered that the existing N86 national secondary road is a route of tourism value with an attractive landscape setting, and noted that the proposed width of the road development corridor, would result in a typical overall finished road width of 16 metres, and significantly wider construction corridor width (typically 28m in width and wider in some locations[)]. The Board considered that the road improvement scheme as proposed would represent an excessive intervention into the landscape, not commensurate with the single-carriageway route being delivered, would have an unacceptable detrimental impact on the visual amenities and landscape character of the area and would seriously detract from the tourism value and amenities of the area. The proposed development would therefore be contrary to the proper planning and sustainable development of the area.
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> Notes:
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> In making its decision, the Board did not accept all of the inspector's recommended refusal reasons, as explained below:
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> The order of priority for the completion of national secondary road schemes is not a matter for the Board to determine, and the justification for the road upgrade as set out by Kerry County Council was accepted by the Board.
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> In relation to the proposed cycleway (recommended reason no. 2), the Board noted that the development of a long-distance cycling route linking Tralee with Dingle accords with national policy on tourism and transport and would complement the development of Dingle as a 'Category 1 Cycling Hub Town' as set out in *"A Strategy for the Development of Irish Cycle Tourism, 2007 (Bord Fáilte)["],* albeit that a different route was envisaged in that strategy. The inspector's concerns about the cycleway – including the lack of connectivity and concerns over its attractiveness for recreation – were noted. The submissions received in June, 2013, from Kerry County Council (including the enclosed submission from the National Trail's Office and An Bord Fáilte), illustrating the challenges associated with potential alternative routes, were also considered. The Board concluded that the proposed design including cycleways contributed significantly to the width of the proposed road alignment and the associated landscape impacts. The Board was not satisfied that the cycleway justification was sufficient to overcome the landscape concerns as set out in the refusal reason.…
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> Revised Proposals
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> In relation to the response by Kerry County Council to the request for a redesign and revised EIS (issued by ABP on 7th of November 2012), notwithstanding the greater detail provided in relation to landscape impacts and proposed mitigation measures, it was not considered that the amendments included in the response addressed the Board's stated concerns in a satisfactory manner, most notably in relation to the width of the road. Therefore the Board decided that further circulation of this documentation and re-opening of the oral hearing was not necessary and the board proceeded to refuse approval of the scheme for the reasons and considerations set out above.

2. What this case is about emerges naturally from the previous quotation. The road in question is 28 km long. In the middle of the stretch in question there is a 5.2 km piece of road that has been expanded and straightened and it includes a two-way cycleway on one side. About 2 km of the route goes through various villages, including Abhainn an Scáil, while the rest is twisty and very narrow. At times, apparently, it is only 6 metres wide. This kind of road is called a Type 3 Single Carriageway and it is to be constructed upon the existing road; 'online' is the term applicable. But, on the application lodged, the road will become much wider and have a cycle lane on each side for most of it, excluding villages, and a hard margin as well for maintenance and pedestrian use. To validly make this

application, Kerry County Council had to lodge an environmental impact statement. Under the legislation, the matter went directly to An Bord Pleanála. The Board made a decision to hold an oral hearing on the matter. An inspector then summarised the issues and gave tentative conclusions. Normally, a local planning authority or the Board will make a decision and adopt in whole or in part the reasons for refusal or acceptance in the inspector's report, or other report. Here the Board adopted and formulated its own reasons as it disagreed with the inspector in part. As to the necessity for having a road improvement scheme at all, everybody agrees that this is a road that badly needs to be seen to. It clearly cannot continue as it is.

3. This was one of those rare cases where An Bord Pleanála used its powers under strategic infrastructure projects legislation, well prior to its final decision, to indicate to Kerry County Council that it would not approve the project but would instead indicate that specified changes might assist in the project going through. Such an indication, in this instance under s.182C(5)(b) of the Planning and Development Act, 2000, as amended, cannot fetter the discretion of a statutory authority. This is made clear in the terms of the legislation which enables such communications where the Board is "provisionally of the view that it would be appropriate to approve the proposed development were certain alterations… to be made". The letter setting out this provisional view from An Bord Pleanála to Kerry County Council was dated the 7th November, 2012. At its core it suggests the following:

> A narrower overall road cross-section should be adopted, omitting the cycleway and reducing the total width of the alignment in so far as possible, including minimising the working strips required on a temporary basis along the edge of the final carriageway and the overall land-take.
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> Re-examined the alignment to minimise interference with natural landscape features, hedgerows and tree-lines, and minimising other interventions including embankments and excavations that would create scarring of the landscape. The total length of the tree-lined and hedgerow to be lost should be minimised.
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> Submit more detailed proposals in relation to the re-instatement and landscaping of the completed scheme, with a view to minimising the extent and duration of visual impacts.

4. Essentially, the view expressed was that the road should not be so wide, in order not to be so obtrusive on the landscape. Cars were to be accommodated but not cyclists. They were to share the road with cars, vans, trucks and buses. The idea, perhaps, was that cyclists would be otherwise provided for in a dedicated trail for them, and perhaps pedestrians, running along the Dingle peninsula from Tralee westwards. Of course, An Bord Pleanála has no power to engage in providing for such a scheme. Only Kerry County Council can do that. There is an alternate route in early consideration, perhaps eventually leading to more formal planning. This route has a steeper gradient than the N86. It has been demonstrated in the past that sometimes these schemes take years to come to fulfilment, if they ever do.

Timeline

5. On the 15th December, 2011, a submission was made for confirmation of compulsory purchase orders. An oral hearing took place from the 15th to 17th May, 2012. The report of the inspector was signed on the 13th September, 2012. The letter just quoted was issued on the 7th November, 2012. The response from Kerry County Council was not received until the 17th June, 2013. It is fair to say that what was proposed by the Board was not acceded to and whatever changes were set out did not accord with what had been suggested. On the 4th September, 2013, the Board met to consider the road improvement scheme and refused it. The compulsory purchase order was annulled on the 6th September. An order of An Bord Pleanála was drawn up on the 10th September and then this judicial review commenced by order of Peart J on the 5th November. This hearing took place on the 11th and 12th March, 2014. If matters had to start all over again, it can be predicted that perhaps two more years will be lost before work can start.

