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THE HIGH COURT

JUDICIAL REVIEW

2009 534 JR

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED)

AND

IN THE MATTER OF AN APPLICATION

BETWEEN

THOMAS MONE

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

PATRICK MONE

AND

MONAGHAN COUNTY COUNCIL

NOTICE PARTIES

JUDGMENT of Mr. Justice William M. McKechnie delivered on the 18th day of May, 2010

1. This judgment is given in respect of a consolidated hearing, being both the leave application and, if successful, the substantial application in these judicial review proceedings. This case concerns a challenge to a decision of An Bord Pleanála ("the Board") to grant permission to the first notice party, Mr. Patrick Mone ("the developer"), who is the uncle of the applicant herein, to rebuild a petrol station at Tullynagrow, County Monaghan, on the County Armagh border.

Background

2. In April 1998, the applicant's father, Mr. Jim Mone, started a small oil business in a yard at Tullynagrow, Castleblaney, County Monaghan, on lands which he rented from his brother, Patrick Mone, the developer. The business involved the selling of agricultural and road diesel. In November 1998, Mr. Jim Mone applied for planning permission for the retention of a petrol station which he had built on the developer's lands (planning application register reference 98/818) ("application 98/818" or "the 1998 application"). In this regard he commissioned an architect to prepare plans, paid the appropriate planning fees and lodged the application in his own name.

3. Sometime after this and, for reasons not relevant, relations deteriorated between both brothers with the result that Mr. Jim Mone decided that he would instead build a petrol station on his own lands. In furtherance of this, he caused an application to be made on the 13th October, 1999, for a new station on lands owned by him on the opposite side of the road: (planning application register reference 99/888).

4. Consistent with this, Mr. Mone instructed his architect to withdraw the first application, but this was not done until a letter was delivered to Monaghan County Council ("the council" or "the planning authority") on the 11th February, 2000. Unfortunately however, this letter was placed incorrectly on the file relating to application 99/888. The council on the 20th April, 2000, issued a notification of decision to grant permission on the 1998 application. This, of course, was not what was intended; accordingly, Mr. Jim Mone instructed Mr. Christopher Pringle, a chartered civil engineer, to do what was necessary to achieve the intended result.

5. Technically speaking it would appear that it was not possible to simply withdraw the application at that stage. For this reason Mr. Pringle was advised to appeal the decision to the Board; this he did by letter of the 16th May, 2000. Once before the Board he could and did withdraw the application in its entirety. A decision of the Board dated the 14th November, 2000, recorded that the application had been withdrawn; this was notified to Mr. Christopher Pringle, on behalf of the applicant, the developer and the council. The notification from the Board specified the statutory basis for its decision, namely s.16 of the Local Government (Planning and Development) Act 1992 ("the Act of 1992"), quoting, in particular, section 16(3). (para. 23 *infra*)

6. Notwithstanding this decision, the council misunderstood the legal position, erroneously believing that only the appeal had been withdrawn; as a result it issued a grant of permission in the same terms as its original notification ("the 1998 grant"). The validity of that grant was never challenged. However, it should be noted that as the application had been withdrawn and the requirements under s.16 of the Act of 1992 had been complied with, the decision of the Board was final. In such circumstances, it is readily recognised and accepted by all parties that the planning authority had no power to make such a grant since, *inter alia*, it was *functus officio*.

7. The council on the 19th April, 2000, refused permission in respect of application 99/888. The Board on the 12th December, 2000, rejected Mr. Jim Mone's appeal therefrom.

8. Purportedly relying on the 1998 grant, the developer duly constructed a petrol station on his lands. In the mistaken belief (yet again) that planning permission had been granted, the council subsequently granted permission for two additional overground storage tanks and other works under planning application register reference 99/920. No challenge was brought to the validity of the resulting grant which issued on the 7th July, 2000.

9. The developer also applied for permission to alter and extend the facility under planning application register reference 00/1083. However the council refused planning permission on grounds not material to this case.

10. The council also refused permission for the retention and completion of a bulk fuel storage depot, office/toilet and associated works on the site opposite, now the applicant's land (planning application register reference 01/920). This decision was appealed but such appeal was subsequently withdrawn.

11. A further application to develop the select site was made by the developer on the 26th September, 2002, (planning application register reference 02/766). This was refused by the Board on the 19th May, 2003 (the "2003 refusal") for the reasons advanced in the report of the inspector (An Bord Pleanála reference 18.201655). The inspector, Mr. Ruairi Somers, having set out the planning history of the matter, considered that the application depended on the legal status of the previous permissions, particularly the 1998 grant. He concluded, having regard to s.16(3) of the Act of 1992, that the council's grant of this permission was invalid. In his opinion the implications of this were that:-

> *"1. No permission exists for the development deemed authorised by PL Ref. 98/818.*
>
> *2. No permission exists for the development deemed authorised by PL Ref. 99/920. This is because the latter concerns the provision of additional storage tanks and relocation of facilities deemed authorised by 98/818.*
>
> *3. The current application is invalid as it also refers to relocation and modifications to existing facilities and represents effectively the use and extension of what are unauthorised development.*
>
> *4. The planning references 98/818 and 99/920 are relied on both by the applicant and the planning authority to establish the use of the site. In effect it would seem that the merits or otherwise of a petrol station and associated facilities on this site depends on the compatibility of such development with County Plan policy for new petrol filling stations etc. In this context it is noted that Section 39(2)(b) of the 2000 Act states that "no account shall be taken of any use of the land begun in contravention of this part".*

This is the first decision of the Board which refused permission expressly on the ground that the application related to the proposed development of "*a site the use of which is unauthorised … and that the proposed development would facilitate the consolidation and intensification of this unauthorised use.*" (see p. 2 of 2: 19/5/2003)

12. A further application was lodged by the developer on the 17th December, 2003, to redevelop the existing petrol station (planning application register reference 03/1035). Whilst the council decided to grant permission, the Board refused by decision dated the 6th January, 2005, again on the ground, *inter alia*, that the proposal would facilitate the consolidation and intensification of an existing unauthorised use (the "2005 refusal"). An opinion of counsel, Mr. Galligan S.C., dated the 16th September, 2004, had been submitted to the Board by the developer which acknowledged that the 1998 grant could not be relied upon, yet argued that the decision on application 99/920 could. The inspector, Mr. G. Farrington, was of the opinion that the 1998 grant was invalid and pointed out that if the Board was to agree with counsel's opinion it would have to reverse its earlier position. The Board, in its decision to refuse permission generally adopted the inspector's position.

13. It might be mentioned briefly that the decision of the Board last referred to, was the subject of judicial review proceedings instituted by the developer, who claimed that Mr. Thomas Mone, the applicant herein, was not entitled to appeal because he did not have an interest in the property adjoining the developer's petrol station. However, such proceedings were withdrawn when the applicant produced evidence of title.

14. Mr. Jim Mone in the meantime, despite having failed to gain permission in respect of application 99/888, built his petrol station on lands opposite, now the applicant's land, resulting in two competing petrol stations on either side of the road. He applied for retention of that enterprise on or about the 13th February, 2004, (planning application register reference 04/187). The council granted permission on the 11th November, 2004, but on appeal the Board refused on the 20th April, 2005. Mr. Mone, in disregard of this refusal, has continued to operate his petrol station.

