THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 916 J.R.]

IN THE MATTER OF SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 2000, AS AMENDED

BETWEEN

CARMAN'S HALL COMMUNITY INTEREST GROUP, MICHAEL MALLIN HOUSE RESIDENTS ASSOCIATION AND ELIZABETH (OTHERWISE LIZ) O'CONNOR

APPLICANTS

AND

DUBLIN CITY COUNCIL

RESPONDENT

JUDGMENT of Mr. Justice Binchy delivered on the 11th day of October, 2017

1. By these proceedings the applicants seek an Order of *certiorari* by way of an application for judicial review quashing a decision and Order of the Deputy Chief Executive of the respondent dated 28th October, 2016 (the "Order"). The Order purports to authorise a change of use and the refurbishment of *inter alia*, a premises formerly used as a Parish Centre and known as St. Nicholas of Myra and situated at Carman's Hall, Dublin 8 ("the Premises"), and in the ownership of the Dublin Archdiocese, in order to provide accommodation for persons experiencing homelessness. It was made by Mr. Jim Keogan, then Assistant Chief Executive of the respondent, and acting pursuant to powers delegated to him by the Chief Executive, Mr. Owen Keegan and is in the following terms:-

> "As the officer with the delegated responsibility for planning and development in Dublin City Council's administrative area I endorse the recommendation of the Senior Executive Officer above requiring that a programme of conversion involving the change of use and refurbishment of the three developments referred to above at Francis Street, Ellis Quay and Little Britain Street/Green Street, be commenced to provide accommodation for persons experiencing homelessness. I am satisfied that the provision of accommodation for persons experiencing homelessness in this instance is an exempted development having regard to the provision of the Planning and Development Act 2000, s. 179(6)(b) which states *inter alia* development by a local authority is exempt if the development "is necessary for dealing urgently with any situation which the Manager considers is an emergency situation calling for immediate action"."

2. It is important to stress that these proceedings are concerned only with the Premises, and not with the other premises at Ellis Quay and Little Britain Street/Green Street referred to in the Order.

3. As is apparent from the Order, it was based upon the recommendation of a Senior Executive Officer in the housing and residential department of the respondent, dated 28th October, 2016. That officer is Ms. Máire Igoe, and in her recommendation, Ms. Igoe states that the respondent is unable:-

> "To meet the needs of a growing cohort of vulnerable adults and families presenting to Dublin City Council's Homeless Services due to the unavailability of suitable accommodation in the Dublin region. The current high levels of presentations of homeless services as well as the growing number of individuals and families being encountered on the streets indicates that this situation is going to get worse during the winter of 2016 and beyond. In addition to adults experiencing homelessness the situation for families is precarious as the numbers of families in need of emergency accommodation is outstripping the available contracted provision in place.
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> The rough sleeper count in Spring 2016 showed at least 102 people sleeping rough in the Dublin region. In July 2016 alone 97 new families presented as homeless bringing the total number of families in emergency accommodation to 993 with 2,020 children. All the Dublin local authorities are experiencing a similar crisis in their administrative areas.
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> Due to the large number of families requiring emergency accommodation which had resulted from a range of factors including the loss of private rental accommodation and family breakdown the Dublin Regional Homeless Executive (on behalf of the four Dublin LA's) has had no choice but to use commercial hotels settings as a form of temporary shelter as no alternative housing options have been available. The use of commercial hotels in this way is an unstable and unsuitable form of accommodation for vulnerable families.
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> The availability of hotel rooms for this use is now at saturation point particularly due to the upturn in the Dublin tourism sector. This is a critical situation which requires an urgent emergency response in order to provide the accommodation necessary to prevent fatalities and/or serious harm to adults and children at serious risk of rough sleeping in Dublin during 2016/2017.
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> Dublin City Council's Housing and Residential Department are seeking approval to take immediate humanitarian action to open the homelessness facilities as set out below in order to ensure beds are available for all persons who are at risk of rough sleeping.
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> A proposal to change the use of the existing buildings outlined below on a temporary basis has been put forward as part of the emergency response. The provision of these emergency accommodation units is temporary in nature pending a more sustainable long term option being provided for this vulnerable group through the provision of supported long term accommodation or permanent housing options (social housing/private rented (HAP))."

4. Ms. Igoe then concludes with a recommendation as follows:-

> "Given the current lack of suitable accommodation to cater for persons experiencing homelessness in the Dublin area as outlined above and given that the situation is considered by both the executive and elected members of Dublin City Council to be of a level that is considered an emergency with immediate action required, I recommend that in order to alleviate this unacceptable situation a programme of conversion involving the change of use and refurbishment of the

three developments referred to above at Francis Street, Ellis Quay and Little Britain Street/Green Street be commenced to provide accommodation for persons experiencing homelessness. I am satisfied that the provision of accommodation for persons experiencing homelessness in this instance is exempted development having regard to the provisions of the Planning and Development Act, 2000 s. 179(6)(b) which states *inter alia* development by a local authority is exempt if the development is necessary for dealing urgently with any situation which the Manager considers is an emergency situation calling for immediate action."

Background

5. In the statement of grounds, the first applicant is described as an association comprising local residents of the Liberties area of Dublin 8, being persons directly affected by and concerned with the proposed development of the Premises. The second applicant is described as a Residents Association comprising exclusively residents of Michael Mallin House, Vicar Street and Carman's Hall, the combined buildings of which are home to 164 residents including 46 children under the age of 16 years. The third applicant is described as a youth and community worker in the employment of the South West Inner City Network under the aegis of the Department of Social Protection, and who works in the immediate local area of the Premises. In this role the third applicant was formerly based at St. Nicholas's of Myra Parish Community Centre, Carman's Hall, Dublin 8, i.e. the Premises, until 8th November, 2013. She was awarded the 2016 Dublin City Council Good Citizen Award for her work in the children and youth category.