Points

6. Counsel for Kerry County Council has helpfully structured the voluminous materials into a number of points that are at the essence of this review. These arguments are:

> 1. The Board was required to furnish documents publicly within 3 days but the decision of the Board was based on notes taken by one member and then destroyed: this does not constitute statutory compliance and the reasons given are not those of the Board and, further, are inadequate.
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> 2. The Board, in considering the widths required for the cycleways as contributing to overall road width as 28 meters, decided on the basis of incorrect figures since the Board's decision was based on reckoning that without cycleways the road would be merely 13 metres wide whereas, in fact, drainage etc must be added as to 6 meters on each side, thereby making 25 metres or, at minimum, 24 metres.
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> 3. The Board failed to carry out any appropriate assessment of the information provided by Kerry County Council and failed to make any decision as to whether the proposed alternative trail for cyclists and walkers, the green way alternative, was suitable; thus side-stepping the issue of gradients.
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> 4. That a Board member had done a road trip along the N86, and other routes, reporting to the Board, noting the frequency of cyclists, thus behaving inappropriately and introducing immaterial and prejudicial material.
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> 5. That section 13(5) of the Roads Act, 1993, concerning the approval for roads, required the relevant Minister to consider all road users in considering road schemes for approval, which includes cyclists and pedestrians, and that since this function now is devolved to the Board, there was a total failure to exercise this function; whereby the Board were wrong to confine themselves to a consideration only of proper planning and sustainable development.

7. This case has in common with most other judicial review applications of environmental planning cases that every conceivable point is put in the mix. The result must be that the High Court is required to exercise its discretion as to costs so that only those aspects of the case which succeed bring costs, with the result while those that do not may result in an award of costs the other way. The overall result, as this is an environmental protection case may in any event be no order as to costs. Nonetheless, the Court will consider all these points. Numbers 5, 3 and 2 require to be considered together. Points 1 and 3 will be considered first.

Destroyed notes

8. The first point is insubstantial. The Board had a different view to that of the statutory inspector. This was a proper exercise of its discretion. The matter was debated by the Board at some length, apparently over three hours. The Board came to its conclusion by a vote of 3 to 2. Tasked with noting the reasons, settled through debate, the deputy chairman, Conall Boland took notes, went away, wrote up his jottings and formulated the reasons as they have been quoted. As a matter of policy, notes and papers of members of

the Board are destroyed after such meetings. The point made is that this was an inaccurate reconstruction of what was decided or, alternatively, that the note-taker simply made up his own reasons which were only tangentially related to anything which the Board had decided. Conall Boland has given evidence and been cross examined. He emerged as trustworthy and conscientious. Since the Board had previously expressed a view to Kerry County Council on the unsuitability of the road, it was no surprise to him, he said, that the Board stayed with the substance of their original reasoning. What emerged was, therefore, broadly parallel to the letter written by the Board on 7th November, 2012. The reason for refusal was in accordance with a condensed version of that letter with particular reference to its first paragraph. He denied adding vocabulary in writing up the decision. That evidence must be accepted as probable.

9. Further, it is to be presumed that statutory bodies function lawfully as they are designed by legislation. Keeping records of everything is not necessarily a guide to the fundamentals of a decision. In any corporate undertaking, different views will be expressed by different people some of them, as in this decision by a bare majority, widely differing. What matters is the responsibility of the Board as a statutory corporation. In *O'Donoghue v An Bord Pleanála* [1991] I.L.R.M. 750 an issue arose as to the keeping of records by the Board. A sensible view was adopted by Murphy J at p. 759-760 which is equally applicable to the facts of this case:

> I find it difficult to envisage circumstances in which the failure of an administrative body to keep appropriate records would be of itself sufficient grounds to render its decision a nullity. I suspect that ordinarily the inadequate record would fall to be considered in conjunction with an inexplicable decision. In any event it seems to me that by any criterion the paucity of the records in the present case would not justify quashing the decision of the [Board] which was manifestly within its jurisdiction and for which they did have adequate material.

10. Section 146 of the Act of 2000, as amended, deals with the appointment of an inspector, and consequent reports, and with the furnishing of documents and maps to interested parties. Once a decision is made, the Board is only required under s. 146(5) to inform the public by making "documents relating to the matter" available for inspection. Since the principle of construction applicable requires words to be seen in context, it should be quoted. The subsection reads:

> (5) Within 3 days following the making of a decision on any matter falling to be decided by it in performance of a function under or transferred by this Act or under any other enactment, the documents relating to the matter—
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> (a) shall be made available by the Board for inspection at the offices of the Board by members of the public, and
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> (b) may be made available by the Board for such inspection—
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> (i) at any other place, or
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> (ii) by electronic means,
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> as the Board considers appropriate.

11. The decision was made available two days after the Board met. That decision mirrors in its wording what the Board had decided. The statutory scheme is thus fulfilled down to its last letter.