15. The developer ultimately submitted the application, currently the subject matter of these proceedings (planning application register reference 07/739), in 2007, which proposed the replacement of existing overground storage tanks, pump islands and portacabin with a new forecourt and canopy, retail shop and other associated buildings and works. Attached was a further opinion of counsel dated the 11th December, 2007. Mr. Galligan S.C. considered the definition of "*unauthorised structure*" under s. 2 of the Planning and Development Act 2000, as amended ("the Act of 2000 Act"), which reads:-

> *"'unauthorised structure' means a structure other than:*
>
> > *(a) a structure which was in existence on 1 October 1964, or*
> >
> > *(b) a structure, the construction, erection or making of which was the subject of a permission for development granted under Part IV of the Act of 1963 or deemed to be such under section 92 of that Act or under section 34 or 37G of this Act, being a permission which has not been revoked, or which exists as a result of the carrying out of exempted development (within the meaning of section 4 of the Act of 1963 or section 4 of this Act)…"*

In his view, since the proposed development had been the subject of two grants of permission (namely the 1998 grant and that in respect of application no. 99/920), the structures could not be considered to be unauthorised within the meaning of s. 2 of the Act of 2000..He concluded, *inter alia*, that:

> *i) the 1998 grant was not amenable to challenge having regard to the judicial review time limits;*
>
> *ii) the developer was entitled to rely on the grant of permission with regards to application 99/920;*

iii) the view of the council, and its standing counsel, was that these grants of permission should not be disturbed; and

iv) whilst the 1998 grant was obtained by "a strange route", it represented a just result in circumstances where Mr. Jim Mone was acting in excess of authority delegated to him by Mr. Pat Mone by appealing the original grant of the council.

16. The Board appointed an inspector, Mr. Donal Donnelly, to consider the application. Mr. Donnelly concluded, in line with the opinions of the previous inspectors, Messrs. Somers and Farrington, that the existing development amounted to an unauthorised development and that the application amounted to an intensification of the underlying unauthorised use, and recommended that planning permission be refused.

17. This recommendation was considered by the Board at a meeting of the 4th March, 2009. On the 16th March, the Board recorded the decision reached and on the 26th March, 2009, issued a grant of permission, rejecting the inspector's recommendation. Under the heading "Reasons and Considerations" it was stated:-

> "Having regard to the established use of the site as a petrol filling station…it is considered,… that the proposed development would be acceptable…and would not be contrary to the proper planning and sustainable development of the area."

18. In dealing with the inspector, the decision of the Board continued at p. 2 of 6:-

> *"In deciding not to accept the Inspector's recommendation to refuse permission, the Board considered the opinion of counsel submitted by the applicant in relation to the status of the original planning application for a petrol station on these lands (planning reregister reference number 98/818) and obtained further legal advice in this connection. The Board concluded, having regard to this new evidence and advice, <u>that a valid planning permission for the use of the land as a petrol station exists on foot of the said planning register reference number 98/818.</u> The Board also noted that a further planning permission (register reference number 99/920) had been granted in 2000 for additional associated development on the site. Accordingly the Board considered that reasoning underlying the first reason for refusal recommended by the Inspector – namely that the current use constitutes unauthorised development – should not be supported." (Emphasis added)*

It is thus clear that the Board came to the conclusion that, contrary to its previous decisions, the 1998 grant was valid for the use of the land as a petrol station, and the structures on the developer's site were not unauthorised.

19. Ms. Ann Mulcrone, the planning consultant for the applicant, states that she attended the offices of the Board on the 18th May, 2009, to view the public files, and in particular to view the further legal advice obtained by the Board. However, the relevant file was missing and/or unavailable. On the 19th May, 2009, Ms. Mulcrone was informed that the file was now available, but that the legal advices obtained for the purposes of advising the Board were classified as privileged, and were therefore not available on the public file. These advices were never produced.

20. Following this decision, the applicant on the 19th May 2009, issued the within judicial review proceedings.

Arguments of the Parties

21. The applicant takes issue with the decision of the Board of the 26th March, 2009, in relation to application 07/739, on the grounds set out in his statement of grounds. In general he alleges that the Board erred in law in its determination by granting permission for a development on the basis of conclusions which are profoundly flawed and contain fundamental errors of fact and law. In particular he says:

> i) There was no material change in circumstances in respect of this development/site use from the decision of the 6th January, 2005, given on application 03/1035 (the "2005 refusal"), and the current application. There is therefore no rational basis for such departure or for altering its decision relative to previous decisions;
>
> ii) The consideration of the impugned application by the Board as contained in a record of its deliberations on the 16th March, 2009, is fundamentally flawed; the Board concluded that having regard to new evidence and advice a valid permission exists on foot of the 1998 grant;
>
> iii) The nominated inspector recorded that the 1998 application had been withdrawn and therefore the purported grant on foot of it could not amount to a planning permission, which the Board could have regard to in its consideration of this application;
>
> iv) The Board fundamentally erred in law and fact in holding that the 1998 grant was a valid planning permission on which subsequent grants could rest: further it erred by determining the status of the development by reference to it and by holding that the grant authorised the development;
>
> v) The Board failed to properly investigate the planning history of the site and consider its own decisions as recorded in the offices of the Board in respect of the 1998 application, in particular its decision of the 14th November, 2000, which declared the application to be withdrawn;
>
> vi) The status of the 1998 grant was a vital and critical consideration of the Board as recorded in its decision;
>
> vii) The Board misunderstood the status of the 1998 grant and the advice of the developer. That advice accepts that the application was made by Mr. Jim Mone, who was entitled to and did in fact withdraw the application, and notice of the decision of the Board in this regard was forwarded to the developer, Mr. Patrick Mone, *inter alia*, who accepted the determination and did not challenge it;
>
> viii) The Board failed to consider all of the documentation and the context of the 1998 application; had it done so it could not have come to the conclusion which it did regarding the 1998 grant;
>
> ix) By recording in its decision that *"a valid planning permission for the use of the land as a petrol station exists on foot of the said planning register reference number 98/818"*, the Board made a fundamental error which appears on

the face of the record of the decision;

x) The Board had regard to irrelevant and inappropriate considerations, in particular that there was a permission granted in respect of the site under application 98/818, and failed to have regard to relevant matters, in particular the absence of any permission in light of the withdrawal of application 98/818 as recorded by the Board; and

xi) The decision of the Board that the 1998 grant constitutes a valid planning permission is irrational and contrary to plain reason and common sense.

22. The central issue is therefore whether the Board by its decision of the 26th March, 2009, on application 07/739 fundamentally erred in law and in fact by finding that the 1998 grant was a valid permission upon which subsequent applications could be based, and that the structures present were no longer "unauthorised developments", as found in prior decisions of the Board. On foot of this argument the applicant seeks an order of *certiorari* quashing the aforesaid decision, and returning the matter to the Board so that the application can be determined in accordance with law.

23. In submissions the applicant draws particular attention to s.16 of the Act of 1992, which states:-

> *"(1) Where the Board is of opinion that an appeal, or a planning application to which an appeal relates, has been abandoned, the Board may serve on the person who made the appeal or application, as may be appropriate, a notice stating that fact and requiring that person, within a period specified in the notice (being a period of not less than fourteen or more than twenty eight days beginning on the date of service of the notice) to make to the Board a submission in writing as to why the appeal or application, as the case may be, should not be regarded as having been withdrawn.*
>
> *(2) Where a notice has been served under subsection (1) the Board may, at any time after the expiration of the period specified in the notice, and after considering the submission (if any) made to the Board pursuant to the notice, declare—*
>
> > *(a) in case the notice refers to a planning application, that the application shall be regarded as having been withdrawn, and*
> >
> > *(b) in case the notice refers to an appeal, that the appeal shall be regarded as having been withdrawn.*
>
> *(3) Where pursuant to this section the Board declares that a planning application is to be regarded as having been withdrawn, the following provisions shall apply as regards the application:*
>
> > *(a) any appeal in relation to the application shall be regarded as having been withdrawn and accordingly shall not be determined by the Board, and*
> >
> > *(b) notwithstanding any previous decision under section 26 of the Principal Act by a planning authority as regards the application, no permission or approval shall be granted under that section by the authority on foot of the application."*

24. Section 16 thus makes clear the consequences of a withdrawal of a planning application. There is therefore no permission in existence under application 98/818. The application was withdrawn by the applicant's father when the matter was before the planning authority, although the letter of withdrawal was misfiled and a notification of decision to grant was made. This was appealed to the Board which, after invoking the statutory consultation process, made a decision recording the fact that the application had been withdrawn. Notwithstanding this, the council purported to issue a grant, something which it was statutorily prohibited from doing.

