

**THE HIGH COURT
JUDICIAL REVIEW**

RECORD NO. 2003 No. 184 JR

**PAUL CLINTON
AND
AN BORD PLEANÁLA
DUBLIN CITY COUNCIL
AND, BY ORDER, THE ATTORNEY GENERAL**

RESPONDENTS

**AND
RICHARD QUIRKE
DUBLIN POOL AND JUKE BOX COMPANY LIMITED
BAYCROSS DEVELOPMENTS LIMITED
CARROLLS OF DUBLIN LIMITED
COLM CARROLL
REGAN DEVELOPMENTS LIMITED
DANIEL TROY AND CHRISTOPHER TROY TRADING AS TROY BROTHERS
DOYLES STORES LIMITED
F.X. BUCKLEY LIMITED
STEPHEN ROSS TRADING AS INDUSTRIA
SIMON HART LIMITED
JOHN CORCORAN
JAMES COUSINS LIMITED
MARTINA INVESTMENTS LIMITED
PETER SLATTERY LIMITED**

NOTICE PARTY

Judgment of Finnegan P. delivered on the 15th day of March 2005

1. The issues in this matter were litigated between the Applicant and the Respondents the Notice Parties, having appeared, taking no active part in the proceedings.
2. This application concerns an extensive site at the northern end of O'Connell Street on its western side extending to the west to Moore Street, to the north to O'Rahilly Parade and to the south to Henry Place. The most prominent building within the site is the Carlton Cinema which fronts onto O'Connell Street. In February 1998 Dublin Corporation published an Integrated Area Plan for O'Connell Street. All of the site with which I am concerned is affected by the proposals contained in that Plan and in particular those in relation to Site Cluster 1 thereof. In short the Plan envisaged an integrated and comprehensive redevelopment of the area with the aid of tax incentives. Beginning in the early 1990s the Applicant with other parties assembled a site of some forty properties within Site Cluster 1 and obtained planning permission in respect thereof by decision dated 4th August 1999 of An Bord Pleanála. Included in the planning permission were premises occupied by Dublin County Council which are outside Site Cluster 1. On the 11th December 2001 the second named Respondent Dublin City Council made a Compulsory Purchase Order in respect of all the lands comprised within the planning permission save and except premises 58 Upper O'Connell Street. The Compulsory Purchase Order was confirmed by An Bord Pleanála on the 17th January 2003 but omitted from the same were the premises occupied by Dublin County Council and No. 57 Upper O'Connell Street. In these proceedings the Applicant seeks to impugn the Compulsory Purchase Order on both non constitutional and constitutional grounds.

The Non Constitutional Grounds

3. On day 14 of the hearing before me Counsel for the Applicant set out five specific grounds which had crystallised in the course of the hearing and upon which it is claimed the Applicant is entitled to relief. The five grounds are as follows:-
 1. The Order of An Bord Pleanála confirming the Compulsory Purchase Order made on the 17th January 2003 is invalid on its face having failed to deal with the Applicant's application for costs pursuant to section 219 of the Planning and Development Act 2000 and an application by the Applicant for the production of documents pursuant to section 135(5)(ii) of the Planning and Development Act 2000.
 2. The said Compulsory Purchase Order is invalid in that it fails to state fully or accurately the purposes for which the same is being made.
 3. The said Compulsory Purchase Order is invalid and ultra vires in that it fails to set out any or any adequate reasons for the decision of An Bord Pleanála and in particular reasons for those components of the decision where An Bord Pleanála departed from the recommendation and reasoning of its Inspector.
 4. The said Compulsory Purchase Order is invalid on its face in that it was confirmed for a purpose other than the purpose for which the Compulsory Purchase Order under appeal had been made.
 5. The said Compulsory Purchase Order is invalid the same having been confirmed without evidence being adduced by Dublin City Council. In consequence the Applicant was unable to test the manner in which the general statutory purposes identified in the Compulsory Purchase Order and supporting documents was to be achieved. Further An Bord Pleanála was without evidence as to the manner in which the general statutory purposes identified in the Compulsory Purchase Order and the supporting documents was to be achieved.
4. In dealing with this issue Counsel for the Applicant sought to argue that the Order of An Bord Pleanála was bad: the Compulsory Purchase Order relied on a statutory purpose within section 212 of the Act of 2000 while An Bord Pleanála relied on a section 213 statutory purpose. Counsel on behalf of An Bord Pleanála objected that the same did not come within the grounds of relief relied upon by the Applicant in respect of which leave was granted and in particular Ground 22. Ground 22 is as follows:-

"22 The confirmed Compulsory Purchase Order is bad in law and/or exhibits an error of law on the face of the record in that it fails to fully and accurately state the particular purpose for which the land is required. In this regard the Applicant will rely *inter alia* on the provisions of the Housing Act 1966 (Acquisition of Land) Regulations 2000 (S.I. No. 454 of 2000) and the provisions of Third Schedule of the Housing Act 1966. (See also section 213(4) of the Planning and Development Act 2000 adapting the provisions of section 10 (as amended by section 86 of the Housing Act 1966) of the Local Government (No. 2) Act 1960). The Applicant will also rely on their being a general requirement at law, given the

draconian nature of a power to compulsory acquisition, that a confirmed compulsory order show jurisdiction on its face. In short the Compulsory Purchase Order gave as its purpose "for development purposes". The Order of An Bord Pleanála gave as its purpose "the purposes of facilitating the implementation of the Dublin City Development Plan and that the said objections cannot be sustained against the said necessity".

5. Counsel for Dublin County Council supported the objection.

6. I have carefully considered the Statement to Ground an Application for Judicial Review and the Affidavits supporting the same. I can find nothing therein clearly to put the Respondents on notice of this issue. While the Affidavits filed refer to the purposes set out in An Bord Pleanála's decision they do so in the context of failure to state a particular purpose. The difference in wording between the purpose set out in the Compulsory Purchase Order and the decision of An Bord Pleanála is not alluded to. I am satisfied that the objection is well founded. Accordingly I propose to deal with each of the four remaining non constitutional issues identified in turn.

The First Issue

A. Costs

7. The Planning and Development Act 2000 section 219 provides as follows –

"219(1) Where an oral hearing is held under section 218, the Bord may in its absolute discretion direct the payment of such sum as it considers reasonable by a local authority concerned in the oral hearing –

(a) to the Bord towards the costs incurred by the Bord in holding the hearing,

(b) to any person appearing at the hearing as a contribution towards the costs, other than the costs referred to in section 135, incurred by that person and the local authority shall pay that sum."

8. An application for costs was made on behalf of the Applicant and that application was not dealt with in the decision of An Bord Pleanála. Counsel for the Applicant rightly points out that the discretion conferred upon An Bord Pleanála where an application for costs is made is to grant or deny costs but that it has no statutory power to ignore the application.

9. The practice of An Bord Pleanála appears from the Affidavit sworn on its behalf by Ellen Morrin on the 3rd July 2003 at paragraph 19 thereof. She acknowledges that An Bord Pleanála has not yet made any determination on the application for costs and deposes that it is the general practice of An Bord Pleanála to defer making any decision on the question of costs until after the expiration of the period during which the Bord's substantive decision may be challenged by way of Judicial Review. While she does not say so I take it to be the case that if Judicial Review proceedings are instituted An Bord Pleanála defers its determination on the issue of costs until the final disposition of the same. However the decision of An Bord Pleanála does not record that its decision on the issue of costs has been adjourned: it is silent on the issue.

10. Counsel for An Bord Pleanála argues that the course adopted is a prudent one as should the Judicial Review application succeed it might well fall to An Bord to reconsider the Compulsory Purchase Order and in that sense in giving its decision on the appeal An Bord Pleanála is not functus officio. Should this occur An Bord Pleanála could then exercise its discretion in the light of all the circumstances then appertaining.