The road trip

12. Since 2008, all public bodies have been especially careful with expenditure. Hence, while members of An Bord Pleanála have looked at plans and have also viewed sites to get a grasp of how a proposed development might fit into a cityscape or landscape, this has tended to be done in their own time. Counsel for Kerry County Council has stated that since the Board is exercising an executive planning function, he could have no objection to members viewing sites or bringing to the discussion of plans whatever local knowledge they might have about an area. That is right. Such a course would, in any event, be inevitable for many projects. A member of the Board might live in Swords and might pass on his or her bus route a site that is proposed to be suitable for a top class but multi-storied hotel near Dublin Airport. Particularly good sightlines can be achieved from the upper deck of a bus. It would be impossible for that person not to have a view informed by local knowledge. When a judge proposes to visit the scene of an accident, the usual course is to do so in court time and to invite solicitors from the opposing parties to accompany the view. This is different. Planning approval is an administrative and not a judicial function. Planning is about how houses, factories, sports facilities and roads may be properly fitted into the human and built infrastructure of an area; how developments will impact; how well built structures will fit; whether proposed plans accord with the democratically mandated development plan; and whether projects will harmoniously fit where they are sited. Planners need to take an overall view not just of one particular development but of how the repetition of permission through the potential re-engagement of similar circumstances may change the character of an area. Hence, suburban housing in the countryside once permitted has been shown by experience to be repeated. Road plans and speed limits will need consequent alteration. The precious resource of beautiful countryside may be replaced by a landscape appropriate to the outskirts of a city. This is but an example but one that has despoiled much of rural Ireland. All of this is a matter of foresight, thought and experience. Were planners, and this includes the Board as ultimate decision makers, precluded from exercising the knowledge of what a site visit has shown them or what living or working or holidaying close to a proposed development would illustrate to them, an unreal if not surreal situation would result. Deliberately only those who never had any acquaintance with an area into which it was proposed to put an apartment block or business building would have to be chosen as decision makers. They would have to avoid the site until a decision had been signed off on. This would be wrong. Yet, it is argued that this local knowledge is equivalent to judicial prejudice. That is untenable. There is nothing in the way of prejudice that knowing about a streetscape or an urban or country area could be regarded as equivalent to a juror knowing someone accused of a crime or a judge dealing with a case involving a former school friend. People have character; something often hidden and sometimes an unpleasant revelation to those who know them. What a person's background is often determines how they act. Where that background involves unfair dealings, judicial proceedings are careful to ensure that if any specific incident is to become evidence that it is considered within a proper context. On the other hand, a plan to build involves static development. While such a plan has an impact that is understandable from drawings and maps, it can be best illuminated where planners have the chance to see how it may fit in. That, after all, must be partly why planning authorities are local. Where, as with major infrastructure and road projects, the Board is the first instance decision maker, it cannot be wrong for some or all of them to seek to become acquainted with the kind of real information that is inescapably part of the landscape of local planning decisions. Fundamentally, one might posit as an inescapable test of procedural fairness before administrative bodies: did the party now complaining have a reasonable opportunity to make any case which was essential to their point of view? That is the test on the authority of *Ballyedmond v Commission for Energy Regulation* [2006] I.E.H.C. 206 and *Ashford Castle Ltd v SIPTU* [2007] 4 I.R. 70. That principle was not breached in this case.

13. But, it is said that prejudice was introduced to the Board that irremediably contaminated its decision through this road trip.

Multiple cases have been cited in pursuit of this argument including, *Bula Ltd v Tara Mines Ltd (No 6)* [2000] 4 I.R. 412, *Usk and District Residents' Association Ltd v An Bord Pleanála* [2010] 4 I.R. 113 and *R (Ramda) v Secretary of State for the Home Department* [2002] EWHC 1278. All of these cases are to the same effect: if a reasonable person observing the fullness of the circumstances that are said to give rise to bias would worry that a judge or quasi-judicial officer might not as a result of a circumstance claimed to introduce bias give a fair hearing, then the decision maker should retire from considering the issue; or if that person persists, then his or her decision is unsound. All of that is fine. It has, however, nothing to do with this. What happened is that Gabriel Dennison, who is a Board member, was given two days to travel from Dublin to Kerry and to see how the project proposed would most likely fit within the landscape and human environment as he observed it. He reported back. The documents show that the short report which he wrote up went to two other board members by email. Common sense suggests that while the Board deliberations, are as a matter of law, corporate in nature, and consequently what anyone said or how anyone else reacted to it is irrelevant save in the most exceptional circumstances, it is likely that he was asked what he saw and that he informed the other Board members in quite similar terms to his memo. Here is that report:

> Notes on Road Trip 11-13 July 2013
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> This road trip was undertaken with the main purpose of viewing the […] road from Camp to Dingle in County Kerry which is scheduled for major improvement and is currently before the Board. A portion of the route has recently been upgraded in the vicinity of Annascaul so it is possible to assess the current state of the present road as well as the appearance and apparent impacts of the improved section.
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> I took the opportunity to see as much of the Dingle area as possible in a 48 hour visit as it is some time since I had been in the area. In addition I made time to view other areas on the route that have arisen from time to time in recent files such as Tralee, Listowel, Rathkeale, Tarbert and Limerick city.
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> I was greatly impressed by what I saw of the improvements wrought in Limerick city centre including the new King John's castle visitors' centre. Likewise, though to a lesser extent, Tralee. After even a short visit one can't but be aware of the great architectural assets of both towns though both appear to have a pressing need to secure their conservation and thereby ensure the protection of the unique qualities them party to their urban settings.
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> As far as the N69 is concerned I noted the relatively light traffic using the route – notwithstanding it being a weekday leading up to the busy holiday weekend in mid-summer (and with unusually good weather conditions). I met 3 tour coaches coming towards Tralee on the route and saw none going in the other direction. I saw a total of four HCVs – again all heading east. I saw no cyclists between Camp and Dingle on the route. There were no hold-ups at any point. I'd averted to Inch beach for a brief visit and, predictably in view of the weather and time of year, it was fairly full of parked cars and sun bathing families.
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> The existing route is not as heavily vegetated as I expected and there are stretches where there is a lot of ribbon development (mainly at the Camp end and in the vicinity of the various towns and villages). The infamous hairpin bends are not as awesome as I had anticipated and noted that they had relatively poor advanced warning signs (merely a standard black and amber diamond sign). The new portion of the road is pleasant to drive and doesn't present as a major imposition on the landscape. If anything one could say it helps the driver to appreciate the dramatic landscape more as it is more open than the existing road. I saw no cyclists on this stretch either notwithstanding the two new cycle paths.
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> As there were no available hotel rooms in the town of Dingle I travelled a few miles north towards [Baile an Fhertéirigh] to get accommodation and was able to see that the road is beyond Dingle are generally good and well surfaced – in some cases as good as the existing N69.
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> I visited the Blasket Islands Visitors Centre while in the vicinity. This is a good example of a major public building which sits very discreetly into the landscape unlike, it has to be said, too many of the modern houses in the area.
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> I returned from Dingle via the Connor Pass as the mist had lifted on Saturday and the views were corresponding[ly] superb. Traffic is well-managed on the Connor Pass road, e.g. there are no tour buses allowed. It was on this road that I saw the most cyclists – though over the course of the approximately 24 hours I was in the area I saw a total of less than a dozen cyclists.
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> In general one would have to say that while the tourism "product" offered by the Dingle peninsula is clearly underpinned by majestic landscape and considerable cultural assets it does suffer from lack of evident coordination and a sense of strategic vision – particularly West of Dingle. For example, there are few of any signposts to such sites as Dún an Óir on Smerwick Harbour (in State care) or the Blasket Islands Centre; signposts alternate between being all Irish to those where English is dominant and Irish is in italics to ones where this precedence is reversed. Other non-official signs are all in English! This must be very confusing to the non-Irish visitor (and sometimes even to the native!) Unlike the Connor Pass route tour buses of the largest type are permitted on the Slea Head scenic route leading to chaotic scenes on the narrow, twisting road or two cars can barely pass one another.
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> My return journey allowed me to visit Listowel, Tarbert and the Shannon estuary coastline in the vicinity of the LNG [Liquified Natural Gas] facility.
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> All in all this was a very helpful exercise in putting flesh on the bones of not only a specific project but a range of other matters with which I have been involved as well.