25. Where a determination has been made under s.16 of Act of 1992, the application, by operation of law, is withdrawn and no decision on the application will be deemed to have been made either by the Board or by the local planning authority; so that any determination by the local planning authority is effectively revoked. It is therefore not possible for the Board or council to assert or determine that a valid permission exists on foot of the 1998 grant. To interpret s.16 of the Act of 1992 in any other way is to err in law.

26. The applicant asserts that a determination reached by an administrative tribunal may be quashed where that determination is premised on a manifest error of law. Reference is made to the decision in *De Burca v. Wicklow County Manager & Anor.* [2009] IEHC 54, (Unreported, High Court, Hedigan J., 4th February, 2009) which cited with approval, as the *locus classicus* of this jurisdiction, the decision of the House of Lords in *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 A.C. 147, which previously had been adopted in this jurisdiction by the Supreme Court in *Killeen v. Director of Public Prosecutions* [1997] 3 I.R. 218.

27. It is claimed that as a creature of statute the Board can clearly only act within its powers. Further, it is a fundamental principle of judicial review that the High Court will intervene to ensure that the powers of public decision-making bodies are exercised lawfully. Such intervention is based on the proposition that such powers have been conferred on the underlying assumption that they will be exercised within the jurisdiction conferred, in accordance with fair procedures and reasonably. In the circumstances herein, the Board, in coming to its decision on application 07/739, erred in law and went against its own statutory declaration issued under s.16 of the Act of 1992.

28. More particularly in a planning context, the applicant argues that there has been no change from a planning perspective which would allow a development described as unauthorised, and recognised as such in a series of previous decisions by the Board, to be viewed as now being authorised. The planning code envisages that the Board, and planning authorities, will have regard to previous decisions (*Irish Hardware Association v. South Dublin County Council* (Unreported, High Court, Butler J., 19th July, 2000); *The State (Kenny and Hussey) v. An Bord Pleanála* (Unreported, High Court, Carroll J., 23rd February, 1984; Supreme Court, 20th December 1984); *Grealish v. An Bord Pleanála* [2006] 1 I.L.R.M. 140).

29. Further, or in the alternative, the applicant contends that the Board's reasoning is irrational, unreasonable and flies in the face of reason; it also flies in the face of previous planning history and precedent established by the Board in this case.

30. The courts have consistently eschewed any approach which would allow a manifest error of law to remain and have rebuffed

arguments seeking to maintain that the exercise of the court's discretion could allow an unlawful decision to avoid the court's supervisory jurisdiction (*In re Green Dale Building Co.* [1977] I.R. 256; *Ashbourne Holding Ltd. v. An Bord Pleanála* [2003] 2 I.R. 114; *Mulcreevy v. Minster for Environment* [2004] 1 I.R. 72).

31. It is further contended that, having regard to the papers filed by the Board in this application, it is common case that the applicant has substantial grounds, as set out in the test of Carroll J. in *McNamara v. An Bord Pleanála* [1995] 2 I.L.R.M. 125 at p.103, and a substantial interest as provided for in the Act of 2000. Further, the factual substratum of the case and the chronology of the applicant's involvement clearly sustains this view. Additionally, he submits that he has established beyond argument that:

> i) He has an interest in the development, the subject matter of this application, which is peculiar and personal to him;
>
> ii) The nature and level of that interest is significant and weighty; and
>
> iii) The interest in question was affected by or connected with the proposed development.

See also *Harding v. Cork County Council* [2008] 4 I.R. 318.

32. In conclusion, the applicant submits that, following the decision of the Board on the 14th November, 2000, to the effect that application 98/818 had been withdrawn, the legal consequences of such a declaration are set out in s.16 of the Act of 1992, and cannot be gainsaid. The decision of the Board therefore acted, by operation of law, to nullify the application *ab initio* and superseded any erroneous subsequent decision of the council in respect of application 98/818.

33. In reply, the Board does not contest the fact that it changed its mind on both the validity and effect of the 1998 grant: rather it contends that it was correct for it to do so. In the Board's opinion, the essential point in this case, in addition to that of standing, turns on the proper interpretation of the prohibition on late challenges to the validity of a permission, as contained in ss.50 and 50A of the Act of 2000, as substituted by s. 13 of the Planning and Development (Strategic Infrastructure) Act 2006 ("the Act of 2006"). Prior to addressing this point, however, the question of substantial interest and substantial grounds should be addressed.

34. Pursuant to s. 50A of the Act of 2000 (as substituted by s.13 of the Act of 2006), an application for leave to apply for judicial review is required to be made on notice, and the applicant is required to establish that there are substantial grounds for contending that the Board's decision is invalid and that he/she has a substantial interest in so contending (subs. 3). Only if these thresholds are met can the court then determine whether the Board's decision should be quashed. Both tests must be satisfied before leave can be granted (*Harding v. Cork County Council* [2008] 4 I.R. 318).

35. The Board contends that, for the reasons offered in relation to the prohibition on questioning validity, other than in accordance with ss. 50 and 50A, the arguments advanced by the applicant do not constitute "substantial grounds" (*McNamara v. An Bord Pleanála* [1995] 2 I.L.R.M. 125; *In The Illegal Immigrants (Trafficking) Bill, 1999* [2000] 2 I.R. 360; *Kenny v. An Bord Pleanála* [2001] 1 I.R. 565 considered).

36. In relation to the substantial interest obligation, the Board, whilst accepting that participation in the appeal process is no longer a prerequisite for this requirement and that the applicant's submissions were transmitted to it, nevertheless makes the point that the making of a submission is distinct and separate from the issue of "substantial interest". The making of submissions in and of itself may not be sufficient to give the applicant a substantial interest (*Harding v. Cork County Council* [2008] 4 I.R. 318; *O'Brien v. Dun Laoghaire Rathdown County Council* [2006] IEHC 177 (Unreported, High Court, O' Neill J., 1st June, 2006) considered).

37. The Board contends that in the present case the applicant has not attempted to show that the proposed development could affect him, or how. Although he has averred that he has an interest in land, and owns a house immediately adjoining the proposed development, he has not said how far away the development is, nor has he said how the redevelopment of the petrol station would affect him, over and above its current effect, which he has never contested. He has therefore failed to show a substantial interest in the development. Further, the applicant made submissions to the planning authority which were forwarded to the Board by virtue of s.21 of the Act of 2006; he made no submissions on the documents lodged by the developer, despite that such would have been available to him for inspection pursuant to s.38 of the Act of 2000. Therefore, as all procedural aspects of the application were regular, he cannot have any complaint in this regard.

38. The second major submission put forth by the Board, as noted above, is that the applicant is precluded from challenging the validity of a decision by the Board or a planning authority other than in accordance with ss.50 and 50A of the Act of 2000. It notes the legislative history of these provisions: section 42 of the Local Government (Planning and Development) (Amendment) Act 1976 ("the Act of 1976") inserted s. 82(3A) into the principal Act, the Local Government (Planning and Development) Act 1963. That section was subsequently substituted by s. 19(3) of the Act of 1992 and in that form provides that:-

> *"(3A) A person shall not question the validity of –*
>
> *(a) a decision of a planning authority on an application for a permission or approval under Part IV of this Act, or*
>
> *(b) a decision of the Board on any appeal or on any reference, otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts (S.I. No. 15 of 1986) (hereafter in this section referred to as 'the Order'.*
>
> *(3B) (a) An application for leave to apply for judicial review under the Order in respect of a decision referred to in subsection (3A) of this section shall—*
>
> (i) be made within the period of two months commencing on the date on which the decision is given, and
>
> (ii) be made by motion on notice (grounded in the manner specified in the Order in respect of an ex parte motion for leave) to—
>
> *(I) if the application relates to a decision referred to in subsection (3A) (a) of this section, the planning authority concerned and, where the applicant for leave is not*

the applicant for the permission or approval under Part IV of this Act, the applicant for such permission or approval,

(II) if the application relates to a decision referred to in subsection (3A) (b) of this section, the Board and each party or each other party, as the case may be, to the appeal or reference,

(III) any other person specified for that purpose by order of the High Court,

and such leave shall not be granted unless the High Court is satisfied that there are substantial grounds for contending that the decision is invalid or ought to be quashed.