11. Section 219 does not expressly authorise An Bord Pleanála to defer or adjourn the exercise of its discretion in relation to costs to abide events outside the hearing with which it is dealing. I am satisfied that it has no such power and in doing so acted ultra vires. It is not necessary for me to decide whether An Bord Pleanála has power to adjourn its decision on costs in order to review matters directly appertaining to the appeal before exercising its statutory discretion. There are it seems to me good practical reasons why a decision on costs should not be unduly deferred. An objector attending before an enquiry could incur very substantial costs indeed as no doubt was the case here and it is appropriate that if he is to be reimbursed pursuant to section 219 that this should occur promptly. Again an objector advised that he has good grounds for applying for Judicial Review might be deterred from incurring the expense of so doing by uncertainty as to whether he will recoup any of the costs which he incurred in pursuing his objection. Indeed he might consider that the deferral holds over him in terroram the possibility of an adverse decision on his application for costs should he choose to apply for Judicial Review and so be dissuaded from so doing. By analogy with the practice of the Courts the discretion as to costs must be exercised judicially and in relation to reasons connected with the case: thus it would be an improper exercise of the discretion to exercise it on the ground of some matter wholly unconnected with the hearing: *Campbell (Donald) & Co. Limited v Pollak* 1927 AC 732.

12. The relief sought by the Applicant is a declaration as to his entitlement to an Order pursuant to section 219 of the Act of 2000 and/or an Order of Mandamus: I will hear Counsel as to the appropriate terms of an Order to be made.

B. Documents

13. The Planning and Development Act 2000 section 135(5) provides as follows –

"(5)(a) Subject to paragraph (b), the Bord in relation to an oral hearing of any appeal or referral may, by giving notice in that behalf in writing to any person, require that person to do either or both of the following:

(i) To attend at such time and place as is specified in the notice to give evidence in relation to any matter in question at the hearing,

(ii) to produce any books, deeds, contracts, accounts, vouchers, maps, plans, documents or other information in his or her possession, custody or control which relate to any such matter."

14. The Inspector adjourned the oral hearing on its original start date of 16th April 2002 to enable the Applicant to be furnished voluntarily with relevant documents. Consequent on this seven folders of documents were made available to the Applicant through the Inspector. The oral hearing resumed on the 6th June 2002 when the Applicant requested a further adjournment and a direction from the Inspector under section 135 requiring Dublin County Council to produce further documents. Counsel on behalf of the Applicant sought information about any meetings which had taken place between Dublin City Council and any third party developer who might purchase the lands the subject matter of the CPO and also sought an adjournment. The information sought extended to discussions, correspondence, negotiations and minutes of such meetings which the Applicant was aware had taken place. The Inspector declined to adjourn the matter. He indicated that he proposed to proceed to hear evidence and expressed the view that the matters in respect of which further documentation had been sought could be raised in cross examination.

15. This issue is dealt with in the Applicant's Pleadings as follows. The Statement to Ground Application for Judicial Review at paragraphs E28 and 29 pleads as follows –

"28 In the context of the compulsory acquisition of land, an objector must be afforded a full and meaningful right to challenge the proposed order. This extends, where necessary, to the discovery and production of documents. The purpose of such production and discovery is to allow the objector to make a fair challenge as to whether the acquisition of the land was necessary or required.

29 An Bord Pleanála acted in breach of fair procedures and/or in breach of the requirements of natural and constitutional justice in failing to exercise its powers under section 135 of the Planning and Development Act 2000 (as applied by section 218(4)) to direct that the Local Authority produce all relevant documents."

Particulars

(i) As part of his written objection of the 25th January 2002 the Applicant had sought certain documents from the Local Authority. The initial reaction of the Local Authority was to state that it was under no legal obligation to provide such documents. Following further representations by the Applicant and a request under the Freedom of Information Act 1997 thereafter documents were disclosed on a drip feed basis. In particular very important documentation in relation to an existing policy of the Local Authority in relation to compulsory purchase powers was not disclosed until well into the oral hearing.

(ii) In the circumstances the Applicant had a concern as to whether or not even at that late stage all relevant documentation had been disclosed. In particular the Applicant knew from his own records that there were certain documents which would appear to be relevant to the oral hearing which had not been disclosed by the Local Authority. In the circumstances the Applicant requested that An Bord Pleanála exercise its powers under section 315 of the Planning and Development Act 2000 (as applied by section 218(4)) to direct that the Local Authority produce all relevant documents and that this should be done by way of an Affidavit of Discovery. In particular the Applicant was anxious to have sight of all documents relevant to any contacts between officials of the Local Authority and any other potential developer of the lands.

(iii) Notwithstanding demand having been made to it on behalf of the Applicant An Bord Pleanála failed or neglected to exercise its powers under section 135. An Bord Pleanála also failed to give reasons as to why it did not exercise this power. Further in the alternative this gives rise to the inference that An Bord Pleanála did not consider the Applicant's request in this regard properly or at all."

30. The Affidavit of the Applicant grounding the application sworn on the 13th March 2003 deals with the request for documents at paragraph 13 thereof. Correspondence between the Applicant's Solicitor and Dublin City Council is exhibited at Exhibit PC8.

31. The Applicant's Solicitor wrote to Dublin City Council on the 10th April 2002 in the following terms: –

"Dear Sirs,

We refer to the above and to our objection document, copy of which was furnished to yourselves on the 24th January last. As An Bord Pleanála propose to hold the oral hearing without undue formality and without proving documents in relation to the Compulsory Purchase Order we require that the queries set out in our objection document are discharged prior to the hearing. We note we sought replies in our letter to you of the 24th January last. Please let us have the following information on the basis that we will reciprocate:-

1. Details of the names and the position within Dublin City Council or otherwise and qualifications of all parties who will give evidence on behalf of Dublin City Council.
2. Copies of all documents which will be relied upon.
3. Names of all witnesses you propose to call.

I look forward to hearing from you.

Yours faithfully,"

32. The objection document is at Exhibit PC6. Contained within the same is a request for information in nine numbered paragraphs none of which relate to documents. Dublin City Council replied to the letter of the 10th April 2002 on the same day and dealt with each of the nine queries raised. On the 12th April 2002 the letter from the Applicant's Solicitor dated 10th April 2002 was replied to. The reply indicated the witnesses whom it was proposed to call and documents additional to those which had already been furnished which it was intended to produce: these were set out as follows:-

1. The O'Connell Street Integrated Area Plan together with details of the current planning permission on the site.
2. Minutes of the Monitoring Committee for the O'Connell Street I.A.P.
3. Book of photographs of the premises the subject of the CPO.
4. Booklet of correspondence with the Carlton Group.

33. The letter indicated that the documents were being assembled and would be forwarded as soon as this had been done. It appears from a letter dated 30th May 2002 from the Freedom of Information Officer that the documents had by that date been furnished to the Applicant's Solicitor. By letter dated 31st May 2004 the Applicant's Solicitor sought further documents being minutes of meetings and correspondence. Dublin City Council replied on the 5th June dealing with that request. That reply indicated that correspondence between Dublin City Council and the Applicant would not be furnished at that time, that some of the documents sought had already

been circulated to the Applicant and that some of the documents sought had been mislaid. The remaining documents sought were furnished.