6. Issues have been raised by the respondent in the proceedings in relation to the legal capacity of the first and second named applicants. I will address those issues in due course, but suffice to say at this juncture that since no issue arises in relation to the capacity of the third named applicant, there can be no obstacle to the bringing of these proceedings by her on these grounds.

7. The proceedings are grounded upon three affidavits: an affidavit of Ruth Campbell sworn 4th December, 2016 on behalf of the second applicant; an affidavit of the third named applicant sworn on the same date; and an affidavit of a Raymond O'Malley, civil engineer and town planner dated 30th November, 2016. Ms. Campbell describes herself as a community volunteer and chairperson of the Michael Mallin House Residents Association. She says that Michael Mallin House is a local authority flat complex made up of two buildings, one of which is within one hundred metres of the Premises and the other of which is just another few metres away. She says that she has lived in Michael Mallin House for twenty-five years with her family.

8. Ms. Campbell states that the Premises was, for a period of twenty-five years until it closed in November 2013, used as a Community Centre. She says that on any given day as many as 450 adults and children made use of the Premises for a wide range of purposes, including a breakfast club to feed disadvantaged children, a homework club, the provision of meals for senior citizens, evening classes, adult training on drug awareness, community development, the local community policing forum and other general uses by associations and organisations. The Premises was closed owing to accessibility issues and because it was not compliant with fire regulations. Ever since then, the residents in the area have campaigned to have the Premises reopened and have sought funding from the relevant authorities to attempt to bring the Premises up to the applicable regulatory standards.

9. Ms. Campbell describes in some detail the importance of the Premises when it was open for use as a Community Centre, on account of the lack of facilities in the Liberties, for children in particular. Since its closure, community activities have been severely restricted because there is no other community facility in the area. In her grounding affidavit, Ms. O'Connor describes the closure of the Premises in 2013 as being a "devastating blow" for the local community because people have nowhere local to come together to run events, as in the past. Both Ms. Campbell and Ms. O'Connor aver that they and others had been seeking assistance from local (elected) representatives in Dublin City Council in order to secure the necessary resources to have the Premises reopened for the benefit of the community and that as recently as October, 2016, Councillor Críona Ní Dhálaigh was in correspondence with both the Archdiocese and the Parish Priest, Fr. Martin Dolan in this regard. Ms Campbell refers to an email to Cllr. Ní Dhálaigh of 13th October, 2016 in which Fr. Dolan stated that "the Parish has been working very hard for the last almost three years to get the Parish Centre open again. In the near future I will be in touch with you again to discuss the progress."

10. Ms. O'Connor, the third named applicant, avers in her grounding affidavit that on 24th October, 2016 she was passing the Premises when she noticed a large team of contractors working at the building. Over the course of the day, she says, rumours circulated that the Premises was to be converted for use as a hostel with 65 bed spaces for men. She contacted Dublin City councillors, but they had no knowledge of the purpose of the works. Following enquiries however, it was established that the respondent had indeed taken the decision to convert the Premises for use as accommodation for homeless persons. It transpired that the respondent had made contact with the parish authorities in May, 2016 to explore the possible temporary use of the Premises as a homeless shelter. The respondent made a presentation to the parish authorities in May 2016, presenting its model for the provision of services to the homeless, contained in a document entitled *Pathway to Home* ,and explaining how it (the respondent) operates to provide emergency accommodation and support services for homeless persons and how quality standards and good neighbourhood relations are a prerequisite for the commissioning and establishment of new facilities. The respondent's proposals were received positively by the parish authorities, and the respondent prepared a draft lease which issued to the parish authorities on 11th August, 2016. Following discussions, agreement in principle was reached in late August, 2016. All of this information was given in a reply dated 30th November, 2016 given by the respondent (through a Mr. Daithi Downey, Deputy Director and Head of Policy and Services Delivery, Dublin Regional Homeless Executive ("DRHE") to a query put by Councillor Ní Dhálaigh. The DRHE is a shared service operating under the aegis of the respondent, as lead statutory authority in the Dublin region, in respect of the co-ordination of responses to homelessness. In this reply, Mr. Downey (who also swore affidavits in these proceedings) states that the formal lease itself was signed on 28th October, 2016. However, in his second affidavit of 14th December, 2016 Mr. Downey says that the lease was signed on 28th September, 2016. No copy of the lease itself was exhibited by the respondent in the proceedings.

11. The information given to Councillor Ní Dhálaigh on 30th November, 2016 may be contrasted with a response to a motion of Councillor Ni Dhálaigh which she tabled for a meeting of the elected representatives of the respondent on 3rd October, 2016. At that time Councillor Ní Dhálaigh was asking the respondent to facilitate a meeting with the Dublin Archdiocese with a view to trying to progress the reopening of the Premises as a Community Centre. In his reply, Mr. Brendan Kenny, Assistant Chief Executive of the respondent stated that:-

> "Officials did meet with the Dublin Diocese on a number of occasions following the closure of this premises a couple of years ago, with a view to the possibility of the Diocese handing it over to Dublin City Council for general community use. Agreement to such a handover was not achieved and this (vacant) premises remains in the ownership of the Dublin Diocese".