(b) …

(c) …

(d) …"

Thus, the Board contends, at the time of the 1998 grant, that the validity of this decision could only be questioned by way of judicial review, and then only within the two month period. This time limit was subsequently declared unconstitutional in *White v. Dublin City Council* [2004] 1 I.R. 545, leaving the usual judicial review outer time limit of six months applicable.

39. The Board, for comparative purposes, wishes to contrast the above amended provisions with the provisions of s. 82(3A) of the Act of 1976, before amendment, which stated, *inter alia,* that:-

"(3A) A person shall not by prohibition, certiorari or in any other legal proceedings whatsoever question the validity of –

(a) a decision of a planning authority on an application for a permission or approval under Part IV of the Principle Act,

(b) a decision of the Board on any appeal or on any reference,

…

unless the proceedings are instituted with the period of two months commencing on the date on which the decision is given."

The Board contends that it is clear when comparing s.82(3A) of the Act of 1976 as amended with the section in its original form, that all questioning of the validity of a permission was excluded by the later provision and not merely questioning in legal proceedings. It is therefore submitted that from 1992 onwards the validity of a decision could not be questioned in an appeal before the Board, even should such have been permitted.

40. Section 82(3A) (as substituted by the Act of 1992) was replaced by s.50 of the Act of 2000, which was later substituted by s.13 of the Act of 2006. Section 50 in its present form states:-

"(1) Where a question of law arises on any matter with which the Board is concerned, the Board may refer the question to the High Court for decision.

(2) A person shall not question the validity of any decision made or other act done by—

(a) a planning authority, a local authority or the Board in the performance or purported performance of a function under this Act,

(b) the Board in the performance or purported performance of a function transferred under Part XIV, or

(c) a local authority in the performance or purported performance of a function conferred by an enactment specified in section 214 relating to the compulsory acquisition of land,

otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts (S.I. No. 15 of 1986) (the 'Order').

(3) …

(4) …

(5) …

(6) Subject to subsection (8), an application for leave to apply for judicial review under the Order in respect of a decision or other act to which subsection (2)(a) applies shall be made within the period of 8 weeks beginning on the date of the decision or, as the case may be, the date of the doing of the act by the planning authority, the local authority or the Board, as appropriate.

(7) Subject to subsection (8), an application for leave to apply for judicial review under the Order in respect of a decision or other act to which subsection (2)(b) or (c) applies shall be made within the period of 8 weeks beginning on the date on which notice of the decision or act was first sent (or as may be the requirement under the relevant enactment, functions under which are transferred under Part XIV or which is specified in section 214, was first published).

(8) The High Court may extend the period provided for in subsection (6) or (7) within which an application for leave referred to in that subsection may be made but shall only do so if it is satisfied that—

(a) there is good and sufficient reason for doing so, and

(b) the circumstances that resulted in the failure to make the application for leave within the period so provided were outside the control of the applicant for the extension.

(9) References in this section to the Order shall be construed as including references to the Order as amended or replaced (with or without modification) by rules of court."

41. The transitional provisions of the Act of 2000 make it clear that a permission granted under the preceding legislation shall not be affected by the repeal of that legislation. Section 265(1) of the Act of 2000 states:-

"(a) Nothing in this Act shall affect the validity of anything done under the Local Government (Planning and Development) Acts, 1963 to 1999, or under any regulations made under those Acts.

(b) Any order, regulation or policy directive made, or any other thing done, under the Local Government (Planning and Development) Acts, 1963 to 1999, that could have been made or done under a corresponding provision of this Act, shall not be invalidated by any repeal effected by this Act but shall, if in force immediately before that repeal was effected, have effect as if made or done under the corresponding provision of this Act, unless otherwise provided."

The position under s. 50 of the Act of 2000, as amended, is therefore the same as under the Act of 1992, namely that the validity of a planning authority's decision cannot be questioned otherwise than by way of an application for judicial review, which is moved within the time limits thereby specified.

42. The purpose of such limits is to ensure that a person granted permission has certainty that such permission cannot be challenged except during a short period after its publication (*K.S.K. Enterprises Ltd. v. An Bord Pleanála* [1994] 2 I.R. 128; *White v. Dublin City Council* [2004] 1 I.R. 545; see also *Square Meals v. Dunstable Corporation* [1974] 1 W.L.R. 59 which considered similar provisions in the English Town and Country Planning Act 1971). In those circumstances, the Board notes that the developer in the within proceedings obtained a grant and acted on it, and no proceedings have been taken to challenge the validity of that grant for a period of more than ten years.

43. It is therefore clear, that relative to the 1998 grant, there has been an overall restriction on any challenge to its validity since 1992. Its validity cannot be questioned other than by way of judicial review. It cannot be questioned in an appeal. It would have been open to the applicant, or more specifically his father, to challenge the 1998 grant at the time by way of judicial review, but he failed to do so. Finally, although the applicant herein does not seek to quash the 1998 grant, since he would be significantly out of time to do so, it is clear that this action amounts to a collateral challenge to its validity *via* a challenge to the recent decision in relation to application 07/739. This, the Board contends, is not permitted under the Acts of 2000 and 2006.

44. In meeting the applicant's claim that there have been no changes in circumstances which might merit the Board changing its decision in relation to the validity or otherwise of the 1998 grant, the Board presumes in its submissions that this is an attempt to raise an estoppel *per rem judicatam* against it. The Board contends that such an estoppel could only arise if the Board had jurisdiction to determine such. In circumstances where the Board was precluded from determining the validity of the 1998 grant, it did not have jurisdiction. In those circumstances, the Board was therefore precluded from doing anything other than accepting the validity of the 1998 grant (*In re Green Dale Building Co.[*1977] IR 256; and *Ashbourne Holdings Ltd. v. An Bord Pleanála* [2003] 2 I.R. 114 considered).

45. In the present case, the Board states that it accepts that in making findings in relation to the 1998 grant in previous decisions, it had erred by failing to take account of the prohibition contained in s. 50 of the Act of 2000, on challenges to the validity of a decision other than by way of judicial review. It has now remedied this error, and it cannot be precluded by estoppel from so doing. Further, if an estoppel based on any prior determination was to arise, the Board might be precluded from accepting that the 1998 grant is beyond challenge, even if the Court were to agree that it was so. Such an approach to estoppel could therefore prevent the Board from complying with a determination of the Court.

46. With regards to any allegation by the applicant that the decision was irrational, or contrary to reason or common sense, the Board argues that since this argument is addressed to a clear issue of law, namely the validity of a decision, irrationality is not a relevant consideration. In any event, should it arise, the Board submits that it had before it evidence, in the form of counsel's opinion submitted on behalf of the developer, on which it was entitled to come to the conclusion that it could not question the validity of the grant. In this respect the Board relies on the passage contained in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 at p.72.

47. Finally, with regards to any question of discretion, the Board notes that the applicant and his father were clearly aware of the circumstances surrounding the development in the year 1998 and thereafter. They could have, at that time, discovered the error of the council and applied to have it quashed. However, they chose not to so do. Instead, they allowed the development to proceed, and when the developer sought further permissions, they chose to appeal to the Board, claiming the original grant was invalid.

48. The Board claims that it was in an invidious position in that it had accepted that application 98/818 had been withdrawn, and its own records showed as such, but the council had clearly and erroneously disregarded that withdrawal and granted permission. In those circumstances the Board initially chose to have regard to its own records, rather than those of the council.