14. The Court is convinced that, as the writer records of that memo records, this trip and this report was nothing more than a look and see exercise. It was useful because made a particular project live within its appropriate context. In terms of planning law, there can be nothing wrong with this. The writer does mention, however, the presence or absence of cyclists in terms which might give rise to the apprehension that cyclists might not be expected, even were they to be specifically provided for. This leads on to the main substantive point which is the duties of An Bord Pleanála under the legislation devolved to the Board under roads legislation.

The Roads Acts

15. The essential argument by Kerry County Council here is that An Bord Pleanála is now a road authority and that it is subject to the Roads Acts 1993 to 2007 in making any decision. Thus, An Bord Pleanála is contended to be subject to the statutory imperatives therein contained: that it is not simply concerned with the proper planning and sustainable development of an area. In making this particular decision, it is argued that the Board erred in failing to take into account the needs of cyclists and pedestrians and

consequently failed to exercise its jurisdiction properly.

16. In respect of this point, the issues of reasonableness, of proportionality, of the standard of judicial review for environmental decisions and availability of appeal remedies under the Aarhus Convention were all cast into the mix. This is unsatisfactory. But it is also usual in every major planning case. Such confusion by multiplication of tenuous argument goes nowhere. There is either a point here or there is not. Too often major planning judicial reviews are confused by taking every insubstantial issue into the mix: this is yet another such case. In the submissions of the Board, it is accepted that the Board is under the same obligations regarding the carrying out of an environmental impact assessment and undertaking the appropriate assessments necessary for the protection of European sites. It is further accepted that the Board operates under the usual statutory enjoinder which requires the Board to consider the proper planning and sustainable development of the area. This is helpful. What, in substance and stripping away irrelevant points, is argued by Kerry County Council is that the Board now has the functions of the Minister in approving roads. Even if that is not so, Kerry County Council argue that the Board in approving road decisions is obliged to have regard to a range of design obligations under the Roads Acts, most especially the need for roads to accommodate all road users. Even if that is not so, Kerry County Council argue that there is a duty on the Board to take into account the relevant policies of statutory bodies. In excluding cycleways, the Board is argued by Kerry County Council to have failed to take into account the need of cyclists to use the roadway and to use it safely. Further, in requiring the removal of the cycleway from the road, it is claimed that the Board ignored a relevant and important policy. Two initial points need to be made here.

17. Firstly, the review of administrative decisions is not simply one as to whether the body in its decision flew in the face of fundamental reason and common sense; the reasonableness standard. An administrative body is obliged to do what it is set up to do. This means taking into account that which it is obliged to consider and excluding from its consideration all that is irrelevant to its statutory function. As Clarke J. put the matter in *Sweetman v An Bord Pleanála* [2008] 1 I.R. 277 at 298, paras. 6.12 -6.13:

> 6.12 Firstly it is important to remember that a court, in judicial review proceedings, is not confined to the irrationality test identified in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39. That is but one ground which can be advanced. A court is also entitled (and indeed is duty bound) to consider matters such as whether the decision maker had regard to factors which ought not properly have been included in the consideration or failed to have regard to factors which should properly have been considered. *O'Keeffe v. An Bord Pleanála* irrationality only arises in circumstances where the decision maker properly considered all of the matters required to be taken into account and did not take into account any matters which should not. The limitations inherent in the *O'Keeffe v. An Bord Pleanála* irrationality test, therefore, only arise in circumstances where all, but only, those matters properly considered were taken into account and where the decision maker comes to a judgment based on all of those matters. It is in those circumstances that the court, by reason of the doctrine of deference, does not attempt to second guess the judgment of the person or body concerned provided that there was material for coming to that decision. In particular the court does not attempt to re-assess the weight to be attached to relevant factors.
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> 6.13 The overall jurisdiction is not, therefore, as narrow as a consideration of *O'Keeffe v. An Bord Pleanála* irrationality alone might suggest.

18. Secondly, the issue of proportionality has been argued by Kerry County Council separately from the question of rationality. Again, that is not helpful. Such arguments come out as if a judicial review were an appeal on the merits. The Court has no function in that regard. That issue as to whether proportionality is separate as a ground for judicial review to reasonableness may be regarded as settled since the decision of the Supreme Court in *Meadows v Minister for Justice* [2010] 2 I.R. 701. If a decision is shown to be disproportionate in terms of its analysis of competing factors, or if disproportion must necessarily be inferred from the terms of a decision, it may be possible to demonstrate that the level of irrationality needed to require the High Court to interfere is manifest. And this may be so despite the reluctance of the courts to interfere with assessments of fact relevant to the special skills and knowledge of specialist bodies such as An Bord Pleanála. It is not easy to argue disproportion in a decision as a ground of unreasonableness. If there was material before the Board which could justify a decision as rational, then there is no jurisdiction to review it judicially. This Court put the matter thus in *Weston Ltd v An Bord Pleanála* [2010] IEHC 255 at paras 11-12:

> 11. The burden of proof of any error of law, or fundamental question of fact, leading to an excess of jurisdiction, or of demonstrating such unreasonableness as flies in the face of fundamental reason and common sense, rests on Weston the applicant in these proceedings. Once there is any reasonable basis upon which the planning authority or An Bord Pleanála can make a decision in favour of, or against, a planning application or appeal, or can attach a condition thereto, the court has no jurisdiction to interfere. Furthermore, where, as a colourable device, a reason is chosen for refusing permission which does not give rise to an entitlement to compensation under the legislation, the burden of proving that a decision choosing such an incorrect reason for that improper purpose rests on the applicant. The presence in the planning file, including the report to the manager, or in the case of An Bord Pleanála, the report of the inspector, of any material which could rationally justify a refusal on a non-compensatory ground is sufficient to support the lawfulness of a decision. Of course, in an appropriate case, it might be possible to prove that a decision was made for an improper purpose or that a conclusion or recommendation in an inspector's report was not arrived at in good faith. That burden however, rests on the applicant for judicial review who seeks to impugn such a decision. Some material ground, upon which such an attack might reasonably be regarded as being capable of being mounted, must be shown in evidential terms before even leave to argue such ground would be granted. In accordance with the legislative circumscription of judicial review appeals against planning decisions, substantial grounds would have to be shown to justify granting leave on such a point.
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> 12. In *Lancefort Limited v. An Bord Pleanála* (Unreported, High Court, McGuinness J., 12th March, 1998), the following passage on the burden of proof, at pp. 21-22, which applies as much to a planning authority as to An Bord Pleanála appears:-
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> > "Counsel for the Notice Party also submitted that where the evidence as to whether a statutory body entrusted by the legislator with a particular function did not exercise its statutory duties, there is a presumption of validity in favour of the decision under attack Finlay P. in *re Comhltas Ceolteorí Éireann* (High Court unreported 14th December, 1977) said (at pages. 3-4 of the transcript of his Judgment):
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> > > "A planning authority is a public authority with a decision-making capacity acting in accordance with statutory powers and duties. In my view, there is rebuttable presumption that its acts are valid."
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> > It appears to me that this submission is well founded. The onus of prove [sic] in establishing that An Bord Pleanála did not consider the question of environmental impact assessment… and thereby rebutting the presumption of validity of the Bord's decision, lies squarely on the Applicant. That burden of proof, it seems to me, has not been fully discharged.

> In addition, the Court has discretion in regard to Orders sought by way of judicial review. In this case, the Bord had before it ample material on which to make its decision. The report of the inspector raises and refers to many of the matters which would also be covered in a environmental impact assessment. Finally, no participant in the oral hearing suggested that an environmental impact assessment was required. Bearing all these matters in mind I would be reluctant to exercise my discretion in favour of the Applicant on this point".

19. Essential to this issue on the duty of An Bord Pleanála when making decisions on road applications is the attempt to sort out the multifarious sections and amendments that define its functions and its duty. That, it might be said, is far from easy. The Law Reform Commission has performed a salutary public service in bringing this kind of legislation up to date on http://www.lawreform.ie/revised-acts/alphabetical-list-of-revised-acts.360.html. Quotes are taken from this.

20. Who has the duty to decide what roads are necessary and how they should be built? Undoubtedly, the answer to that is that local authorities alone have such power. It would be beyond any reasonable construction of the scope of any powers of An Bord Pleanála to require as a condition of granting planning permission for a road, to require that another road should be built elsewhere. That can be argued to be part of this issue since a section of the argument of the statutory inspector for refusal, not adopted by the Board, was that some kind of a greenway ought to be constructed along an alternative route and that this would be the ideal way to accommodate cyclists. That may be right as a matter of fact, but does An Bord Pleanála have such a power? Section 13 of the Roads Act, 1993, as substituted by s. 6 of the Roads Act, 2007, states as to its material part:

> 13 (1) Subject to Part III [concerning the National Roads Authority], the maintenance and construction of all national and regional roads in a county or city is a function of the council of that county or city.
>
> (2) It is the function of a local authority to maintain and construct all local roads—
>
> (a) in the case of a county council — in its administrative area, other than the administrative area of any borough or town referred to in Chapter 2 of Part 1 of Schedule 6 to the Local Government Act 2001 situated within the county of the council, and
>
> (b) in the case of any other local authority — in its administrative area.
>
> (3) The local authorities referred to in subsections (1) and (2) are road authorities for the purposes of the roads referred to in those subsections and shall, subject to Part III and in respect of those roads, perform all the functions assigned to road authorities by or under any enactment (including this Act) or instrument.
>
> (4) The expenses of a county council in respect of its functions under subsection (2) shall be charged on the county of the council exclusive of any borough or town that is situated within the county.
>
> (5) In the performance of their functions under subsections (1) and (2), a road authority shall consider the needs of all road users.

21. It is said in argument by An Bord Pleanála that cyclists do not use this road much and if they do, then serious cyclists will use any road and that if they are less fit cyclists that they should await the planned dedicated greenway. But perhaps this will never happen. Perhaps also a principle to be born in mind on occasion is that the best is the enemy of the good. Cyclists are vulnerable and it is to be assumed that both sides in this case consider them worthy of protection. There may be many or there may be few though, whatever their number, cyclists are disadvantaged on Irish roads by the lack of, or only very sporadic consideration of, their needs. But, as to what should be done, the Court has no competence in deciding these issues. The question is what does the law require?

22. Section 15 of the Roads Act 1993 concerns the power of the Minister to give general directions as to the manner of construction and maintenance of public roads. Section 41 deals with the entitlement of the Minister responsible to give directions in writing to the National Roads Authority. Establishing a safe and effective road network is tasked to the Authority in more specific powers granted under section 17. Section 22(1) provides:

> The Authority may, in relation to its functions under this Act, at any time make recommendations in writing to a planning authority as to the content of that authority's development plan and any such recommendations shall be considered by the planning authority.

23. The Board is for these purposes a planning authority but, of course, it has no competence in drawing up any development plan. Section 47 concerns how the local authority or the National Roads Authority should apply for planning permission where that application relates to:

> (a) a motorway scheme,
>
> (b) a service area scheme,
>
> (c) a busway scheme,
>
> (d) a protected road scheme, or
>
> (e) a protected road scheme amending a protected road scheme approved under section 49.