12. On 11th November 2016, Ms. O'Connor wrote to the Chief Executive of the respondent. This is a lengthy letter in which Ms. O'Connor explains in some detail the effect of the closure of the Premises as a Community Centre, and also sets out her concerns in relation to the provision of accommodation for homeless persons at the Premises. While in this letter Ms. O'Connor expresses concerns

to which she also deposes in her affidavits in these proceedings, nonetheless it is of some assistance to identify those concerns as expressed in this letter, at this juncture:-

> "The proposed hostel is in the very same building as the community crèche which cares for over 100 infants from the local area on a daily basis. The crèche is there 20 years and has only just had its lease renewed for another five years, in October 2016. The residents of the immediate area depend on the crèche and are very concerned for their children. The crèche used to share with the Community Centre, until the Church forced it to shut down in November 2013. We have been campaigning ever since to have the Centre reopened. The hostel will now share the ground floor with the crèche and the hostel windows directly overlook the children's play yard from the first floor. Both the children and the hostel users will be coming and going from the same building at the same time in the mornings and evenings. They have different access doors but it is still the same building. It is well known that many inner-city hostel users have drug and alcohol addiction problems. It is clear that many of the young children will pass the hostel users every single day. From experience, we expect anti-social groups congregating in the immediate area, the surrounding streets and laneways engaging in drug and alcohol abuse. This will bring safety concerns for residents and create a danger to children from used needles, drug paraphernalia and broken alcohol bottles. We cannot understand why the Council is seeking to operate a hostel for the homeless in the very same building as a crèche, and also just feet from the front doors of long established residences of houses and flats in Carmel's Hall and of Michael Mallin House.
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> We cannot understand why the Council is concentrating all of its homelessness services in the same small area in and around the Liberties. There are already over 666 homeless shelter beds within a short distance of this location but there are very few places in other areas of Dublin City. We cannot understand why the Council has closed the nearby Brú Aimsir hostel on Thomas Street and spent money opening another one in the St. Nicholas of Myra Centre. The Council is creating its own problem by closing beds in one location and using it to justify opening yet another hostel."

Ms. O'Connor then continues in this letter to complain about the failure of the Council to consult with the local community about the development or to provide any information in relation to the same.

13. The Chief Executive replied to Ms. O'Connor's letter, by letter of 14th November, 2016. Since this letter sets out the respondent's position as well as any other document in these proceedings, it is worth quoting from it extensively. In relation to the concerns raised by Ms. O'Connor he says the following:-

> • "There is an urgent need to provide emergency accommodation for the 150 or so individuals, who are currently sleeping rough on the city's streets, in advance of the winter period.
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> • In addition to the need to cater for these individuals the Brú Aimsir temporary hostel, which was opened in October 2015, has to close early in 2017. This building is owned by the Digital Hub Development Agency and was only leased to the Council for the 2015/2016 winter period. The lease was extended to allow Brú Aimsir to continue in use beyond April 2016 but the City Council must vacate the building early in 2017 to facilitate planned redevelopment of the site.
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> • A total of three new temporary hostels are being developed to provide additional emergency accommodation and to allow for the closure of Brú Aimsir. Their [sic] are located at Carmel's Hall, at the former Bargain Town premises at 7-9 Ellis Quay, Dublin 7 and at a former warehouse premises at 13-17 Little Britain Street, Dublin 7. The existing users of Brú Aimsir will probably be dispersed between the three new facilities.
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> • The issue of the concentration of emergency accommodation in the Francis Street area of the city should be seen in the context of the planned closure of Brú Aimsir early in 2017.
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> • Given the emergency situation that exists in relation to homeless persons sleeping rough in the city and the urgent need to provide additional accommodation it was considered appropriate and necessary to use the emergency planning powers of the Chief Executive.
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> • I accept that the failure to consult with the local community in relation to the proposed development at Carman's Hall is a matter of considerable annoyance and indeed anger to some members of the community which is both understandable and unfortunate. At the same time, it would have been disingenuous of the Council to engage in local consultation in relation to the Carman's Hall development when the reality was that once the lease was signed the City Council felt it had no option but to proceed with the proposed development given the scale of the homeless emergency it is seeking to deal with.
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> • I do not regard the Carman's Hall premises as an unsuitable location for emergency homeless hostel. I accept however that the management regime in place must have due regard to the legitimate concerns of the local community. The City Council is prepared to facilitate a meeting/meetings between the hostel operator and the local community in an effort to address matters of concern to the local community.
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> • The facility of Carman's Hall is being developed as a temporary homeless hostel. With the expected recovery in the housing market the Council is confident that it will be able to source suitable units of accommodation for homeless individuals, primarily in the private rented sector which with appropriate supports will provide suitable and sustainable accommodation for homeless individuals and allow the Council to close temporary hostels. At this stage however it is impossible to say for certain when this will happen. However, I would be prepared to give a commitment to consult with the local community before any decision is made to extend the use of the Carman's Hall facility beyond the 2017/2018 winter period.
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> • While Carman's Hall is not in the ownership of the City Council, we are prepared to engage with the local community and the Archdiocese of Dublin in relation to the use of the facility once its use as a temporary homeless hostel ceases.
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> • Finally, the Council is not prepared to defer the opening of the Carman's Hall facility. However, it is prepared to engage with the local community in relation to its day to day management in advance of the opening and to provide whatever additional information you require."

14. Following upon receipt of the letter from the Chief Executive of 14th November, 2016, the applicants brought these proceedings.

By order of 5th December, 2016 the applicants were given leave to apply by way of judicial review for the relief set forth at paragraph (d) of the statement of grounds, on the grounds set forth in paragraph (e) thereof. On the same date, Humphreys J. placed a stay on the Order until 24th January, 2017. However, upon application of the respondent, the stay was vacated by Noonan J. on 16th December, 2016 following upon which the Premises was immediately put into use for the provision of accommodation of homeless persons. The Premises accommodates 65 persons.