34. The oral hearing commenced on the 16th April 2002. It appears from the Inspector's Report that the matter was adjourned on the application of Dublin City Council in the light of representations made by some of the objectors who were seeking to have particular information and documents made available to them, that the City Council was prepared to provide the information and documents and that the matter was adjourned to resume on the 5th June 2002: in fact the hearing resumed on the 6th June 2002. What transpired on that resumption is recorded by the Inspector as follows –

"Counsel on behalf of Mr. Clinton sought information about any meetings which had taken place between Dublin City Council and any third party developer who might purchase the land the subject of the CPO. This information would extend to discussions, correspondence, negotiations etc. Information was also sought in relation to minutes of meetings which were known to have taken place. The Inspector was invited to direct that unspecified documents be produced under section 135 of the Planning and Development Act 2000. The Inspector indicated that as he had not heard any evidence from any party he proposed to proceed to hear evidence when the objectors could raise the matter in cross examination or otherwise. The question of a further adjournment was raised but not conceded by the Inspector."

35. Again from the Inspector's Report it appears that on the third day of the oral hearing additional correspondence and documentation had just been made available by Dublin City Council and an objection with regard to discovery of documentation on that date was made on behalf of objectors (unspecified). An Affidavit on behalf of the City Council that no further documentation exists was sought. The documentation produced during the period of adjournment amounted to seven folders and required time to be considered. An application pursuant to the Planning and Development Act 2000 section 135(5) was made to the Inspector directed particularly to documentation in relation to discussions, meetings, contracts etc., between Dublin City Council and any potential or proposed developers of the land. The Inspector asked Counsel for Dublin City Council to consider the objections over the weekend. Following the weekend draft maps and reference books sought were made available. Dublin City Council continued to search for further documents which were being sought. The Inspector concluded that the documentation already furnished was sufficient to comply with the requirements of natural justice. The objection was repeated and it was submitted that documents relating to any contact between Dublin City Council and other potential developers were vital and while some documentation had been produced it appeared that further documentation may be available. The focus of the objection was on documents dealing with the reasons behind the making of the Compulsory Purchase Order.

36. The issue of documents was again raised before the Inspector in the course of the evidence given by witness Mr. McNamara: concern was expressed about delay in making documents available and of a large volume of documentation having been submitted quite late in the oral hearing, that the Inspector record submissions made on behalf of the Appellant in the course of closing submissions, that Nolan –v- Irish Land Commission requires that all documents be made available to allow objectors to make their case fully.

37. Further as the Applicant has identified documents missing from the file of Dublin City Council it may therefore be the case that other documents are missing. The Inspector was informed that an application was being made to An Bord Pleanála under section 135 of the Planning and Development Act 2000 in relation to possible missing documents.

38. The only further information available to me as to the request to be made to An Bord Pleanála pursuant to section 135 of the Planning and Development Act 2000 is contained in paragraph 81 of the Applicant's Affidavit: the request was made orally during the course of closing submissions to the Inspector and also included as part of the written outline legal submission submitted on his behalf. In paragraph 83 of the Grounding Affidavit the Applicant notes that his request for documents was not dealt with in the decision of An Bord Pleanála.

39. Having considered such evidence as is available to me in relation to the application for documents I am satisfied that the focus of the Applicant's request was to ascertain whether or not Dublin City Council had had discussions with other developers in relation to the development of the lands the subject matter of the CPO and the content of any such discussions.

40. My conclusions on this issue are as follows. The onus rests on the Acquiring Authority to satisfy An Bord Pleanála that the Compulsory Purchase Order should be confirmed. It is a matter for the objectors to establish the grounds of their objection. In this case Dublin City Council went to considerable length to supply the information and documents sought by the Applicant. I accept that this was done piecemeal and in some instances during the course of the oral hearing. Some documents were missing and could not be produced. These documents included correspondence and minutes of meetings. The Applicant's focus in requesting documents was on the possibility that meetings had taken place between Dublin City Council and alternative developers for the site the subject matter of the Compulsory Purchase Order. If such meetings did take place it has not been made clear to me that they are of relevance to the oral hearing and the determination of An Bord Pleanála: as will appear later in this Judgment the means by which the Acquiring Authority proposes to achieve the statutory purpose for which it has made a Compulsory Purchase Order are not relevant to the enquiry. Neither has it been made clear to me how the absence of documents worked an injustice or operated to deny natural justice to the Applicant. It was at all times open to the Applicant to invoke the Planning and Development Act 2000 section 135. The section envisages an application not to the Inspector but to An Bord Pleanála and the only applications relying on section 135 made on the evidence before me are oral applications to the Inspector on the 6th June 2002 and in the course of closing submissions: the oral hearing had commenced on the 16th April 2002 but was then adjourned to Thursday the 6th June but in fact commenced on the 7th June and then proceeded for a total of nine hearing days. While objection had been raised in relation to documentation during the course of the oral hearing if the documentation was truly relevant and appropriate to be introduced before the Inspector one would have expected a formal application pursuant to section 135 of the Act of 2000 to have been made to An Bord Pleanála (and not to the Inspector) in advance of or in the course of the hearing well in advance of the concluding submissions and no such application was made.

41. In summary the Applicant has not satisfied me as to either of the following:-

1. The relevance of the documents relating to discussions if any between Dublin City Council and other developers. In this regard there is a distinction between the purpose of the Compulsory Purchase Order and the means by which the purpose is to be achieved: the latter is not relevant to the enquiry.
2. That it pursued its request for documents in the appropriate manner by applying to An Bord Pleanála to exercise its powers under section 135 of the Planning and Development 2000.

42. The Applicant has not satisfied me that there was a denial of natural justice in the manner in which its requests for documents

were dealt with. Having regard to the manner in which the requests were pursued it would not have been appropriate for An Bord Pleanála to deal with the same in its decision: if an application was made to An Bord Pleanála its decision on that application would in the ordinary course be made and communicated independently of its decision on the Inspector's Report and normally one would expect in advance of the enquiry and its decision on such an application would be amenable to Judicial Review.

The Second Issue

43. The Applicant contends that the Compulsory Purchase Order is invalid in that it fails to state fully or accurately the purposes for which the same is being made. The Order of An Bord Pleanála recites that the Compulsory Purchase Order was made in pursuance of section 76 of and the Third Schedule to the Housing Act 1966 as extended by section 10 of the Local Government (No. 2) Act 1960 (as substituted by section 86 of the Housing Act 1966) and the Planning and Development Act 2000. Insofar as purposes are set out the Order of An Bord Pleanála it recites as follows –

“And whereas An Bord Pleanála has concluded that the acquisition by the local authority of the lands included in the Order is necessary for the purposes of facilitating the implementation of the Dublin City Development Plan and that the said objections cannot be sustained against the said necessity.”

44. The Compulsory Purchase Order itself gives as its purpose “development purposes”.

45. The background to the making of the Compulsory Purchase Order is set out in the Report of the Inspector at paragraph 3.6.1 as follows –

“The background to the making of the CPO is the desire of the Council to regenerate Dublin City. Integrated Area Plans are the vehicles used to secure regeneration. These are intended to facilitate private public investment in selected areas. The first of these was formulated in 1996 and included the west side of O'Connell Street. The HARP Plan (Historic Area Rejuvenation Plan) had set the scene for the O'Connell Street Integrated Area Plan which provides for the regeneration of O'Connell Street area and is expected to cost €60m. The Area Plan was accepted by the Council in 1998 and was effectively adopted in the 1999 Development Plan. The planning permission on the site the subject of the CPO was granted in 1999 to the Carlton Group. The permission appears to the City Council to be going nowhere. The urban regeneration of O'Connell has been held up and requires to be commenced and the City Council felt it had to resort to the compulsory acquisition of the site to secure its development. The inability of the owners to develop the site appears to be due to a division in the ownership and lack of experience in relation to development together with the lack of financial ability. The City Council had been waiting for the development to take place having given many warnings to the owners. In the absence of progress over a four year period the City Council decided to make the CPO.”

46. The O'Connell Street Integrated Area Plan considered O'Connell Street as important as the Champs Elysees in Paris or the Unter den Linden in Berlin and that it should be in itself an attraction in like manner to the great streets of other major cities. To achieve this required an integrated approach which is detailed in the Plan.