49. The developer therefore was left with two options, either he challenged those decisions as being in breach of s. 50 of the Act of 2000, or he could bring a new application to change the decision of the Board..He chose the latter option and was ultimately successful; the Board accepting the legal opinion furnished to it by him. The applicant made his objection with regards to this known to the council, but did not make any submissions on appeal. The applicant then, having sat silently, chose to challenge the validity of the Board's decision, without challenging the validity of the council's erroneous decision, which it would in any event have been out of time to so do. The court has jurisdiction to refuse relief by reason of delay where another person has acted on the assumption of the validity of such decision (*The State (Cussen) v. Brennan* [1981] I.R. 181). In circumstances where the grant was over ten years ago, and the developer has acted on it, the applicant should be precluded from impugning that decision.

50. Finally, in any event, should the applicant even be right in law, he does not have a substantial interest and therefore the Court should exercise its discretion to refuse judicial review in these circumstances.

Substantial Grounds and Substantial Interest:
51. Before moving to consider the core legal point, the first issue which must be dealt with is whether the applicant has met the criteria required for leave in this type of judicial review. As stated at the outset the leave and substantive hearing were consolidated for the purposes of expediency and costs. Thus, if there is a positive outcome to the leave application, I shall then proceed to consider the substantive arguments and rule thereon.

52. The requirements of substantial grounds and a substantial interest can be found in s. 50A(3) of the Act of 2000, as inserted by s. 13 of the Act of 2006, which states in particular that:-

> *"The Court shall not grant section 50 leave unless it is satisfied that—*
>
> *(a) there are substantial grounds for contending that the decision or act concerned is invalid or ought to be quashed, and*
>
> *(b) (i) the applicant has a substantial interest in the matter which is the subject of the application …"*

Subsection (4) seeks to clarify the breadth of the concept of "substantial interest", stating:-

> *"A substantial interest for the purposes of subsection (3)(b)(i) is not limited to an interest in land or other financial interest."*

53. In order for the applicant to obtain leave in the within proceedings, it is therefore clear that he must show that he has both substantial grounds and a substantial interest in the matter. As stated by Kearns J. in *Harding v. Cork County Council* [2008] 4 IR 318 at p. 349:-

> *"I see no basis for conflating the concepts of "substantial grounds" and "substantial interest". I am fortified in so concluding by considering what might occur if one took the view that substantial grounds alone might suffice to confer locus standi where no substantial interest exists. In such circumstances an objector in the planning process – who might be a person with no connection to the locality where the development was taking place – could stymie or delay the entire planning process if he could identify even an arguable error of process in the manner in which the planning authority had dealt with the application."*

I would respectfully concur with the statements of Kearns J. in this regard. I therefore proceed on the basis that the applicant must show both.

54. The appropriate order in which to deal with these two issues was also suggested by Kearns J. in *Harding*, where, commenting on the High Court decision of Clarke J. in the same case ([2006] IEHC 295, (Unreported, High Court, Clarke J., 12th October, 2006), he stated at p. 348:-

> *"I think therefore it is a perfectly legitimate approach for the court to adopt the position that it will first examine whether an applicant has a substantial interest before it considers the issue of substantial grounds."*

Clarke J. had stated at para. 2.2 of the High Court judgment:-

> *"If a planning authority or the Board or, indeed, a notice party can satisfy the court that the person seeking judicial review does not have a sufficient interest to meet the test set out in s. 50, then it does not seem to me to be appropriate for the court to go any further in a consideration of whether there are substantial grounds for the challenge."*

I therefore propose to deal with the two issues in this order.

55. Turning to the issue of whether the applicant has a sufficient interest, the Board denies this. It submitted that a number of points were indicative of the fact that no such interest existed. It was not sufficient for the applicant to have merely participated in the planning process; indeed with regards to application 07/739 it could hardly ever be said that he did so, providing submissions to the council only and not to the Board.

56. The Supreme Court in *Harding v. Cork County Council* [2008] 4 I.R. 318 delivered a detailed review of what constitutes a "substantial interest" for the purposes of s. 50 of the Act of 2000. The applicant in that case sought to review a decision of Cork County Council to grant planning permission for the development of a golf leisure resort at Ballymacus Head and Preghane Point at the entrance to Kinsale harbour. He objected to the application and had lodged submissions and observations with regards to the proposal pursuant to reg. 29 of the Planning and Development Regulations 2001 (S.I. No. 600 of 2001). The applicant was a sailor and retired merchant seaman who lived in the town of Kinsale, approximately three kilometres from the headland, the subject matter of the proceedings, where he had spent all of his life. Members of his family also lived in the Ballymacus area and his uncle owned a portion of the headland. He asserted that he had, over the years, maintained a constant and continuous interest in the area and visited it frequently by both land and sea. The High Court refused to accept these matters as sufficient to establish "substantial interest". Nonetheless, Clarke J. granted a certificate for leave to appeal in respect of this very point; five other points sought to be raised in the certificate were refused. In particular Clarke J. sought clarification (at p. 342) as to "*the criteria by reference to which a person may be said to have a 'substantial interest' even though they do not have a financial or property interest within the meaning of s. 50 of the Planning and Development Act 2000 and has this court properly applied such criteria to the instant case?"*

57. At the appeal hearing, Mr. Harding relied upon two grounds, so described by Murray C.J., to show that he had a substantial interest: (i) environmental interest; and (ii) statutory process interest. The first of these related generally to the applicant's contention that he had a substantial interest in the proposed development by reason of the nature, scope and location of the development and its environmental impact on a sea headland, where he had a constant and continuous interest in the area. The second ground of interest arose, the applicant contended, by virtue of alleged serious and unlawful abuse of process by the planning authority in the statutory procedure which it followed leading up to the decision, and that he, as an objector, had a substantial interest to challenge the validity of the decision because his right to participate had been unlawfully restricted.

58. Considering the environmental interest claimed, Murray C.J. cited with approval the views of Macken J. in *Harrington v. An Bord Pleanála* [2006] 1 I.R. 388 at p.403, where she stated that the "substantial interest" of an applicant is one which is "*peculiar or personal to him*", and those of Ó'Néill J. in *Cumann Tomas Dáibhis v. South Dublin County Council* [2007] IEHC 118, (Unreported, High

Court, Ó'Néill J., 30th March, 2007), where he stated at p. 12 of the judgment that:-

> *"In my view the requirement that an interest must be "peculiar or personal" to an applicant does not mean that if some other party has the same or similar interest in the subject matter of the application that both are thereby excluded from having a "substantial" interest. … In my view what the phrase "peculiar or personal" imports is that the proposed development the subject matter of the application is one which affects the applicant personally or individually in a substantial way as distinct from any interest which the wider community, not so personally and individually affected, might have in the proposed development."*

59. Murray C.J. was ultimately of the opinion (at p. 334) that:-

> *"While certain delineations can be made in defining what "substantial interest" may or may not amount to, the phrase is not susceptible to a general or all embracing definition or formula covering all cases."*

In the end, the Court found that claims as to the effect which a development, such as this, might have on the environment were not personal or specific enough to ground judicial review of a planning permission, absent more specific affectation of the applicant.