The Reliefs Sought

15. The applicants seek the following reliefs:-

(1) An Order by way of *certiorari* quashing the Order insofar as it relates to the Premises only;

(2) A declaration that the Order is null and void, being *ultra vires* the powers of the respondent, by reason of the respondent's failure to comply *inter alia* with s. 178(2) of the Planning and Development Acts 2000-2016 and Part VIII of the Planning and Development Regulations 2001, as amended; and

(3) A declaration that authorisation of the proposed change of use and refurbishment works of the Premises comprises a material contravention of the Dublin City Development Plan 2016-2022; and

(4) A declaration that the Order is *ultra vires* and/or is invalid and of no legal effect; and/or

(5) A declaration that the Order is so irrational and/or unreasonable that it has to be unlawful and/or invalid; and

(6) A declaration that by reason of the manner in which the respondent brought forth the authorisation to proceed with the proposed development the subject of the decision impugned in the within proceedings, the applicants have been denied fair procedures and natural and constitutional justice.

16. The applicants also seek other reliefs not relevant for present purposes. The grounds upon which the reliefs are sought are as follows:-

(i) The proposed development of the Premises is a material contravention of the current Dublin City Development Plan 2016-2022.

(a) It is pleaded that the respondent failed to have regard to the requirements of s. 5.5.11, Policy QH30 and s. 16.12 of the respondent's development plan, 2016-2022, ("the Second Development Plan"). The development of the premises should not have been authorised without an applicant for permission identifying the mandatory, specific and detailed requirements of Policy QH30 thereof. It is pleaded that there are already five existing institutional accommodation services located within 500m of the Premises and an additional seven separate social support services within the same radius. This is contrary to Policy QH30 and s. 16.12 of the Second Development Plan. It is claimed that the addition of the proposed development will comprise an undue concentration of services within the immediate area, thereby undermining the sustainability of the neighbourhood, contrary to s. 5.5.11 of the Second Development Plan. It is pleaded that neither the Order nor the recommendation of Ms. Igoe pursuant to which it was made identified the catchment area which the Premises is intended to serve and does not contain any statement regarding the management of the facility.

(b) It is also claimed that the respondent has erred in law as identifying an emergency as justifying the authorisation of a material contravention of the Second Development Plan.

(ii) The proposed development is a material contravention of the previous Dublin City Development Plan 2011-2017.

It is pleaded that the decision purportedly made by the Order on 28th October 2016 was in fact made long before the coming into effect of the Second Development Plan on 21st October 2016, and constitutes a material contravention of the respondent's development plan 2011-2017, ("the First Development Plan"). The grounds relied upon by the applicant in relation to material contravention of the Second Development Plan are also relied upon in relation to material contravention of the First Development Plan

(iii) The Order retrospectively approves an earlier decision and works.

It is pleaded that the order purported to authorise works which had been planned and commenced at an earlier date, and in any case no later than 24th October 2016 and that accordingly the Order is *ultra vires* because it cannot retrospectively authorise works.

(iv) The Order is ultra vires/invalid by reason of it lacking the necessary temporal certainty required;

It is pleaded that the Order is invalid because :

(a) It fails to provide any detail as to the duration of the change of use purported to be authorised, and,

(b) It authorises a change of use which is of permanent effect and is irreversible save by way of further permission or authorisation, thereby leaving the respondent at large to continue the change of use indefinitely. It is claimed that that this is *ultra vires* the power of the respondent pursuant to s. 179(6) which envisages the use of such powers on a temporary basis only

(v) That there has been a denial of fair procedures in that the respondent wilfully withheld information from the public concerned, and the applicants in particular;

It is claimed that the applicants, as persons directly affected by the proposals, had an entitlement to be consulted by the

respondent in connection with the same and to make submissions to the respondent in regard thereto. It is pleaded that the respondent denied the applicants their rights of public participation and accordingly denied the applicants fair procedures as well as natural and constitutional justice. It is also pleaded that the respondent wilfully and unlawfully withheld all information concerning the project's proposals. The applicants claim that the respondent had a duty to advance its proposals for the development of the Premises by way of Part VIII of the Regulations

(vi) That the decision is so irrational as to be unreasonable.

The applicants claim there is already a proliferation of institutional accommodation and support services within the immediate area of the Premises and that the addition of a further 65 bed spaces is disproportionate and is so irrational as to be unreasonable.

17. The applicants claim that the recommendation of Ms. Igoe underpinning the Order does not evidence an emergency. While the recommendation repeatedly refers to a shortage of family accommodation, the proposed development envisages only the provision of single bed spaces. It is also pleaded that there is an insufficiency of information supplied in the recommendation of Ms. Igoe such as to justify the emergency asserted by the respondent. It is claimed that the Order relies upon out of date data so as to identify the precise and immediate nature of the alleged emergency.

18. It is further pleaded that if there is an emergency, it is one that has arisen through the failure of the respondent to effect a sufficient response to a longstanding obligation to provide housing, and in particular housing for families in its administrative area, within a reasonable period of time. The applicants claim that the respondent has failed to implement its own Rapid Build Housing programme which was authorised in November, 2015.

Statement of Opposition

19. The respondent delivered its statement of opposition on 13th December, 2016. All allegations contained in the statement of grounds are denied by the respondent in its statement of opposition. It is denied that there has been any contravention of either the First Development Plan or the Second Development Plan. It is pleaded that all local authority development is exempted development by reason of s. 4(1)(a) of the Act of 2000 and it is further pleaded that Part VIII of the Planning and Development Regulations 2001 (as amended) (the "Regulations") have no application in circumstances where an emergency situation was deemed by the respondent to exist, and s. 179(6)(b) of the Act 2000 therefore applied. There was therefore no "application" to which policy QH30 of the Second Development Plan would apply.

20. The respondent pleads that the question of whether a proposal to provide or extend temporary homeless accommodation or support services results in an undue concentration of such uses or undermines the existing local economy, resident community or regeneration of an area is a matter of planning assessment and/or discretion of the respondent.