47. The Plan envisaged the creation of a route from O'Connell Street to Moore Street through Site Cluster 1 and the development of up to 50,000 square metres of mixed use development. The Dublin City Development Plan 1999 at paragraph 5.8.0 provides that it is a policy objective of the Planning Authority to implement an Integrated Area Plan for O'Connell Street and environs. Again under policies at paragraph 11.5.0 it is stated as a policy to implement the O'Connell Street Integrated Plan.

48. Statutory provisions relevant to the power to make a Compulsory Purchase Order are the following –

The Planning and Development Act 2000 section 212(1)

(1) A planning authority may develop or secure or facilitate the development of land and, in particular and without prejudice to the generality of the foregoing may do one or more of the following:

(d) Provide, secure or facilitate the provision of areas of convenient shape and size for development.

(e) secure, facilitate or carry out the development and renewal of areas in need of physical, social or economic regeneration and provide open spaces and other public amenities.

(3) A planning authority may, in connection with any of its functions under this Act, make and carry out arrangements or enter into agreements with any person or body for the development or management of land, and may incorporate a company for those purposes.

(4) A planning authority may use any of the powers available to it under any enactment, including any powers in relation to the compulsory acquisition of land in relation to its functions under this section and in particular in order to facilitate the assembly of sites for the purposes of the orderly development of land.

Section 213(1)

(1) The power conferred on a local authority under any enactment to acquire land shall be construed in accordance with this section.

(2)(a) A local authority may for the purposes of performing any of its functions (whether conferred by or under this Act, or any other enactment passed before or after the passing of this Act), including giving effect or facilitating implementation of its development plan or its housing strategy under section 94 do all or any of the following:

(i) Acquire land, permanently or temporarily, by agreement or compulsorily,

And the performance of all or any of the functions referred to in sub paragraphs (i), (ii) and (iii) are referred to in this Act as an “acquisition of land”.

(3)(a) The acquisition may be effected by agreement or compulsorily in respect of land not immediately required for a particular purpose if, in the opinion of the local authority the land will be required by the authority for that purpose in the future.

(b) The acquisition may be effected by agreement in respect of any land which in the opinion of the local authority it will require in the future for the purposes of any of its functions notwithstanding that the authority has not determined the manner in which or the purpose for which it will use the land.

(c) Paragraphs (a) and (b) shall apply and have effect in relation to any power to acquire land conferred on a local authority by virtue of this Act or any other enactment whether enacted before or after this Act.

4. A local authority may be authorised by Compulsory Purchase Order to acquire land for any of the purposes referred to in sub-section (2) of this section and section 10 (as amended by section 86 of the Housing Act 1966) of the Local Government (No. 2) Act 1960 shall be construed so as to apply accordingly and the reference to "purposes" in section 10(1)(a) of that Act shall be construed as including purposes referred to in section (2) of this section.

49. The Applicant contends that the purpose set out in each of them the Compulsory Purchase Order and in the Order of An Bord Pleanala is insufficient in that no concrete plan for the development of the lands to be acquired exists or is identified. Accordingly the land the subject of the CPO is "land not immediately required for a particular purpose" within the meaning of section 213(3)(b). The identification of a general statutory function, it is argued, is insufficient for the purposes of a Compulsory Purchase Order and the statute requires identification of a particular development otherwise land can only be acquired by agreement under section 213(3)(b) of the Act of 2000.

50. I am satisfied that the meaning to be ascribed to "particular purpose" in section 213(3)(b) is to be found in a consideration of section 213 of the Act of 2000 as a whole. Section 213(2) contains the phrase "for the purposes of performing any of its functions". Section 213(4) also refers to "purposes" in its reference to section 10(1)(a) of the Local Government (No. 2) Act 1960 section 10 as substituted by section 86 of the Housing Act 1966. "Purposes" in section 10 as substituted is part of a phrase – "purposes for which they are capable of being authorised by law to acquire land compulsorily". It is clear that in section 213(1) and (4) of the 2000 Act and section 10 of the 1960 Act "purposes" refers to statutory purposes and not as is suggested by the Applicant to a particular scheme of development intended to be pursued that is to means of achieving the statutory purpose. I can find no indication that the phrase "particular purpose" in section 213(3) should be accorded any different meaning than statutory purpose and I am satisfied that the same refers to a particular statutory purpose. I am fortified in this view by the circumstance that section 213(3)(b) clearly distinguishes purpose and means.

51. Section 213(3)(b) provides in relation to land which in the opinion of the local authority it will require in the future for the purposes of any of its functions the same can be acquired by agreement notwithstanding that the authority has not

(a) determined the manner in which it will use the land or

(b) the purpose for which it will use the land.

52. The Applicant's contention is that as there is no concrete plan for the development of the site it is not required for a particular purpose and therefore can only be acquired under section 213(3)(b) by agreement. For this argument to succeed it seems to me that it would be necessary to read into the provisions of section 213(3)(b) the words "the particular" and thereby alter the meaning of purpose in that provision.

53. The Applicant further argues that by providing in section 213(3)(b) that there is no requirement for a purpose for which the Acquiring Authority will use the land suggests that such a purpose is necessary if compulsory purchase powers are to be exercised. I do not find support for the Applicant's argument in section 213(3)(b) which enables an authority to acquire lands which it will require in the future by agreement, in effect to create a land bank, notwithstanding that it has not determined how it will use the land or for which of its statutory purposes it will use the land. If the legislature required that a Compulsory Purchase Order in addition to stating the statutory purpose it is necessary to state the manner in which the same will be achieved in relation to lands to be compulsorily acquired it would have said so in section 213(2) by referring in addition to the purposes of performing any of its functions expressly referring to the manner in which the land would be used for the purposes of performing any of its functions and the legislature have not done so.

54. In urging on me the construction for which the Applicant contends Counsel relied upon the Constitution Article 43.1 and 40.3.3 in relation to the rights to private property and the history and development of the law in relation to compulsory purchase as exemplified in cases prior to the enactment of the provisions with which I am concerned. I readily accept that the making of a Compulsory Purchase Order is an interference with an objector's constitutionally protected rights. Again I accept as a correct statement of the law a passage from Kelly The Irish Constitution (Fourth Edition) para 7.7.88 –

"As an important preliminary point, it is submitted that it follows from Article 43.1 that compensation cannot validate an interference with property rights that is not justified by the exigencies of the common good. Any other view would mean that Article 43 merely guarantees a right to compensation rather than a right to property per se."

55. The balancing of the constitutional right and the exigencies of the common good is a matter for An Bord Pleanala. I accept the comments of Budd J. in *An Blascaod Mór v Commisisoners of Public Works (No. 3)* Unreported 27th February 1998 as a correct statement of the law as to the approach which An Bord Pleanala should take in considering a Compulsory Purchase Order where he stated –

"The word "exigencies" has a connotation of more than useful and, "reasonable" or "desirable"; it means "necessary" and implies the existence of a pressing social need. The notion of necessity is linked to that of a democratic society. A measure cannot be regarded as necessary in a democratic society, based on tolerance and broad mindedness, unless it is proportionate to the legitimate aim being pursued."

56. However the exhibits before me satisfy me that in this case at the public enquiry there was ample evidence before the Inspector to enable the Inspector in his Report and An Bord Pleanala in reaching its decision to carry out the appropriate balancing exercise and have regard to proportionality and there is nothing to suggest that they did not do so. Had this not been done a remedy in Judicial Review would be available. Having regard to the statutory provisions which provide for a public enquiry at which both the exigencies of the common good and proportionality can be addressed (and if not properly addressed the availability of access to the Courts) I do not accept the Applicant's argument that it is incumbent on the Court to construe section 213 and the word "purposes" as requiring a specific development as opposed to a particular statutory purpose to be stated as the reason for the Order confirming a Compulsory

Purchase Order.