60. In relation to the question of whether or not a denial of statutory rights, particularly in relation to participation in the planning process, would be sufficient. Murray C.J. considered (at p. 337) that:-

> *"If an individual is denied such a statutory right he or she has, potentially, a "substantial interest" in seeking a judicial remedy, including by way of judicial review, with a view to impugning a decision made in breach of that right."*

Nonetheless, Kearns J. warned (at p. 348) that:-

> *"If one were to accept that a deficiency of interest could be compensated for by demonstrating substantial grounds, such a conflation of the two requirements of the subsection would inexorably also mean that a particularly strong interest in the development could be invoked as a justification for granting leave even in the absence of substantial grounds. That would be plainly wrong."*

61. The requirement of substantial interest is a high threshold. That this is so is clear, inter alia, from the legislative history of the Planning Acts. Macken J. in *Harrington v. An Bord Pleanála* [2006] 1 I.R. 388, having reviewed the historical legislation observed (at pp. 400 to 401) that:-

> *"The Act of 2000 adopted an even more strict approach overall to the rights of third parties to object to the grant of planning permissions than that found in those cases heard under earlier legislation, once a full appeal has taken place, inter alia, by requiring that an applicant should have, not just a status as an "aggrieved party" as was the position under earlier legislation, or even a "sufficient interest" as was the case under the Act of 1992, but rather a "substantial interest", a clearly more onerous test."*

She also noted the rationale for such a strict statutory judicial review scheme (at p. 399):-

> *"This is because there is in place an extensive statutory scheme under which members of the public may object to the original grant before a planning authority and may also appeal to and be heard by an independent appeal authority, namely [An Bord Pleanála]. To that appeal scheme the statute also provides for the nomination of certain designated parties, who have an automatic right to be heard, with a view to ensuring wide ranging representation in planning matters from diverse interest group."*

Further, Keane J. in the case of *Lancefort Ltd. v. An Bord Pleanála (No. 2)* [1999] 2 I.R. 270, who had similarly considered the legislative history of the Planning Acts and the tightening of requirements for judicial review, noted at pp. 309 to 310 that:-

> *"[T]he Oireachtas has made plain its concern that … the judicial review procedure should not be availed of as a form of further appeal by persons who may well be dissatisfied with the ultimate decision, but whose rights to be heard have been fully protected by the legislation."*

62. Thus the mere fact that an applicant's rights in relation to the planning process had been breached would not automatically confer on him a substantial interest. He may have substantial grounds, but if he would not be personally affected by the impugned decision, it would be difficult to see how even an egregious breach of procedural rights could confer upon an applicant a substantial interest for the purposes of the Act of 2000. As Kearns J. thus noted in Harding (cited above, at p. 349):-

> *"Thus the objector might be a person who resides at the opposite end of the country, or for that matter in the United Kingdom or mainland Europe, or indeed might even be a person with some knowledge of the local area who has moved away overseas but who nonetheless likes to fill in idle moments by tracking planning developments in Ireland on the internet. Conceivably such a person might be an individual living and working in a whaling station on South Georgia. This "open to all comers" scenario is the exact opposite of what the Act is designed to achieve and is in my view irreconcilable with any reasonable interpretation of s. 50(4)(b)(iv) of the Act of 2000."*

63. Considering the scope of "substantial interest", Kearns J. said at p. 350:-

> *"[The] wording [of s. 50] strongly suggests to me that the framers of the legislation had in mind a range of interests originating in, but not necessarily limited to, considerations of how an applicant's property or financial interests might be affected by the particular development. In one sense it admits, therefore, a simple and perhaps limited interpretation. If, for example, the requirement is to have a "substantial interest in the project for a new stadium for Manchester United", would any reasonable person assume this threshold level of interest was met by simply having an interest in footballing matters generally or by general concerns about the impact of a new stadium on the city of Manchester? I do not think so. However, if I live next door to the stadium I might be said to have a substantial interest with regard to any proposed building works or other onsite developments in terms of the impact on the value of my property or how my property or business might be affected by increased traffic or other consequential effects. The way I am affected is <u>tangible and immediate</u> and largely derives from the geographical proximity of the proposed development to my property. Needless to remark, it does not necessarily*

follow that, because an applicant has an interest in land or financial interest which is affected by the development, such applicant will have a substantial interest, although this may often be the case on a particular set of facts. Equally, the subsection does not necessarily mean that a person without an interest in land or financial interest must always fall outside the category of those who have a substantial interest, but simply that other types of interest can count towards whether a person has a substantial interest." (Emphasis added)

64. The Court ultimately found that in the particular circumstances, the applicant had not been denied a right to participate in the process, and in any event even if he had been so denied to a certain extent, it was not shown that such a breach would affect the applicant's interests. It noted that he lived two or three kilometres from the development and had to rely upon the fact that he had family connections with the location and that he took sailing trips in the vicinity and visited the area. These facts distinguished him from no other member of the public living in or outside the relevant area. In those circumstances he could not be said to have a substantial interest for the purposes of s. 50 of the Act of 2000, as amended.

65. It is therefore clear to me that in order for an interest in a matter to be substantial for the purposes of the Acts of 1992 or 2000, as amended:

i) The affect of the development on an applicant must be tangible and immediate, rather than illusory and remote;

ii) The interest should be peculiar and personal, rather than general; and

iii) The interest should be weighty, rather than tenuous.

As noted by Kearns J. in *Harding*, geographic proximity to a site may often be sufficient to imbue an applicant with a substantial interest, however a lack of such proximity will almost inevitably defeat a claim that an applicant has such an interest (see also *Harrington*). The purpose of the legislation is not to imbue all and sundry with a right to challenge a planning decision, regardless of the effect that development will have directly upon them. I would respectfully agree with the opinion of Kearns J. on this particular observation.

66. Despite the forceful views experienced in *Harding*, there has been some suggestion of a caveat to the strict requirement of a substantial interest as outlined above. Having considered the question of substantial interest and concluded against the applicant in that case, Macken J. in *Harrington v. Cork County Council* [2006] 1 I.R. 388 at p. 405 stated:-

"However, that is not quite the end of the matter. I have already indicated that, while the section, as well as the obligations imposed upon the applicant in the proviso, must be construed and applied strictly, the application of that strict test must not permit a clear abuse of process, or a serious failure to apply the law correctly, to escape judicial scrutiny. In that regard I refer to the comments of Keane J. in the case of Lancefort Ltd. v. An Bord Pleanála (No. 2) [1999] 2 IR 270 where, having considered two judgments on the same issue, he stated at p. 312:

> *"It was accepted in both cases that it was unlikely that any other responsible challenger would emerge if standing was denied to the applicants and that the allegations, if made out, would establish a clear breach of an important duty or a default in a significant area by public bodies."*

…

Having regard to the jurisprudence, it is my judgment that, notwithstanding that the applicant has failed to satisfy the court he has a substantial interest, as required, the court should now consider the arguments on the question whether there are, in fact, substantial grounds for contending that the decision was invalid. If that is established, on the basis that [An Bord Pleanála] failed in a real sense seriously to comply with the law, in the sense set forth in the above extract, the applicant would still be entitled to commence proceedings, under the proviso I have mentioned, namely that the court should not be precluded from scrutinising a serious failure to apply the law."

67. Notwithstanding what would appear to be a general approval of the approach in *Harrington* by the Supreme Court in *Harding*, the implications of such an exception to the explicit wording of the Act of 2000 may at some stage require further exploration. Murray C.J., at p. 338 of the report in Harding, stated:-

"Only persons who have a "substantial interest" in the subject matter of the application may seek leave to judicially review the validity of the decision to grant planning permission on those or other grounds. The mere fact that the applicant relies on such grounds cannot mean that he has a "substantial interest" for the purposes of s. 50 of the Act of 2000 no more than the fact that he objects to the development on environmental grounds means that he must be deemed to have such a "substantial interest". Absent a "substantial interest" the applicant is no more entitled to leave to bring judicial review proceedings than any other person whose interest in the development is simply a general one or too remote."

However, where there is a question as to the potential breach of an objector's rights with regards to the planning process, Murray C.J. felt (at p. 341) that:-

"[A] consideration of whether the alleged breach was sufficient to give him a "substantial interest" for the purpose of s. 50 may indeed overlap with the kind of considerations that would be involved in determining whether it also constistuted, distinctly and separately, a substantial ground. [However] I just wish to make it clear that my considerations were not concerned with the latter issue, which is a distinct one notwitstanding the overlap of considerations that may be involved in the context of this particular point."