24. Section 49, as amended, sets out the jurisdiction of An Bord Pleanála. This, in its current state may be regarded as confusing because section 215(1) & (2) of the Planning and Development Acts, 2000-2007, in other words the Planning and Development Act 2000, as amended, means that certain powers of the Minister in terms of road scheme approvals are to be construed as powers of An Bord Pleanála:

> 215.—(1) The functions of the Minister in relation to a scheme or proposed road development under sections 49 , 50 and 51 of the Roads Act, 1993 , are hereby transferred to and vested in the Board and relevant references in that Act to the Minister shall be construed as references to the Board and any connected references shall be construed accordingly, except that any powers under those sections to make regulations or to prescribe any matter shall remain with the Minister.

(2) The references to the Minister in section 19 (7) and paragraphs (a), (c), (e) and (f) of section 20 (1) of the Roads Act, 1993 , shall be deemed to be references to the Board.

Consequently, even though the first subsection of section 49 of the Roads Act 1993 is properly amended, the references to the Minister which occur thereafter are in fact references to An Bord Pleanála even though it does not state that:

49 (1) A road authority or the Authority shall submit any scheme made by it under section 47 to An Bord Pleanála for its approval.

(2) Before approving a scheme submitted to him the Minister shall—

(a) cause a public local inquiry into all matters relating to the scheme to be held,

(b) consider any objections to the scheme which have been made to him and not withdrawn,

(c) consider the report and any recommendation of the person conducting such inquiry.

(3) The Minister may, by order, approve a scheme with or without modifications or he may refuse to approve such a scheme and shall publish in one or more newspapers circulating in the area where the proposed motorway, busway, protected road or service area is to be located notice of his decision, including, where appropriate, particulars of any modifications to the scheme.

(4) The Minister may, in any case where he considers it reasonable to do so, direct the road authority to provide for any person who, by reason of the implementation of a motorway, busway, protected road or service area scheme—

(a) is permanently deprived of reasonable access to or from his property or to or from one part of his property to another — a suitable alternative means of access,

(b) is, during construction, temporarily deprived of reasonable access to or from his property or to or from one part of his property to another —a temporary means of access during the course of such construction, and the road authority shall comply with any such direction.

(5) Where a scheme made by a road authority under section 47 specifies a planning permission which it is proposed to revoke or modify and where the Minister—

(a) refuses to approve the scheme, or

(b) approves the scheme with modifications and the effect of such modifications is that the specified planning permission will not be revoked or modified or will be modified in a form other than that specified in the scheme as made by the road authority, the duration of such planning permission shall, notwithstanding section 40 of the Act of 2000, be extended by a period specified in the order of the Minister under subsection (3), the duration of which shall be equivalent to the period beginning on the date on which the scheme was made by the road authority and ending on the date on which the decision referred to in paragraph (a) or (b) was made by the Minister.

(6) Where the Authority has submitted a scheme for approval under subsection

(1) references to road authority in the other provisions of this section in respect of the scheme are to read as references to the Authority.

25. It is perhaps instructive to consider what that section looked like before it was amended; and, in that regard, the most substantial change is that previously the relevant Minister was the authority for the approval of roads:

49.—(1) A road authority shall submit any scheme made by it under section 47 to the Minister for his approval.

(2) Before approving a scheme submitted to him the Minister shall—

(a) cause a public local inquiry into all matters relating to the scheme to be held,

(b) consider any objections to the scheme which have been made to him and not withdrawn,

(c) consider the report and any recommendation of the person conducting such inquiry.

(3) The Minister may, by order, approve a scheme with or without modifications or he may refuse to approve such a scheme and shall publish in one or more newspapers circulating in the area where the proposed motorway, busway or protected road is to be located notice of his decision, including, where appropriate, particulars of any modifications to the scheme.

(4) The Minister may, in any case where he considers it reasonable to do so, direct the road authority to provide for any person who, by reason of the implementation of a motorway, busway or protected road scheme—

(a) is permanently deprived of reasonable access to or from his property or to or from one part of his property to another — a suitable alternative means of access,

(b) is, during construction, temporarily deprived of reasonable access to or from his property or to or from one part of his property to another — a temporary means of access during the course of such construction, and the road authority shall comply with any such direction.

(5) Where a scheme made by a road authority under section 47 specifies a planning permission which it is proposed to revoke or modify and where the Minister—

(a) refuses to approve the scheme, or

(b) approves the scheme with modifications and the effect of such modifications is that the specified planning permission will not be revoked or modified or will be modified in a form other than that specified in the scheme as made by the road authority, the duration of such planning permission shall, notwithstanding the Act of 1982, be extended by a period specified in the order of the Minister under subsection (3), the duration of which shall be equivalent to the period beginning on the date on which the scheme was made by the road authority and ending on the date on which the decision referred to in paragraph (a) or (b) was made by the Minister.

26. Section 50, as it now stands, requires an environmental impact statement to be drawn up in appropriate cases. This was done here. Section 51 amplifies the previous sections as to the authority exercised by An Board Pleanála in cases where it is the decision making authority. Again, references to the Minister, one must remind oneself, are in fact references to An Bord Pleanála. It reads:

51(1) A proposed road development shall not be carried out unless An Bord Pleanála has approved it or approved it with modifications.

(2) The road authority concerned or the Authority, as the case may be, shall apply to An Bord Pleanála for the approval referred to in subsection (1) in relation to a proposed road development it proposes and shall submit to An Bord Pleanála the environmental impact statement prepared in respect of the development.