57. Further as I am satisfied that the construction of section 213 is clear it would be inappropriate to have regard to the cases cited dealing with earlier and different statutory provisions which conferred powers of compulsory acquisition.

58. In summary I am satisfied that section 213 in referring to "purposes" refers to statutory purposes and that accordingly the purpose set forth in the Order of An Bord Pleanala sought to be impugned is sufficient.

59. Further I am satisfied that "purpose" having that meaning the land the subject matter of the CPO is required for a present purpose – that of development and not for a future indefinite purpose as envisaged by section 213(3)(b).

The Third Ground

60. The Order of An Bord Pleanala excluded plots 1, 2, 11 and 12 from the Compulsory Purchase Order as confirmed. Further parts of Moore Lane to the rear of plots number 1, 2, 11 and 12 were omitted from the proposed extinguishment of the right of way over part of Moore Lane.

61. The reason given in respect of the first exclusion is as follows –

"Reason: the plots in question are not considered necessary to facilitate the implementation of the Dublin City Development Plan".

62. The reason given in respect of the second exclusion is as follows –

"Reason: in order to allow continued access to the rear of properties not part of the Compulsory Purchase Order as confirmed".

63. Plot 1 is Fingal County Council Offices and Plot 2 an adjoining site and which are situate to the north of the lands comprised in the Compulsory Purchase Order each extending from O'Connell Street to Moore Lane. Plot 12 is an ESB substation situate to the rear of plot 1 and fronting on to Moore Lane. Plot 11 is No. 57 O'Connell Street and is to the south of that part of the lands comprised in the CPO stretching from O'Connell Street to Moore Lane.

64. I fully accept that there is an obligation on An Bord Pleanala to give reasons. Counsel for the Applicant in argument accepted that where An Bord Pleanala endorses the decision of the Inspector any want in particularity in the reasons given can be supplied by reference to the reasoning process in the Inspector's Report. However it is argued where the Inspector's Report is not accepted then reasons for the divergence must be furnished. In this case the Inspector's Report has not been accepted. The Report at paragraph 5.0 recommends as a reason for the Board's decision –

"It is considered that the Compulsory Acquisition of the lands would:-

(a) secure the early development of the lands,

(b) ensure that any such development would be in accordance with the proper planning and sustainable development of the area.

65. The reason given by An Bord Pleanala was as follows –

"An Bord Pleanala has concluded that the acquisition by the Local Authority of the lands included in the Order is necessary for the purposes of facilitating the implementation of the Dublin City Development Plan and that the said objections cannot be sustained against the said necessity".

66. In relation to Moore Lane the Inspector's recommendation as to the schedule to the Order is as follows –

"Prior to the making of an Extinguishment Order by Dublin City Council an alternative servicing arrangement (in place of the existing public right of way) shall be agreed between the objecting parties as represented at the Oral Hearing and Dublin City Council or, in default of agreement should be determined by An Bord Pleanala.

Reason: It is considered reasonable to make provision for an alternative servicing arrangement."

67. The Order made by An Bord Pleanala was in the following terms –

"Those parts of Moore Lane to the rear of plots numbers 1, 2, 11 and 12 shall be omitted from the proposed extinguishment of the public right of way over part of Moore Lane.

Reason: In order to allow continued access to the rear of properties not part of the Compulsory Purchase Order as confirmed."

68. The Applicant argues that An Bord Pleanala cannot call in aid the Inspector's Report to expand upon the reasons given where the same differ from those recommended by the Inspector. In support of this the Applicant relies upon *Ni Eili v EPA* Supreme Court Unreported 30th July 1999 and *O'Keeffe v An Bord Pleanala* 1993 1 I.R. 39. The Applicant refers first to a passage in *O'Keeffe* at page 61 taken from *The State (Creedon) v Criminal Injuries Compensation Tribunal* (1988) I.R. 51 and cited with approval –

"I feel I should add that for a Tribunal of this nature even though it is not of statutory origin and was set up by an administrative decision by the Government, to reach a conclusion rejecting in full the claim of the Applicant before it and not to give any reason for that rejection is not an acceptable and proper form of procedure.

Once the Courts have a jurisdiction and if that jurisdiction is invoked, an obligation to enquire into and if necessary, correct the decisions and activities of a Tribunal of this description, it would appear necessary for the proper carrying out of that jurisdiction that the Court should be able to ascertain the reasons by which the Tribunal came to its determination. Apart from that, I am satisfied that the requirement which applies to this Tribunal, as it would to a Court, that justice should appear to be done, necessitates that the unsuccessful applicant before it should be made aware in general and broad terms of the grounds on which he or she has failed. Merely, as was done in this case, to reject the

application and when that rejection was challenged subsequently to maintain a silence as to the reason for it, does not appear to me to be consistent with the proper administration of the functions which are of a quasi judicial nature.”

69. In *O’Keeffe An Bord Pleanála* was advised by its Inspector to refuse permission but rejected that advice. The reason for its decision given was that the proposed development would not be contrary to the proper planning and development of the area.

70. The Supreme Court however on appeal held that the expert evidence in the Reports before the Board contained ample material on all issues as to the proper planning and development of the area which would justify rejection by the Board of the Report’s conclusions and that the Board’s decision as notified coupled with the detailed conditions attached to the decision and the reasons for each condition constituted an adequate discharge of the Board’s statutory duty to state the reasons for its decision. While Costello J. held that the decision was ultra vires upon the basis that there were no minutes or other documents to enable a Court to be apprised of the reasons for the decision not to accept the Inspector’s recommendation the Supreme Court did not. Finlay C.J. at page 76 said –

“Firstly I am satisfied that there is no substance in the contention made on behalf of the Plaintiff that the Board should be prohibited from relying on a combination of the reasons given for the decision and the reasons given for the conditions together with the terms of the conditions. There is nothing in the statute which would justify such a rigid approach and it would be contrary to common sense and to fairness. What must be looked at is what an intelligent person who had taken part in the appeal or had been apprised of the broad views which had arisen in it would understand from this document, these conditions and these reasons. Approached in that way I am satisfied that the entire of this document sufficiently identifies the reasons by which the Board reached their decision to grant the particular planning permission subject to the particular conditions.”

71. It seems to me that while the decision in *O’Keeffe* was based on the reason given in the permission and the conditions attached the same reasoning applies where as here the Applicant has taken part in the appeal and is fully aware of the issues which had arisen. In this case it is common case that central to the hearing were a number of matters –

1. The desire of Dublin City Council that the area in question should be developed.
2. The concern that the Applicant would be unable to develop pursuant to the planning permission whether by reason of lack of expertise, lack of funds or non availability of the entire site the subject matter of the planning permission.
3. At the hearing the Development Plan and the Integrated Area Plan (one of the objectives of the Development Plan) were widely canvassed. On reading the evidence led before the hearing by Dublin City Council it was clearly open on that evidence to arrive at the reason given by An Bord Pleanála. When one compares the reason given by An Bord Pleanála with those suggested by its Inspector and acknowledging fully the difference in phraseology I am not satisfied that there is any difference in substance between the two. Can there be any difference in substance between ensuring that the redevelopment of the lands would be in accordance with proper planning and sustainable development of the area and facilitating the Dublin City Development Plan?