Nonetheless Murray C.J. recognised that such errors in process may be challenged by way of the statutory judicial review procedure. Kearns J., on the other hand, whilst ultimately agreeing with Murray C.J. as to his conclusions, expressed his own opinion on this point. He stated, at p. 358 of the report, that:-

"[T]he possibility that in a given case there may be an error in process which cannot be addressed in the context of an appeal to the second respondent does not convert a non-substantial interest into a substantial one. Nor do the hypothetical problems mentioned by counsel for the applicant arise in the context of the present appeal. This does not mean that some legal error in the process is necessarily immune from judicial remedy. It simply means that persons who do not have a substantial interest in the matter, the subject of the decision, to grant or refuse

an application for planning permission do not have locus standi to seek judicial review of the actual decision. That remedy is confined to those persons who have such a substantial interest. The words of the statute are plain and unambiguous and I see s. 50 of the Act of 2000 as expressly excluding a remedy by way of judicial review from persons who do not have a substantial interest. In the context of s. 50 it seems to me that any right of such an applicant to bring judicial review proceedings is necessarily limited to reliefs which may be sought prior to the making of any decision by the planning or local authority concerned, as otherwise a challenge by an objector without substantial interest would attack the decision itself in an impermissible manner.

The Act does not itself provide for an exception from the scope of its provisions where some want of process has occurred in the case of an objector who lacks substantial interest."

68. Ultimately in this case, the question of whether the applicant's procedural rights were breached does not substantively arise. In any event, except in the circumstances mentioned above where there would appear possibly to be some ambiguity, there was and is fundamental agreement that in order for judicial leave to be granted an applicant must show both a substantial interest and substantial grounds, which should be considered separately.

69. In my opinion, in the case at hand there is no doubt that the applicant is geographically proximate to the development. Further still, he is in direct competition with the developer for the provision of petrol station services. Furthermore, the applicant has been involved in the planning process in both the present application and in earlier ones (e.g. application 03/1035) where the same and/or similar issues were dealt with by the Board. Indeed one might consider the applicant's non-participation with the appeal, the subject matter of these proceedings, as not unreasonable, given that he had been involved in prior appeals before the Board on the same issues, in respect of which the Board had consistently found the development to be unauthorised. In those circumstances, and in circumstances where he had lodged submissions with the council which would be forwarded to the Board in the case of an appeal, the applicant might reasonably take the view that given the foregoing, his participation in the appeal was unnecessary. I do not accept that his failure to appear before the Board on this occasion is in any way fatal to his standing to challenge the decision; indeed such is admitted by the Board. There could therefore be no question in my mind but that the applicant has a significant interest, both in relation to his own property and in relation to the effect the development may have on his business; the development may affect the applicant, both with regards to his property and financially.

70. Turing to the issue of substantial grounds, Carroll J. in *McNamara v. An Bord Pleanála* [1995] 2 I.L.R.M. 125 at p.130 set out the general requirements of what might be considered to be substantial grounds:-

"In order for a ground to be substantial it must be reasonable, it must be arguable, it must be weighty. It must not be trivial or tenuous."

71. Commenting on this in *Kenny v. An Bord Pleanála* [2001] 1 I.R. 565 at p. 572, I noted that:-

"[T]here can be no doubt but that the threshold of "substantial grounds", was intended, in my humble view, to result in a different and higher threshold, than that normally applicable to an application for judicial review under the Rules of the Superior Courts, 1986. That a ground had to be reasonable, before it could be substantial, could never be disputed. That such a ground also had to be arguable, equally in my view, could not be challenged. Such tests on their own however, may not be adequate as both of these descriptions equally apply when one seeks leave in an ordinary judicial review case under O. 84, r. 20: see the judgment of Denham J. in G v. Director of Public Prosecutions [1994] 1 I.R. 374. Indeed, in a consideration of these words, one can think of grounds which could be both reasonable and arguable and yet fall significantly short of meeting the threshold of being "substantial". The words "trivial or tenuous" are undoubtedly helpful but probably more so as words of elimination rather than qualification. The description of being "weighty" and of "real substance" are in my view of considerable importance in the interpretation of this threshold phrase. However, it must also be remembered that, from a base say, opposite substantial, namely insubstantial, an applicant must navigate the considerable distance in between, and in addition, must arrive at and meet the threshold whilst still afloat and on course. In truth I feel, whilst many attempts have been made to explain or convey "the equivalent of its meaning" I am not certain that one can better the original phrase itself. In any event these observations of mine are purely an aside as the Supreme Court has, once again, in The Illegal Immigrants (Trafficking) Bill, 1999, [2000] 2 I.R. 360, endorsed the McNamara test."

72. I do not feel that it is necessary in any way to labour on the law as to what constitutes "substantial grounds" in circumstances where there are clear issues present in this case; especially in light of my subsequent ruling herein (see para. 85 *infra*.). This case is concerned with a decision taken by the Board which ran contrary to its previous findings and which relied upon a document which had been created erroneously and without statutory basis; facts which are not in dispute between the parties. It is therefore abundantly clear that the applicant has substantial grounds for bringing the within application.

73. In light of my finding that the applicant has both a "substantial interest" and "substantial grounds", I shall now move to consider the substantive issues in the current application.

Error of Law on the Face of the Record:

74. Many of the challenges to decisions of public law bodies are based on an allegation that the decision is unlawful as such body acted entirely without jurisdiction: the typical *ultra vires* argument. This is to be contrasted with errors within jurisdiction where necessary precision will be required when using this term as the same has a number of principal and subsidiary meanings. Examples frequently arise where bodies lack the power or authority to enter into or embark upon the exercise which gives rise to the decision. Other situations, however, are also reviewable: situations even where at the commencement of the process, jurisdiction undoubtedly exists, see *The State (Holland) v. Kennedy* [1977] I.R. 193. An aspect of this power to review, makes clear that a determination reached by an administrative tribunal may be quashed in circumstances where that determination is premised on a manifest error of law. The *locus classicus* of the court's jurisdiction in this regard can be seen in the House of Lords decision in *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 A.C. 147, as approved in this jurisdiction by the Supreme Court in *Killeen v. Director of Public Prosecutions* [1997] 3 I.R. 218. Lord Reid, considering the supervisory role of the court, noted at p. 171 of the report:-

"It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word "jurisdiction" has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. <u>It may have made a decision which it had no power to</u>

> *make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly." (Emphasis added)*

75. In *Harte v. The Labour Court* [1996] 2 I.R. 171, the issue was whether the Labour Court had erred in law in construing the relevant provisions of the Anti-Discrimination Pay Act 1974. Having again approved *Anisminic* and *The State (Holland) v. Kennedy*, Keane J. in the High Court said at pp. 177 to 178:-

> *"It is sufficient to say that there are cases in which an error of law may be of such a nature, although apparently committed within jurisdiction, as to render the entire proceedings a nullity."*

Given the particular issue in that case, it was not necessary for Keane J. to detail further, but this is a clear acknowledgement of such errors being amenable to challenge, even when apparently committed within jurisdiction. See also the decision of Hedigan J. in *De Burca v. Wicklow County Manager & Anor.* [2009] IEHC 54 (Unreported, High Court, Hedigan J., 4th February, 2009)

76. In addition to the above example list, which permits intervention, there is a further rule or principle, whether anomalous or not, where a decision of an inferior body, even one acting within jurisdiction, can be set aside. Denning L.J. put this jurisdiction succinctly in *Rex v. Northumberland Compensation Appeal Tribunal Ex parte Shaw* [1952] 1 K.B. 338 at p. 352 where he stated:-

> *"If the tribunal does state the reasons, and the reasons are wrong in law, certiorari lies to quash the decision."*

In the same case Morris L.J. expanded (at p. 357):-

> *"It is plain that certiorari will not issue as the cloak of an appeal in disguise. It does not lie in order to bring up an order or decision for rehearing of the issue raised in the proceedings. It exists to correct error of law where revealed on the face of an order or decision, or irregularity, or absence of, or excess of, jurisdiction where shown. The control is exercised by removing an order or decision and then by quashing it."*