(3) Where a road authority has made an application for approval under subsection (2), it shall as soon as may be—

(a) publish in one or more newspapers circulating in the area in which the proposed road development would take place a notice in the prescribed form—

(i) stating that it has made an application to the Minister for the approval of the proposed road development,

(ii) stating that an environmental impact statement in respect of the proposed road development has been prepared,

(iii) indicating the times at which, the period (not being less than 6 weeks) during which and the place where a copy of the environmental impact statement may be inspected,

(iv) stating that a copy of the environmental impact statement may be purchased on payment of a specified fee not exceeding the reasonable cost of making such copy,

(v) stating that submissions may be made in writing to the Minister in relation to the likely effects on the environment of the proposed road development during the period referred to in paragraph (a)(iii);

(vi) where relevant, stating that the proposed road development is likely to have significant effects on the environment in Northern Ireland, and

(vii) specifying the types of decision An Bord Pleanála may make, under section 51(6), in relation to the application;

(b) send a copy of the environmental impact statement together with a notice in the prescribed form, stating that the authority has made an application for approval of the proposed road development and that submissions may be made in writing to the Minister within a specified period (which shall be that referred to in paragraph (a)(iii)) in relation to the likely effects on the environment of the proposed road development to each of the following—

(i) the Commissioners of Public Works in Ireland,

(ii) Bord Fáilte Éireann,

(iii) An Taisce — the National Trust for Ireland,

(iv) any other prescribed body or person;

(c) send a copy of the environmental impact statement to the prescribed authority in Northern Ireland where the proposed road development is likely to have significant effects on the environment in Northern Ireland or where that authority so requests, together with a notice in the prescribed form, stating that the authority has made an application for approval of the proposed road development and that submissions may be made in writing to the Minister in relation to the likely effects on the environment of the proposed road development.

(d) where the environmental impact statement and a notice has been sent to the prescribed authority in Northern Ireland pursuant to paragraph (c), enter into consultations with that authority regarding the potential effects on the environment of the proposed road development and the measures envisaged to reduce or eliminate such effects.

(4) The Minister may require a road authority which has applied to him for an approval in accordance with *subsection* (2) to furnish him with specified additional information in relation to the likely effects on the environment of the proposed road development and the authority shall comply with any such requirement.

(4A) The Minister shall, where he considers that additional information furnished in accordance with a requirement under *subsection* (4) contains significant additional data in relation to the effects on the environment of the proposed road development, require the relevant road authority to —

(a) publish in one or more newspapers circulating in the area in which the proposed road development would take place a notice stating that significant additional information in relation to the said effects has been furnished to the Minister, that the additional information will be available, for inspection or for purchase (on payment of a specified fee not exceeding the reasonable cost of making a copy), at a specified place and at specified times during a specified period, and that submissions or observations in relation to the additional information may be made in writing to the Minister before a specified date, and

(b) send notice of the furnishing to the Minister of significant additional information, and a copy of the additional information, to the bodies and persons and the authority (where appropriate) referred to in subsections (3) (b) and (c) and to indicate to such bodies and persons and the authority (where appropriate) that submissions or observations in relation to the additional information may be made in writing to the Minister before a specified date.

(5) Before approving a proposed road development the Minister shall—

(a) consider the environmental impact statement submitted under *subsection* (2), any additional information furnished under *subsection* (4) and any submissions made in relation to the likely effects on the environment of the proposed road development,

(b) consider any views of the prescribed authority in Northern Ireland where a copy of the environmental impact statement was sent to it in accordance with subsection (3) (c),

(c) consider the report and any recommendation of the person conducting an inquiry referred to in *subsection* (7) where evidence is heard at such inquiry in relation to the likely effects on the environment of the proposed road development.

(6) The Minister may, by order, approve a proposed road development with or without modifications or he may refuse to approve such a development and shall—

(a) publish in one or more newspapers circulating in the area in which the proposed road development would take place notice of his decision, including, where appropriate, particulars of any modifications to the proposed road development,
(aa) The said notice shall inform the public that a person may question the validity of any determination by An Bord Pleanála on a proposed road development by way of an application for judicial review, under Order 84 of the Rules of the Superior Courts (S.I. No. 15 of 1986).

(ab) The notice shall identify where practical information on the review mechanism can be found.

(b) inform the prescribed authority in Northern Ireland of his decision where a copy of the environmental impact statement was sent to it in accordance with subsection (3) (c).

(6A) A notice published by the Minister pursuant to *subsection* (6) shall indicate the times at which, the period during which and the place where a copy of the decision and the relevant environmental impact statement may be inspected.

(7) (a) The person conducting—

(i) a public local inquiry under section 49, or

(ii) a local inquiry in relation to a bridge order under section 47 of the Act of 1946, or

(iii) a public local inquiry in relation to the compulsory acquisition of land, which relates wholly or partly to a proposed road development in respect of which a road authority has applied for an approval under this section shall be entitled to hear evidence in relation to the likely effects on the environment of such development.

(b) Where an application for approval under this section relates to a proposed road development, and

(i) a scheme submitted to the Minister for approval under section 49, or

(ii) an application submitted to the Minister for a bridge order under the Act of 1946, or

(iii) a compulsory purchase order submitted to the Minister for confirmation, relate wholly or partly to the same proposed road development, the Minister shall make a decision on such approval and on the approval of such scheme or the making of such bridge order or the confirmation of such compulsory purchase order at the same time.

(8) (a) The European Communities (Environmental Impact Assessment) (Motorways) Regulations, 1988 (S.I. No. 221 of 1988) are hereby revoked.

(b) The European Communities (Environmental Impact Assessment) Regulations, 1989 (S.I. No. 349 of 1989) and the Local Government (Planning and Development) Regulations, 1990 (S.I. No. 25 of 1990) shall not apply to proposed road development.

(9) Where the Authority makes an application for approval under subsection (2) references to road authority in *subsection* (3) and its following provisions of this section in respect of the application are to be read as references to the Authority.

27. None of this is easy to construe. There are a multiplicity of provisions coming from disparate sources. This is even more especially so as there is, as has been argued on behalf of Kerry County Council, an obligation on An Bord Pleanála to have regard to the policies and objectives of public authorities. Section 143 of the Act, 2000, as substituted by s. 26 of the Planning and Development (Strategic Infrastructure) Act, 2006, reads:

(1) The Board shall, in performing its functions, have regard to—

(a) the policies and objectives for the time being of the Government, a State authority, the Minister, planning authorities and any other body which is a public authority whose functions have, or may have, a bearing on the proper planning and sustainable development of cities, towns or other areas, whether urban or rural,

(b) the national interest and any effect the performance of the Board's functions may have on issues of strategic economic or social importance to the State, and

(c) the National Spatial Strategy and any regional planning guidelines for the time being in force.