72. The other difference is that the Inspector recommended as a reason that the Compulsory Purchase Order would secure the early redevelopment of the lands. The assessment of the Inspector was that there were many obstacles to this being achieved by the Applicant: see paragraph 4.7 of the Inspector’s Report. The planning permission which has been obtained could not now be built on as the owner of the Fingal County Council premises did not then wish to be part of the project for which planning permission had been obtained. Notwithstanding considerable progress having been made by the Applicant in advancing his project such advancement could not occur without a development partner and the Applicant had been unable to procure one. The Inspector identified an urgent and identifiable need to redevelop the lands in whole or in part and concluded that given the key and critical location of the site with frontage on O’Connell Street it is imperative that early development of the site should occur and as the landowners appear to be unable to secure such development in a reasonable or indeed any timescale he recommended confirmation of the Compulsory Purchase Order. Thus while in his recommendation of reasons the Inspector referred to the reasonable rather than to any timescale his assessment encompassed both. On considering the Report it was open to An Bord Pleanála to focus on the assessment that development could not be secured in any timescale in which event they were entitled to disregard the suggested reason based on delay.

73. It seems to me therefore that in considering the reason given the Court is entitled to have regard to the documents before An Bord Pleanála. The Court may have regard to the fact that the Applicant was actively involved in the enquiry and fully aware of the matters there canvassed and had made available to him the Report of the Inspector. In these circumstances I am satisfied that the reasons given insofar as there is any substantive difference between the recommendation of the Inspector as to reasons and the reasons actually given both are justified by the assessment of the Inspector. In these circumstances following the approach adopted by Murphy J. in *Ni Eili v the Environmental Protection Agency* and having regard to the Inspector’s Report as was done in that case An Bord Pleanála were entitled to conclude that development of the lands in question could not take place by the Applicant and not to adopt the Inspector’s suggestion based on delay. In these circumstances I am satisfied that the reasons given by An Bord Pleanála when read in conjunction with the Inspector’s Report are sufficient. While Counsel submitted that in the *Ni Eili* case the Report of the Inspector was adopted it was not in fact adopted in total in that there was an extension to the suggested compliance date for lower emission limit values.

74. The Applicant raises a further point. In effect this is the point sought to be raised as the Fourth Issue. On objection by the Respondents I ruled that the same did not come within the grounds in respect of which leave was given. In short the statutory purpose of the Compulsory Purchase Order was a statutory purpose within section 212 of the Planning and Development Act: the statutory purpose for which the Compulsory Purchase Order was confirmed is a section 213 purpose – see section 213(2). *Proctor & Gamble Limited v Secretary of State for the Environment and Others* 63 P & CR 317 is authority for the proposition that a Compulsory Purchase Order made for one purpose cannot be confirmed for another. The purpose given in the Compulsory Purchase Order is “for development purposes”: this would appear to relate to section 212(1)(d)(e).

75. The Applicant relies as authority on *Proctor & Gamble Limited v Secretary of State for the Environment & Others* 63P and CR 317. A very large area to the east of Newcastle on Tyne was designated as an urban development area and the Tyne and Weir Development Corporation was constituted the Planning Authority for the area. The Planning Authority made a Compulsory Purchase Order for an area of twelve acres part of the urban development area and within which was a property owned by Proctor & Gamble Limited which fronted onto City Road. The Planning Authority held a competition for proposals for redevelopment. The winning proposal received planning permission. The Planning Authority made a Compulsory Purchase Order “for the purpose of securing the regeneration of part of the Tyne and Weir development area” and subsequently issued a statutory statement of reasons which was served on the

objectors. There was no statement of any need to widen City Road or to take any part of the land of Proctor & Gamble Limited for that purpose. Following the making of the Compulsory Purchase Order the local Highway Authority made objections to the highways aspect of the developer's proposal and the Tyne and Weir Development Corporation agreed that part of the land to be acquired would be made available for the purposes of improving City Road. Proctor & Gamble Limited objected to the Compulsory Purchase Order and a public enquiry was held. The Inspector found that the road improvements were reasonably necessary to secure the regeneration of the area in that they were the subject of detailed negotiations and agreement between the Tyne & Weir Development Corporation and Newcastle City Council. Proctor & Gamble Limited applied to have that part of the Order which affected their lands quashed on the grounds that the Order was confirmed for a purpose different from or additional to that for which it was made namely for a scheme of highway improvement to facilitate the development of sites within the urban development area. The decision on the application is dealt with in the head note to the Judgment in the following terms –

"Held, dismissing the appeal, a Compulsory Purchase Order which had been made for one purpose could not lawfully be confirmed for another purpose or for a purpose additional to that for which it was made. It was necessary, therefore, to identify the actual purpose for which the Order had been made. On the facts of the present case, the purpose for which the Order was made was the regeneration of East Quayside area which was within the scope of the statutory power given to the Development Corporation. It was not made for the purpose of implementing the scheme for which planning permission was given. The Inspector had concluded that the highway improvements were necessary to achieve the regeneration of East Quayside. The purpose for which the Order was confirmed, namely the regeneration of East Quayside was therefore the same as that for which the Order had been made, although the means by which that purpose was now to be achieved namely by the highway improvements had changed between the making of the Order and the confirmation of the Order. It followed that the Order was lawful as it was confirmed for the purpose for which it was made and the highway improvements scheme was not an irrelevant consideration. There was ample evidence before the Inspector on which he could come to the conclusion that the highway improvements were necessary for the regeneration and that the Highway Authority would oppose the Order unless they were made. Further the Local Government Planning and Land Law Act 1980 empowered the Urban Development Corporation to acquire land compulsorily within its area for the purpose of securing the regeneration of part of its area. The greater includes the less."

76. In applying the decision in *Proctor & Gamble Limited* it is necessary first of all to look at the purpose stated in the Compulsory Purchase Order, the reasons recommended by the Inspector and the reasons given by An Bord Pleanála. The purpose stated in the Compulsory Purchase Order is "for development purposes". The reasons recommended by the Inspector are as follows namely two

- Secure the early development of the lands.

- Ensure that any such development would be in accordance with the proper planning and sustainable development of the area.

77. The reasons given by An Bord Pleanála is for the purpose of facilitating the Dublin City Development Plan.

78. In determining this issue it is appropriate to have regard to all the material which was before the Board and which is contained in the Inspector's Report: this approach which was adopted in *Proctor & Gamble Limited* is in accordance with the decision of the Supreme Court in *O'Keeffe v An Bord Pleanála* 1993 1 I.R. 41.

79. Mann J. in the course of his Judgment at page 324 said –

"Despite the absence of authority I have no hesitation in thinking that a Compulsory Purchase Order made for one purpose cannot lawfully be confirmed for another purpose or for a purpose additional to that for which it was made. Confirmation is the ratification by the Confirming Authority of what the Acquiring Authority have resolved to do."

80. Again at page 325 in dealing with the decision in *Mearvale Builders Limited v Secretary of State for the Environment* (1978) 36 P & CR 87 at p95 he said –

"The decision shows that the Courts can look behind the express purpose of both making and confirming an order to identify on the evidence the actual purpose which axiomatically must be one within the purpose for which the power to make and confirm is granted."

81. Mann J. rejected a submission on behalf of Proctor & Gamble that as a matter of law the purpose must be not merely within but must also be the same as that for which the power is conferred regardless of the purpose promoted by the Acquiring Authority. He then identified the task which faced him namely to determine whether the purpose of the Compulsory Purchase Order was the regeneration of part of the Tyne and Weir urban development area or the implementation of the scheme for which planning permission was granted. If the latter was the purpose then Proctor & Gamble Limited would succeed because the widening of City Road was incompatible with the approved layout. His finding was in effect that the purpose of the Compulsory Purchase Order had not changed but between the making and confirmation the means of achieving the expressed purpose had changed from the approved scheme of development to road improvement.

82. In this jurisdiction in *Crosby v Custom House Dock Development Authority* 1996 2 I.R. 533 the same approach was adopted in that it was held that there was a distinction between the purposes for which an Authority might seek to acquire land and the means by which those purposes might be achieved.