21. It is denied that there are five existing institutional accommodation services within 500m of the development as alleged by the applicants; the respondent states that there are only three such accommodation places within 500m of the Premises. The respondent pleads that the population within 500m of the Premises is just over 11,000 and pleads that the provision of a 65 bed homeless centre in addition to the existing 83 beds cannot be considered as an undue concentration in a catchment area of that population. The respondent also denies that there are seven separate social services within a 500m radius of the Premises, but pleads that even if there are, this is not contrary to Policy QH30 or contrary to the development standards specified in s. 16.2 of the Second Development Plan.

22. Moreover, the respondent pleads that the development is in accordance with its obligations under the Housing Acts, 1988 to 2009, with government policy for a housing-led solution to long term homelessness and the Second Development Plan itself. The respondent specifically refers to and relies upon the following sections of the Second Development Plan:-

(i) s.11.4.2 which provides :"The city council and other statutory agencies are obliged to provide appropriate accommodation and to work together to improve the range and quality of services available for homeless persons".

(ii) Policy QH28 which provides:-

"It is the policy of Dublin City Council to support the implementation of the homeless action plan for Dublin"

(iii) Policy QH29 which provides:-

"To support the implementation of the homeless action plan framework for Dublin and support related initiatives to address homelessness."

23. The respondent pleads that the development of the Premises is in accordance with the zoning of the lands concerned. The respondent pleads that the Second Development Plan envisages that there will be a need for an additional 2,500 residential units in the Liberties area over the life of the plan, and it is further envisaged that the homeless crisis will be eliminated through the provision of the required number of residential units across the city over the life of the development plan i.e. by the year 2022. It is pleaded that in the interim, the provision of 65 emergency bed spaces at the Premises in the context of the provision of 2,500 residential units in the Liberties area, over the next six years, and 29,500 citywide, cannot be considered to be a material contravention of the Second Development Plan.

24. It is pleaded that the First Development Plan has no bearing upon these proceedings because the Order was not made by the respondent until after the date the Second Development Plan came into effect. The respondent contends that the entry into a lease of the Premises by the respondent with the Archdiocese prior to the date of the Order did not and could not authorise the development of the Premises. The respondent denies that any works other than scoping works were carried out at the Premises prior to the date of the Order, but pleads that even if there were such works, this would not invalidate the Order.

25. It is further denied that the temporal scope of the Order is vague or uncertain in that the Order states that the change of use is temporary in nature pending a more sustainable long term option being provided through the provision of long-term accommodation or permanent housing options. It is pleaded that the temporary nature of the use of the Premises is confirmed by the fact that the lease is for a five year period with a break clause after three years. It is also pleaded that the respondent has waived any entitlement to renew the lease and that the respondent in a letter of 14th November, 2016 to the third-named applicant has stated that the

respondent would be prepared to give a commitment to consult with the local community before any decision is made to extend the use of the Premises beyond the 2017/2018 winter period.

26. It is denied that the Order authorises a change of use which is permanent and irreversible. It is denied that the respondent was under any obligation to consult with the applicants or the public generally in circumstances where the proposal was considered by the Assistant Chief Executive of the respondent to be necessary to deal with an emergency within the meaning of s. 179(6)(b) of the Act of 2000. It is pleaded that the plea on the part of the applicants of a denial of fair procedures is misconceived in circumstances where there is no procedure or process to which the applicants were a party. The respondent denies that there was any wilful withholding of information as alleged by the applicants or at all. It is pleaded that there is no legal basis for participation by the applicants in the decision of the respondents to make the Order.

27. The respondent denies that there is a proliferation of institutional accommodation and/or social support services within the immediate area of the Premises, and pleads that there is in fact a substantial shortage of homeless accommodation in the area and in the functional area of the respondent in general. It is therefore denied that the provision of 65 bed spaces could be considered to be disproportionate and/or unreasonable and/or irrational. It is pleaded that at present, and for the period since the previous expansion in capacity in Quarter 4 of 2015, all available temporary emergency accommodation for adults in Dublin is fully occupied and in regular use.

28. The respondent denies that the emergency has arisen through any failure on the part of the respondent to effect an efficient response to the problem of homelessness over a reasonable period of time; in the alternative, the respondent pleads that even if this is the case it is irrelevant to the requirement to take emergency action within the meaning of s. 176(6)(b) of the Act of 2000.

The Affidavits

29. As I mentioned at the outset, the proceedings are grounded upon the affidavits of Ms. Campbell, Ms. O'Connor and Mr. O'Malley. This gave rise to replying affidavits from Mr. Downey, Mr. John O'Hara, city planning officer with the respondent, Mr. Jim Keoghan, former assistant Chief Executive of the respondent, who made the Order, and Mr. Colm Moroney, administrative officer of the respondent and manager of the central placement service with the Dublin Regional Homeless Executive. These affidavits in turn gave rise to further replying affidavits from Ms. Campbell, Ms. O'Connor and Mr. O'Malley which in resulted in further exchanges of affidavits on behalf of each of the parties. In total, some seventeen affidavits were sworn on behalf of the parties in the proceedings.

30. In their grounding affidavits, each of Ms. Campbell and Ms. O'Connor described (as I have set out above) the effects of the closure of the Premises as a community centre in 2013, and the efforts that have been made to have it reopened as such. It is clear from these affidavits that the Premises had served a very useful purpose as a community centre until its closure. That is not disputed by the respondent, but nor is it an issue in the proceedings.