(2) In this section 'public authority' means any body established by or under statute which is for the time being declared,

by regulations made by the Minister, to be a public authority for the purposes of this section.

28. Returning to fundamental principles, the following emerges. Firstly, An Bord Pleanála has taken the place of the Minister in approving or refusing to approve road schemes. Secondly, in consequence, the authority of the Minister has become through statutory amendment confined to matters of general direction to local road and urban authorities and is not concerned with the impact of the road on the environment or whether the necessary consultations have taken place and the necessary enquiries have been drawn up or whether the needs of all road users have been considered or whether the policies of statutory bodies have been also considered. Thirdly, in considering whether a road ought to be approved or not, the Board must have regard, as a matter of statute, to whether the road authority applying has fulfilled its statutory responsibilities. In this regard, the responsibility of the local roads authority under s. 13(5) of the Roads Act of 1993, as amended, is most relevant. Such an authority is obliged in formulating a scheme for a road to "consider the needs of all road users." That includes bicyclists and pedestrians. Even was that not to be the case, s. 143 of the Act of 2000, as amended, obliges the Board to have regard to the policies and objectives of statutory bodies. It cannot reasonably be argued that a policy of Government can be excluded from this imperative. Even less tenable is any argument that a statutorily mandated requirement to have regard to the needs of all road users could be ignored. Though expressed in statutory terms, it is the unequivocal policy of the Government, and of the Oireachtas as declared through legislation, that roads should be maintained and constructed in consideration not simply of cars, commercial vehicles and buses, but of all road users. This means that the needs of cyclists and pedestrians must also be included for the proper formulation of plans.

29. An argument of Kerry County Council which is merely additional, in that regard, is that the Department of Transport supported the inclusion of cycleways, at least to some degree, in 'Smarter Travel: A Sustainable Transport Future, 2009' and more pertinently and in explicit terms in the report of the national tourism authority in 'Strategy for the Development of Irish Cycle Tourism, 2007'. That is correct. But, the much stronger position is that the needs of cyclists and pedestrians must be considered in all road planning. That is a clear statutory imperative. There is no evidence at all that in regard to the decision of An Bord Pleanála of the 4th September 2013 refusing this road proposal, or in its explicit direction to Kerry County Council to remove cycleways from the proposal by its letter of the 7th November, 2012, that these considerations played any part in this process. Rather, there is strong evidence that an appropriate consideration was excluded. Furthermore, it is worth noting that 5.2 km of this proposed route already has a fenced off cycleway. This section of roadway as so constructed was regarded as relatively unobtrusive in the report of the trip by the Board member to West Kerry. Moreover, while the argument by Kerry County Council that mistakes were made by the inspector has been overplayed as to the effect on width of the road by the removal of the cycleways, perhaps 4 metres are being saved by excluding consideration for cyclists from a potential width of 28 metres while a two way off road cycleway, such as exists for a 5 km stretch already, allows a saving of 1.5 metres. What is important in road safety terms is to keep speeds low and to avoid bicycles and pedestrians crossing the carriageway. Car drivers play little heed to warning signs. Similarly overplayed was the argument by Kerry County Council that no regard was had at all to alternatives to cyclists using this national route in going from Tralee to An Daingean. Certainly, the inspector mentions this in his report. In that report a determined expression is made that the cycle route should be gotten right from the very beginning. The alternative green way type of solution is regarded as better by the inspector. But, in terms of reality, it is not legally tenable to construe the labyrinthine interactions between the Planning and Development Acts and the Roads Acts as enabling An Bord Pleanála to grant permission but only on the basis that an alternative exclusive cycling and pedestrian way is constructed. That seems to this Court to be outside the competence of the Board in terms of any condition that might be attached to the grant of permission because, under the Roads Acts, that express function is that of the local roads authority. Clearly, that was not done by the Board. The crucial problem here was the exclusion of consideration for cyclists. The point is not essential to the decision and is only mentioned because it was thrown into the mix.

30. There was therefore a failure by An Bord Pleanála to consider the needs of cyclists and pedestrians in turning down a road scheme which made express provision for them in accordance with an appropriate National Roads Authority model for this type of highway. Even were that not the case, there is no evidence which supports the contention that regard was had by An Bord Pleanála to the strategy of the Government in regard to cyclists, as expressed in legislation or of the responsible plans of statutory bodies.

31. The other points argued at length are not necessary to the Court's decision. Only the point just decided was of any merit at all.

Conclusion

32. The complexity of the relevant legislation has made the task of An Bord Pleanála in relation to road planning authorisation and refusal very difficult indeed. The time line in this case shows, however, the care exercised by both Kerry County Council and An Bord Pleanála in discharge of their tasks. A submission was made as far back as the 22nd November, 2011, for the road improvement scheme. Section 182E of the Act of 2000, which allows for structured consultations, is applicable only to gas and electricity applications. As to the unusually complex burden which An Bord Pleanála has been required to assume in road approval cases, section 217B allows the Board to request further submissions from any person who has already communicated as such "or any other person who may … have information which is relevant" and enables it to hold meetings with the road authority "or any other person". In that respect, a written record of such meeting must be kept and must be made available on the planning file. In cases requiring an environmental impact statement, such meetings probably are suspected as giving rise to a new range of problems in cases in which multiple challenges are invariably part of the legal landscape. Nonetheless, a formal mechanism of consultation is built into the legislation. In future, it may assist in permeating this unique burden of competence through competing legal sources. No such consultation, however, ever has the competence in law to fetter the discretion of An Bord Pleanála but might, however, help in the search for a way forward in similar road approval cases where road authorities and An Bord Pleanála are working towards the protection of cyclists and pedestrians in making provision for highway use. As previously noted, the Board did exercise its functions under section 217 B(4) in suggesting alterations, and as the legislation makes clear, where the Board expresses that it is "provisionally of the view that it would be appropriate to approve the scheme" were those alterations to be made, such a provisional view cannot bind the Board.

33. In the light of the findings made, the decision to refuse is quashed and the matter is remitted. Neither party has sought leave to appeal. Neither party has sought costs.