83. Within the Inspector's Report there is abundant evidence as to the background to the making of the Compulsory Purchase Order. At paragraph 3.6.1 this is given as the desire of Dublin City Council to regenerate Dublin City. It refers to the Integrated Area Plan accepted by Dublin City Council in 1998 and adopted into the 1999 Development Plan. The urban regeneration of O'Connell Street has been held up and requires to be commenced and the City Council felt it had to resort to the compulsory acquisition of the site to secure its development. There was an inability by the owners to develop the site due to division in the ownership and lack of experience in relation to development together with the lack of financial ability. The City Council had been waiting for the development to take place having given many warnings to the owners. In the absence of progress over a four year period the decision was made to compulsorily acquire the site. Within the summary of the evidence before the Inspector there is ample evidence to justify the City Council's conclusion that resort to compulsory acquisition of the site was necessary. The Integrated Area Plan envisages O'Connell Street being developed from what was regarded as its downgraded status to a street comparable with the principal streets of other European capitals. The lands the subject matter of the Compulsory Purchase Order were considered in great detail in the Integrated Area Plan being contained within Site Cluster 1 therein. The evidence of Mr. Mulcahy, Valuer on behalf of the Acquiring Authority was that the dynamics for achieving development require unitary ownership a situation in which decision making is

possible without constraints of lesser interests, proven development expertise and the ability to raise development capital: if development was to be achieved compulsory acquisition is necessary. The particular manner in which the purpose would be achieved had not yet been determined. If the Compulsory Purchase Order is approved development could start quickly. Thus the phrase "development purposes" was fleshed out in very considerable detail at the enquiry.

84. The Development Plan has as an objective at 5.8.0 the implementation of an Integrated Area Plan for O'Connell Street and its environs. Again as a policy at Policy IC3 paragraph 11.5.0 provides as follows –

"It is the policy of Dublin Corporation to implement the five Integrated Area Plans as follows –

(b) O'Connell Street."

85. In these circumstances while the purpose as stated in the Compulsory Order is "for development purposes" and the purpose as stated in the decision of An Bord Pleanála is that of facilitating the Dublin City Development Plan when these purposes are considered in conjunction with the contents of the Inspector's Report they are in effect identical. The Court, as held in *Mearvale Builders Limited* and confirmed in *Proctor & Gamble Limited* can look behind the express purpose of both making and confirming a Compulsory Purchase Order to identify the actual purpose: in the present case the actual purpose is one for which there is power to make and confirm a Compulsory Purchase Order.

86. If the acquiring authority possesses a statutory power to acquire then the function of An Bord Pleanála and on Judicial Review of this Court is to determine if the exercise of the power is for a purpose for which the power is conferred. Such statutory power is to be found in the present case within the Planning and Development Act 2000 section 212(1)(d) and (e) and in section 213(2)(a).

87. In summary then I am satisfied that the purpose set out in the Compulsory Purchase Order and the purpose set out in the decision of An Bord Pleanála is the same purpose: that purpose is one which enables a compulsory purchase order to be made and confirmed.

The Fifth Issue

88. The Applicant complains that the Compulsory Purchase Order was confirmed without evidence being adduced by Dublin City Council. In consequence the Applicant was unable to test the manner in which the general statutory purpose identified in the Compulsory Purchase Order and supporting documents was to be achieved. Further An Bord Pleanála was without evidence as to the manner in which the general statutory purpose is identified in the Compulsory Purchase Order and the supporting documents was to be achieved.

89. As to the manner in which the general statutory purposes identified in the Compulsory Purchase Order were to be achieved I am satisfied that abundant evidence was adduced before the Inspector as to the purpose: it is unnecessary that the means by which that statutory purpose will be achieved be determined in advance of the making of the Compulsory Purchase Order: *Proctor & Gamble Limited v Secretary of State for the Environment & Others* 63 P & CR 317. This issue arose in *Crosby v Custom House Dock Development Authority* 1996 2 I.R. 331. One of the grounds relied upon by the Applicant there in seeking to quash the Minister's confirmation of a Compulsory Purchase Order was that during the public enquiry it became apparent that the Defendant did not know at that stage what use if any they would make of the land. Costello P. held that the Acquiring Authority was not required to limit its purpose for acquisition to a particular proposed development. I am satisfied that this applies equally in the present case: a distinction between purpose and the means of achieving the same must be drawn. This applies equally to the decision of the Acquiring Authority to make the Compulsory Purchase Order and to the decision of An Bord Pleanála to confirm the same.

90. As to the remainder of this ground as expounded by Counsel on behalf of the Applicant the point sought to be made is that An Bord Pleanála confirmed the Compulsory Purchase Order without any evidence of any specific proposal. This again returns to the proposition that in addition to a purpose an Acquiring Authority must at the enquiry be in a position to indicate a specific proposal which can then be tested by the objectors. However the argument is refined in that the Applicant argues that the Acquiring Authority must at least select one of the means whereby the purpose can be achieved – developing it themselves, putting it out to tender or entering into an agreement whereby they sell the lands acquired to an individual developer.

91. I can see no logically reason to distinguish between means in the sense of the particular development to be carried out or the process to be utilised in ensuring that development is carried out be that by way of the Acquiring Authority itself carrying out the development, selling the land to a developer, or engaging in a public private partnership. These are simply different aspects of means which on authority of *Proctor & Gamble Limited* and *Crosby v Custom House Dock Development Authority* are each irrelevant at the stage of acquisition.

The Constitutional Issue

92. The constitutional issue is pleaded in the Statement to Ground Application for Judicial Review as follows. The relief sought –

"8. In the alternative a Declaration that the provisions of Part XIV of the Planning and Development Act 2000 are invalid having regard to the provisions of the Constitution."

93. The grounds relied upon are as follows –

39. Strictly in the alternative to the foregoing pleas, it is the Applicant's case that if the legislative provisions in respect of the compulsory acquisition of lands allow for the acquisition of lands other than in circumstances whereas a very minimum (i) there is a mandatory requirement that the acquiring authority demonstrate that there is a countervailing public interest which justifies the use of compulsory purchase powers; (ii) the question of whether or not there is such a countervailing public interest is to be determined either by the High Court or by an independent person or body subject to a heightened standard of review by the High Court; (iii) the owner of the land is to be afforded a meaningful opportunity to make submissions and representations at an oral hearing as to why his land should not be acquired compulsorily (to include the concomitant right to fair procedures, extending to the right to advance and detailed notice of the reasons put forward in support of the compulsory acquisition; the right to discovery and the production of documents; and the right to cross examination); and (iv) that the use of the land acquired be confined to the particular purpose in respect of which the independent determination at (ii) above was made then such provisions are unconstitutional.

40. Under the Constitution, private property rights are expressly protected and the exercise of a power of compulsory purchase represents a prima facie interference with those rights. The use of such an exceptional power must accordingly, be justified by reference to the common good. More particularly the acquiring authority must be in a position to

demonstrate that there is a countervailing public interest which justifies the use of compulsory purchase powers.

41. The Applicant was at all material times the owner of certain of the lands the subject matter of the confirmed Compulsory Purchase Order (the nature and extent of the lands owned by the Applicant are set out in the Schedule of Lands hereto). The right to retain those lands form part of the Plaintiff's property rights, as protected by Article 40.1 and 3 and Article 43 of the Constitution. Any exercise by the State, or any agency authorised by the State, of a power of compulsory purchase over the said lands, can only arise in circumstances where, having regard to the public good, same is justified. Even where same is justified in principle, the extent to which the property rights are interfered with must, so as to comply with the principles of proportionality, be both proportionate to the ends intended to be achieved thereby, and interfere with the Applicant's property rights to no greater extent than that which is necessary for the purpose of achieving such end.