31. In their grounding affidavits, Ms. Campbell and Ms. O'Connor express their concerns that the use of the Premises as a 65 bed hostel for homeless persons will have multiple negative impacts which will be permanent because the Order is of no fixed duration. They each express concerns that such use of the Premises will give rise to increased problems of anti-social behaviour, as well as alcohol and drug abuse in the streets surrounding the Premises, which children traverse on their way to and from school. They say that there are already twelve homeless and social service facilities within 500m of the Premises and many more again within 1km, so there is already an undue concentration of such services in the area. Accordingly, they opine that the proposed change of use of the Premises is contrary to the Development Plan. They also complain about what they describe as the failure of the respondent to consult with the local community before embarking upon this project. They say that it is clear that the respondent knew that the project would attract huge local opposition, and that this is acknowledged by the Chief Executive of the respondent in his letter to Ms. O'Connor of 14th November, 2016. They also claim that since the respondent was exploring the use of the Premises for use as a hostel for the homeless as far back as May 2016, that the emergency relied upon by the respondent was neither sudden nor immediate, and that the respondent would have had time to go through the procedure required by Part VIII of the Regulations.

32. It should be observed that the concerns expressed by Ms Campbell and Ms. O'Connor as regards the impact of the development on the local community drew a sharp response from the respondent in an affidavit sworn by Mr. Daithí Downey dated 9th December, 2016. In his affidavit, Mr. Downey states that the affidavits of Ms. Campbell and Ms. O'Connor are "replete with exaggerated, ill-informed and prejudicial views of homeless persons", views which the respondent rejects. Mr. Downey avers that the Premises will be serviced and maintained by the Dublin Simon Community and the Salvation Army through experienced and trained service providers who have detailed policies and protocols in place to ensure that there will not be disruption to the neighbourhood. He further avers that the lease of the Premises to the respondent requires the respondent to provide appropriate staffing resources to ensure the effective day to day management of the Premises and the respondent must comply with the ethos of the parish in its dealings with the service users and the community.

33. This in turn gave rise to further replying affidavits from Ms. Campbell and Ms. O'Connor. Ms. Campbell characterises Mr. Downey's comments as being pejorative and offensive. She says that she is acutely aware of the challenges faced by those that are homeless, having been homeless herself during three different stages of her life. Moreover, she says she works closely with people who were formerly homeless to help them establish themselves and face their challenges. She says there is nothing exaggerated about the concerns expressed in her grounding affidavit, and that these are based on real life experiences. In her second affidavit, Ms. O'Connor also rejects Mr. Downey's remarks and says that she too is very familiar with the problems experienced by those who are homeless, from her work in the community, for which she was awarded in 2016 the Dublin City Council Good Citizen Award. I think it important to record now that I am absolutely satisfied that the applicants bring these proceedings in good faith, and with the best of intentions for the community in which they live and serve, and that in doing so they are in no way motivated or influenced by any misguided prejudice against those misfortunate enough to be homeless.

34. In an affidavit sworn on 14th December, 2016 specifically to address the remarks of Ms Campbell and Ms. O'Connor in this regard, Mr. Downey acknowledged the contribution of Ms. Campbell and Ms. O'Connor to the community and in particular on behalf of persons experiencing homelessness. But he does not accept that the theories as identified by them in their affidavits are well founded, because the service that is to be provided at the Premises will be of the highest standard for the reasons set out already above. In both this affidavit and his previous affidavit, Mr. Downey refers to the respondents' model of homeless services as set out in "Pathway to Home", which I referred to earlier.. He says that a particular focus of this policy is to tackle the most significant risky and harmful homeless living situation i.e. "rough sleeping" and "street homelessness" which arise when a person does not avail of emergency accommodation and has no other shelter option available.

35. A considerable body of the affidavits exchanged between the parties is taken up with argument about the existing facilities for homeless in the vicinity of the Premises. It is perhaps somewhat surprising that there should be disagreement on what one would imagine would be a straightforward matter of fact. The respondent acknowledges that there are three facilities within a 500m radius

of the Premises providing accommodation for homeless namely Viking Lodge, Back Lane Hostel and the Caretaker Hostel. However, the applicants contend that there are an additional five facilities namely the Iveagh Hostel, a Focus Ireland Hostel at John's Lane West (but which the applicants acknowledge is closed and is now being redeveloped to provide 31 new housing units), the Merchants Quay night café, O'Shea's Public House and a hostel known as the Backpackers Hostel. The respondents argue that the Iveagh Hostel and O'Shea's Public House should be disregarded because they have nothing to do with the respondent. They contend that the Merchants Quay night café is a respite service only, and that people do not sleep there. They claim that the Backpackers Hostel is a commercial hostel and that there is no evidence that it is used by persons who are homeless.

36. The applicants identify some five support services that they say are used by homeless persons in the area. These are:-

- Community respite, an addiction rehabilitation service;
- The Bridge Project – a drug recovery education centre;
- Guild of the Little Flower, a facility that targets homeless and older people with food services, laundry services and social activities;
- Casadh, a drug stabilisation and progression service centre for the Dublin 8 community; and
- Castle Street Clinic, a HSE addiction services centre.

The respondent argues however that these services are not exclusively for homeless persons, but are for the benefit of the community at large.

Legislative Provisions and Provisions of Development Plan
37. At this juncture, it is useful to identify both the relevant legislative provisions and those parts of the Development Plan of the respondent relied upon in the proceedings.

Relevant Legislative Provisions
Planning and Developments Acts 2000-2014 ("the Act of 2000")

38. Section 4 of the Act of 2000 sets out exempted developments for the purpose of the Acts:-

> "4. – (1) the following shall be exempted developments for the purposes of this Act –
>
> (aa) development by a local authority in its functional area."

Section 15(1) of the Act of 2000 states:-

> "15-(1) It shall be the duty of a planning authority to take such steps within its powers as may be necessary for securing the objectives of the development plan."

Section 178 contains restrictions on development by certain local authorities and subsection (2) states:-

> "178-(2) The council of a city shall not effect any development in the city which contravenes materially the development plan."