Both of these statements were endorsed by Costello J..in *Ryan v. Compensation Tribunal* (Unreported, High Court, Costello J., 15th November, 1996) and were also accepted and applied by Blaney J. in *Bannon v. Employment Appeals Tribunal* [1993] 1 I.R. 500. In that case, on a claim for unfair dismissal, the Employment Appeals Tribunal held "*that a transfer of undertaking, business or part of a business within the meaning of the European Communities (Safeguarding of Employees' Rights on Transfer of Undertakings) Regulations, 1980, did not take place when …"* the employer outsourced contract security. On the resulting judicial review the employer argued that certiorari did not lie because the Tribunal erred within jurisdiction. This submission was rejected by the trial judge who, having quoted with approval from *Ex parte Shaw*, held that the since the error appeared on the face of the record, the same was amenable to review. (See also *The State (Abenglen Properties Ltd) v. Corporation of Dublin* [1984] I.R. 381 at p. 399). Although, by reason of later decisions applying a generous interpretation to *Anisminic,* this rule is now almost redundant in England (see Wade & Forsyth, "*Administrative Law"*, (9th Ed.) p.268), it nonetheless remains a principle which clearly applies in this jurisdiction.

77. An aspect of this approach which has given trouble is what constitutes "the record". Henchy J., in *The State (Abenglen Properties) v. Corporation of Dublin* [1984] I.R. 381, took a narrow view in a planning context and confined "the record" to the formal decision of granting or refusing permission. A more extensive view was adopted in *Ex parte Shaw* and in the case of *In Re Doherty and Others' Application* [1988] N.I. 14 at p. 31, where Kelly L.J. held that the plans and specifications contained in a licensing application also constituted part of the record. Further consideration of the point is unnecessary in this case as the record undoubtedly includes the actual decision of the Board. Therefore, the question is what were the reasons advanced by the Board for its decision of the 26th March, 2009, and can it be that such reasons are correct in law?

78. The Board in that decision, having decided to grant permission, stated unequivocally in the section entitled "Reasons and Considerations" that:-

> *"[A] valid planning permission for the use of land as a petrol station exists on foot of the said planning register reference number 98/818."*

79. The question thus arises, having regard to what is known in relation to the history of the 1998 grant, as to whether it is possible in law for a valid planning permission to exist grounded upon the 1998 grant? If the 1998 grant could not found such a conclusion in law, the decision of the Board of the 26th March, 2009, must be invalid as expressing an error of law on the face of the record and, subject to the discretion point, must be quashed.

80. The Board's answer is to confess that its previous decisions were legally unsupportable because, somehow, it overlooked the provisions of s.50 of the Act of 2000. On this critical point, that really is its only response. The reference to legal opinion from counsel for the developer and its own counsel is trying to overcome a different argument. So was the Board correct to consider that it was precluded by virtue of s. 50 from entering into a consideration of the effect of the 1998 grant, where it had not been challenged previously?

81. Considering the 1998 grant, I am satisfied, as is agreed between the parties, that as a result of the Board's declaration made on the 14th November, 2000, application 98/818 ceased existence as a matter of both fact and law. The purported grant by the council to this application was thus fundamentally impossible, again both in fact and in law. However the term is used, it had no jurisdiction to do so. The document created by the council had no statutory force; the council had no application to address: not one of the steps or acts mandatorily required for a valid application existed. It had no basis or foundation upon which to respond. It had no comparison or effect. Nothing could be based on the written application and nothing could spring from it. It had no effective utility. It must, as against the statutory prohibition contained in s. 16 of the Act of 1992, be regarded as if it had not issued.

82. It is impossible to see how this document, which was a clear nullity, could affect subsequently the legal status of any planning matter (s.16 of the Act of 1992 considered). How could it have any influence or impact on it? It could not possibly confer planning legitimacy on the site; it could not authorise the development, to wit, the carrying out of a petrol service station thereon. In those circumstances, I entirely agree with the repeated assertions that the developer's petrol station was an "unauthorised development".

One must therefore ask whether there have been, or indeed ever could be, circumstances which as a matter of law might change this status between the several prior applications and the one presently at issue?

83. It would seem to me that as a matter of common sense, where a grant as in this case has been issued without the relevant statutory basis, it can have no force. The fact that the erroneous grant was not challenged could in no way confer it with retroactive validity; such is wholly outside of the legislative scheme which entirely governs this area of law. The 1998 grant was therefore wholly illusory; it was a grant in name only, having no possible basis in either law or fact. No future actions could change this. The council had no power or jurisdiction to make the grant. It must therefore follow that any subsequent decision which places reliance upon this must be similarly flawed, being based on no legitimate legal or factual basis. The Board's decision that the development was based on a valid planning permission, as well as being erroneous, was a decision it had no power to make; it was not possible as a matter of law for the Board to retroactively confer validity on the 1998 grant.

84. The argument of the Board by reference to s.50 of the Act of 2000 is misconceived. That section (subject to the court's power to extend time, which here is not relevant) is a time limit restriction operating not as a matter of defence but of jurisdiction. It regulates the challenge to a decision, nothing more. It leaves unaltered the legal status of the decision. It has no influence on the lawfulness or effect of the decision. It gives it no badge of either approval or disapproval. It prevents challenge. Notwithstanding these views the practical effect of this section is that in almost all cases once the time period has expired, no further consideration will be required or needed. But exceptionally, as here, where a subsequent decision depends on conferring the status of legality on a legal nullity, that decision will not be allowed to stand.

85. I should of course note that the Board is entitled to change its mind on a matter, but in order to so do there must be some accompanying change in circumstances of a material nature, which could precipitate such a decision. As stated, no subsequent event could, in my opinion, have changed the status of the 1998 grant, or the status of the development as "unauthorised", in light of the grant's invalidity. It must inevitably follow that the Board's decision of the 26th March, 2009, was fundamentally flawed, being grounded upon an intrinsic misinterpretation of both law and indeed fact. That decision is one of flagrant invalidity and as such cannot enjoy any presumption. It was simply impossible as a matter of law for the 1998 grant to ground a valid planning permission.

86. In the preceding paragraph, I touched upon the Board's entitlement to change its mind, but have done so only in the more general way. Any further analysis is not required for this case. Therefore, I have not dealt with when and in what circumstances previous decisions remain binding on the Board whether, within the frame of *res judicata* or otherwise. However, I would note that the principle set out in *Athlone Woollen Mills Co .Ltd. v. Athlone Urban District Council* [1950] I.R. 1, and accepted in the judgment of McCarthy J. in *The State (Kenny & Hussey) v. An Bord Pleanála)* (Unreported, Supreme Court, 20th December 1984); are well established in this area of the law. (*See Ashbourne Holdings Ltd. v. An Bord Pleanála* [2003] 2 I.R. 114 at p.134 and *Grealish v. An Bord Pleanála* [2006] 1 I.L.R.M. 140). Therefore, the above acknowledgement of the Board's position in this regard must be seen very much against this established position. Finally, in this context the Board offers as a reason for its altered position the receipt of legal advice. Where such purported justification is recorded ex facie in its formal decision, any claim to privilege in respect thereof may not be as definitively conclusive as the Board submits.

87. In conclusion, given the most unusual, if not unique circumstances of this case, I cannot accept the argument that by granting relief the objectives of s. 50 of the Act of 2000, as outlined in *K.S.K. Enterprises Ltd v. An Bord Pleanála* [1994] 2 I.R. 128, are threatened or undermined. In fact, if on discretionary or policy grounds the 1998 grant continued as a legal foundation for the impugned and perhaps later permissions, the established and accepted reputation of the planning code could suffer. Therefore, I do not accept that the conclusion reached in this judgment could have the effect as submitted.

88. For the above reasons it is therefore clear that there has been an error of law which renders the decision of the Board invalid on its face. I would therefore grant the order of *certiorari* as sought, and quash the decision of the Board dated the 26th March, 2009.