42. The provisions of the Local Government (No. 2) Act 1960; the Housing Act 1966; and Part XIV of the Planning and Development Act 2000 are invalid having regard to the provisions of the Constitution in that the said provisions purport to allow for compulsory purchase of the Applicant's lands other than pursuant to a scheme with the safeguards identified at paragraph 39."

94. The Pleadings also raise as a constitutional ground at paragraph 20 the following –

"20. The citizens constitutionally protected property rights cannot be overridden simply on the payment of compensation. It is a necessary precondition of the acquisition of, and/or extinction of, any property right of the citizen that would be bona fide considered and, if necessary demonstrated either by statute or by the determination of the relevant acquiring authority, and confirmed by an independent review, that the public interest requires that the citizen be deprived of the property in question (even on payment of fair compensation)."

95. The relevant provisions of the Constitution are the following –

Article 40.3.2. The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.

Article 43.1.1. The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.

2.1. The State recognises, however that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice.

2.2 The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good.

96. It is submitted by the Applicant that if effect is to be given to the provisions of the Constitution in the context of a Compulsory Purchase Order before confirming the Order An Bord Pleanála must be satisfied that the acquisition is required by an exigency of the common good and in order to be so satisfied the acquiring authority must put forward for consideration by An Bord Pleanála the purpose of the acquisition and the manner in which the land required is proposed to be used. The Applicant however lays particular stress on the words "requires" and "exigencies" in Article 43.1.2 of the Constitution as imposing upon a body seeking to interfere with property rights and a requirement to show not just a necessity but something which is demanded for the common good: see *An Blascaod Mor Teoranta & Others -v- the Commissioners of Public Works in Ireland & Others* Budd J. 27th February 1998 at page 110 et seq –

"The following inferences can be drawn in respect of the principles of law from the cases. In order to ascertain the constitutionality of the 1989 Act, the Court must ask

(1) Whether this delimitation, the restriction on the rights of enjoyment of private property, is in accordance with the principles of social justice and

(2) whether the delimitation, in this case involving expropriation with compensation, is necessary in order to reconcile the exercise of the Plaintiff's property rights with the exigencies of the common good.

Furthermore these questions must be examined against the background of the presumption of constitutionality and the margin of tolerance allowed to the Oireachtas in making the assessment of what is required to fulfil the exigencies of the common good. In this regard the word "exigencies" has a connotation of more than "useful", "reasonable" or "desirable": it means "necessary" and implies the existence of a pressing social need. The notion of necessity is linked to that of a democratic society. A measure cannot be regarded as necessary in a democratic society, based on tolerance and broad mindedness, unless it was proportionate to the legitimate aim being pursued. Furthermore, when the exigencies of the common good are called in and justify restrictions on the exercise of the rights of private property, being fundamental rights spelt out in the Constitution, it should be remembered that the protection of the fundamental right, is one of the objects which needs to be secured as a part of the common good. Has a pressing social need been demonstrated which justify the impugned legislation and its encroachment on the basic rights of private property? Is the amount of the encroachment proportionate to a legitimate aim being pursued and to the difference in the Plaintiff's situation which requires the delimitation of their rights."

97. From that case I take the following propositions. The delimitation of private ownership to be valid must be reconcilable with the exigencies of the common good and with the principles of social justice. There must be a sufficient and proper public purpose for the acquisition and which purpose cannot be achieved by lesser means.

98. Further the margin of appreciation allowable to the Oireachtas where fundamental rights to private property are concerned is not as wide as in cases such as *MacMathuna -v- Ireland and the Attorney General* (1995) 1 I.R. 484 and *Madigan -v- The Attorney General* (1986) ILRM 136 which concern the allocation of social welfare allowances and taxation respectively. The Applicant further submitted and I accept that it follows from Article 43.1.1 that compensation cannot validate an interference with property rights that is not justified by the exigencies of the common good: the right to private property cannot be equated with a right to compensation. It is submitted by the Applicant and I accept that the principle of proportionality applies to the exercise of the constitutional power to

delimit the right to property.

99. From the Pleadings it is clear that the Applicant challenges in its entirety the Planning and Development Act 2000 Part XIV. The challenge however in argument was more focused and I propose to deal with the same on the basis advanced in argument.

100. Turning to the Ground at paragraph 20 of the Statement to Ground Application for Judicial Review I do not understand it to have been in contention between the parties that the mere existence of an entitlement to compensation would render constitutionally permissible the compulsory acquisition of property. As to the remainder of paragraph 20 I consider the same to be encompassed within the Grounds at paragraph 40. The proposition in paragraph 41 of the Statement of Grounds is an unobjectionable statement of constitutional principles.

101. Turning to paragraph 39 of the Grounds I propose dealing with the same *seriatim* –

(i) There is a mandatory requirement that the Acquiring Authority demonstrate that there is a countervailing public interest which justifies the use of compulsory powers.

Counsel for the Attorney General accepted and I agree that this is a correct statement of the law.

(ii) The question of whether or not there is such a countervailing public interest is to be determined either by the High Court or by an independent person or body subject to a heightened standard of review by the High Court.

I accept that the correct approach for this Court to adopt where a constitutional right is sought to be affected is that stated in *Prest -v- Secretary of State for Wales* (1982) 81 LGR 193 by Watkins L.J. –

“In the sphere of compulsory land acquisition, the onus of showing that a Compulsory Purchase Order has been properly confirmed rests squarely on the Secretary of State. The taking of a persons land against his will is a serious invasion of his proprietary rights. The use of statutory authority for the destruction of those rights requires to be most carefully scrutinised. The Courts must be vigilant to see to it that the authority is not abused. It must not be used unless it is clear that the Secretary of State has allowed those rights to be violated by a decision based upon the right legal principles, adequate evidence and proper consideration of the factor which sways his mind into confirmation of the Order sought.”

Where constitutional rights are to be affected I accept that both the relevant statutory provisions which are purported to be exercised and the manner and purpose for which they are exercised should be subjected to heightened scrutiny.

(iii) The owner of the land is to be afforded a meaningful opportunity to make submissions and representations at an oral hearing as to why his land should not be acquired compulsorily (to include the concomitant right to fair procedures, extending to the right to advance and detailed notice of the reasons put forward in support of the compulsory acquisition; the right to discovery and the production of documents; and the right to cross examination).

I accept this proposition: however I am satisfied that the statutory scheme meets all these requirements and accordingly does not offend the Constitution. The application of the statutory scheme is a different matter: should there be a denial of natural justice or an unfairness the remedy lies in the Courts by way of an application for Judicial Review: in short the appropriate remedy is to judicial review proceedings at the public inquiry or the decision and if there has been a denial of natural justice there is a remedy available. In such circumstances however the constitutional infirmity lies in the procedures and the decision making process but not in the statute itself. I am satisfied that the statutory provisions which provide for an oral hearing with an onus on the acquiring authority to satisfy the Bord that the power to acquire has been properly invoked in accordance with the statute. It affords him an opportunity to test the evidence proffered in support of confirmation by cross examination and by adducing evidence. There is a facility to obtain documents other than those produced by the Acquiring Authority in section 135 of the Act of 2002. The presumption of constitutionality carries with it an intention on the part of the Oireachtas that proceedings, procedures, discretions and adjudications pursuant to a statute are to be themselves in accordance with the principles of constitutional justice: see *East Donegal Cooperative Livestock Mart Limited -v- Attorney General* (1970) I.R. 317. Given that this is the case I am satisfied that the scheme of the legislation does not infringe the constitutional rights of the Applicant to private property.

(iv) That the use of the land acquired be confined to the particular purpose in respect of which the independent determination was made.

102. I have already dealt with the purpose for which these lands have been acquired and which are detailed in the Inspector's Report. There is no question of that purpose having been abandoned. In these circumstances no issue arises.

103. Having regard to the foregoing I refuse the Applicant the leave which he seeks.