Section 179 is entitled "Local Authority Own Development" and states:-

> "(1) (a) The Minister may prescribe a development or a class of development for the purposes of this section where he or she is of the opinion that by reason of the likely size, nature or effect on the surroundings of such a development or class of development there should, in relation to any such development or development belonging to such class of development, be compliance with the provisions of this section and regulations under this section.
>
> (b) Where a local authority that is a planning authority proposes to carry out development or development belonging to a class of development prescribed under para. (a) (hereafter in this section referred to as "proposed development") it shall in relation to the proposed development comply with this section and any regulations under this section."
>
> (c) - repealed.
>
> (d) - not relevant.
>
> "(2) The Minister shall make regulations providing for any or all of the following matters:-
>
> (a) the publication by a local authority of any specified notice with respect to proposed development;
>
> (b) requiring local authorities to –
>
> (i) (I) notify prescribed authorities of such proposed development or classes of proposed development as may be prescribed, or
>
> (II) consult with them in respect thereof,
>
> and
>
> (ii) give to them such documents, particulars plan or other information in respect thereof as may be prescribed;
>
> (c) the making available for inspection, by members of the public, of any specified documents, particulars, plans or other information with respect to proposed development;

(d) the making of submissions or observations to a local authority with respect to proposed development.

(3) (a) The manager of a local authority shall, within 8 weeks after the expiration of the period during which submissions or observations with respect to the proposed development may be made, in accordance with regulations under subsection (2), prepare a written report in relation to the proposed development and submit the report to the members of the authority.

(b) A report prepared in accordance with paragraph (a) shall –

(i) describe the nature and extent of the proposed development and the principal features thereof, and shall include an appropriate plan of the development and appropriate map of the relevant area,

(ii) evaluate whether or not the proposed development would be consistent with the proper planning and sustainable development of the area to which the development relates, having regard to the provisions of the development plan and giving the reasons and the considerations for the evaluation,

(iii) list the persons or bodies who made submissions or observations with respect to the proposed development in accordance with the regulations under subsection (2),

(iv) summarise the issues, with respect to the proper planning and sustainable development of the area in which the proposed development would be situated, raised in any such submissions or observations, and give the response of the manager thereto, and

(v) recommend whether or not the proposed development should be proceeded with as proposed, or as varied or modified as recommended in the report, or should not be proceeded with, as the case may be.

(4) (a) The members of a local authority shall, within 6 weeks of the receipt of the report of the manager, consider the proposed development and the report of the manager under subsection (3).

(b) Following the consideration of the manager's report under paragraph (a), the proposed development may be carried out as recommended in the manager's report, unless the local authority, by resolution, decides to vary or modify the development, otherwise than as recommended in the manager's report, or decides not to proceed with the development.

(c) For a resolution to have effect under paragraph (b)-

(i) it has to be passed not later than 6 weeks after the receipt of the manager’s report, and

(ii) in the case of a resolution not to proceed with a proposed development, it shall state the reasons for such resolution.

(5) (1) Each Act specified in the first and second columns of Part 1 of Schedule 3 is repealed to the extent specified in the third column of that Part opposite the references in the first and second columns.

(2) Each order specified in the first and second columns of Part 2 of Schedule 3 is revoked to the extent specified in the third column of that Part opposite the references in the first and second columns.

(3) Each Act specified in the first and second columns of Schedule 4 is amended in the manner stated in the third column of that Schedule opposite the references in the first and second columns.

(6) This section shall not apply to proposed development which –

(a) - not relevant,

(b) is necessary for dealing urgently with any situation which the manager considers is an emergency situation calling for immediate action.”

Planning and Regulations 2001-2015 (“the Regulations”)

39. The first article of Part VIII of the Regulations is article 80,which sets out developments prescribed for the purposes of s. 179 of the Acts of 2000-2014. Article 80(1)(k) prescribes any development other than those specified in paras. (a) to (j) (which are of no application in this case), the estimated cost of which exceeds €126,000.00, not being a development consisting of the laying underground of sewers, mains, pipes or other apparatus.

40. In an affidavit dated 9th December, 2016 sworn on behalf of the respondent, Mr. Downey states that the total cost of works carried out at the Premises to that date is of the order of €1,184,000. Accordingly, the procedures set out in s. 179 of the Act of 2000 and Part VIII of the Regulations would, in the ordinary course of events, apply to the works undertaken by the respondent at the Premises. The remainder of Part VIII of the Regulations sets out in some detail the procedures to be followed by local authorities in developments to which the Regulations apply. It is not necessary to set out those procedures here. However, it can be seen from s. 179(6)(b) that the requirement imposed upon local authorities to comply with s. 179 of the Act of 2001 and any regulations made thereunder does not apply to development which is necessary for dealing urgently with any situation which the manager considers is an emergency situation calling for immediate action, as is the case in relation to the refurbishment of the Premises by the respondent for the purposes of accommodating persons who are homeless. While the combined effect of s. 4(1)(aa) and s. 179(6)(b) of the Act of 2001 is to exempt any development of the kind described in s. 179(6)(b) from the requirements to obtain planning permission or to go through the procedure prescribed pursuant to s. 179 and Part VIII of the Regulations, that does not entitle a local authority to undertake development in contravention of its own development plan. It is clear from ss. 15 and 178 of the Act of 2000, that a planning authority has both positive and negative obligations as regards the development plan – the first being to take such steps as are within its powers and as may be necessary to secure the objectives of the development plan, and the second being not to effect any development which contravenes materially the development plan. It is common case that a planning authority remains subject to these obligations, notwithstanding that it may be exempt from any procedures to obtain permission for or secure approval under s.

179 of the Act of 2000,for the proposed development.

Relevant Provisions of Development Plan
41. It is pleaded on behalf of the applicants that the development of the Premises by the respondent is a material contravention of both the First and the Second Development Plans. The Second Development Plan came into effect on 21st October, 2016. As it happens however, the provisions of both development plans are almost identical in all material respects as regards these proceedings, save for a footnote in the First Development Plan, which does not appear in the Second Development Plan. For completeness, I set this foot note out in the next paragraph. While it is pleaded in the alternative by the applicants that the respondent is in breach of each plan, nothing turns on which plan is the relevant plan for the purpose of the proceedings. Accordingly, save for the footnote below, I will set out only those provisions of the Second Development Plan as are relevant and, for convenience, I will from this point onwards (save for in the next paragraph) refer to both plans together as "the Development Plan".

42. The footnote in the First Development Plan referred to above stated:-

> "Hostels for the care of people, such as, homeless hostels will not be allowed in areas where there is an over concentration of such facilities such as parts of the north inner city and south-west inner city in Dublin 1, 7 and 8."

This footnote was not carried forward to the Second Development Plan. I queried counsel for the respondent about this, and in particular inquired if a conscious decision was taken not to carry the footnote forward to the Second Development Plan, or whether or not there was any record of any discussions or consideration of the issue. Following the taking of instructions, counsel for the respondent informed me that there was no indication given as to why the footnote was not carried forward to the Second Development Plan. It appears that from the very first draft of the Second Development Plan, there was no corresponding content in the Second Development Plan.

Section 5.5.11 Homeless Services
43. The City Council and other statutory agencies provide appropriate accommodation and work together to improve the range and quality of services available for homeless persons. An over-concentration of institutional accommodation can have an undue impact on residential communities and on the inner city in particular. A coordinated approach to the provision and management of these facilities as well as their spread across the City is important.

44. But it is the policy of Dublin City Council:-

> QH29 to support the implementation of the Homeless Action Plan Framework for Dublin and support related initiatives to address homelessness.
>
> QH30 to ensure that all proposals to provide or extend temporary homeless accommodation or support services shall be supported by information demonstrating that the proposal would not result in an undue concentration of such uses nor undermine the existing local economy, resident community or regeneration of an area. All such applications shall include: a map of all homeless services within a 500m radius of the application site, a statement on the catchment area identifying whether the proposal is to serve local or regional demand; and a statement regarding the management of the service/facility.
>
> 16.12 Standards – Institutions/Hostels and Social Support Services
>
> An over-concentration of institutional hostel accommodation, homeless accommodation and social support institutions can potentially undermine the sustainability of a neighbourhood and so there must be an appropriate balance in the further provision of new developments and/or expansion of existing such uses in electoral wards which already accommodate a disproportionate quantum. Accordingly, there shall be an onus on all applicants to indicate that any proposal for homeless accommodation or support services will not result in an undue concentration of such uses, nor undermine the existing local economy, the resident community, the residential amenity, or the regeneration of the area.
>
> All such applications for such uses shall include the following:-
>
> - A map of all homeless and other social support services within a 500m radius of the application site
> - A statement on catchment area, i.e. whether a proposal is to serve local or regional demand
> - A statement regarding management of the service/facility.

45. As to the zoning of the lands on which the premises are situate, the zoning is categorised as objective Z1 which includes buildings for the health, safety and welfare of the public. It is common case that the use of the Premises for the accommodation of homeless persons would be permitted by the applicable zoning objective.

Discussion and Decision
46. These proceedings are concerned with one of the most pressing and significant social issues facing many societies today. Homelessness has always been an issue for society, but it is perplexing that in an era of unprecedented prosperity (notwithstanding the recent financial crisis), it should continue to present as a problem to any significant degree at all. That this is so is undoubtedly due, at least to a significant degree, to the underlying complexity behind the reasons that give rise to homelessness. The reasons for homelessness are manifold, and this is addressed by Mr. Downey in his second affidavit wherein he avers that the DRHE, having reviewed the records of those presenting as homeless over separate months in 2015 and 2016, identified the key reasons giving rise to homelessness in recent times. These are: service of notices to quit in private tenancies, overcrowding and relationship breakdown. The DRHE identifies that over two thirds of family households presenting as homeless in Dublin did so because of tenure insecurity caused by increased rates of rent inflation and notices of rent increases that were unaffordable. The DRHE has devised a very comprehensive policy to address homelessness in its *Pathway to Home* strategy. In addition, Development Plan has clear objectives to address homelessness, and policy QH29 specifically states that it is the policy of the respondent to support the homeless action framework for Dublin (which is the plan set out in *Pathway to Home*).

47. It is apparent from the face of the Order that it was made in order to address what the Assistant Chief Executive considered at the time to be an emergency in the provision of accommodation for the homeless. The affidavits sworn on behalf of the applicants grounding these proceedings do not dispute that there is a crisis or an emergency in the provision of homeless accommodation.

However, this is put in issue by the applicants in paragraph (E)(34) of the statement of grounds under the heading "the decision is so irrational as to be unreasonable", as summarised above. Notwithstanding therefore that the issue is not raised by the applicants in their affidavits, it is necessary for me to address the issue even though, to put it mildly, it can hardly be gainsaid that there was at the time and there remains now a crisis in the Dublin city area in the provision of accommodation for persons who are homeless

48. In his affidavit of 14th December, 2016, Mr. Downey refers to and exhibits the respondent's Homeless Action Plan Framework for the period 2014-2016, contained in "*Pathway to Home*". Mr. Downey says that the primary emphasis of the Pathway to Home strategy is on securing a speedy exit from a homeless living situation to independent living in a tenancy (with support as required). He says that for the period January – September 2016, a total of 1,241 moves to tenancies were provided for homeless households in Dublin. He avers:-

> "A particular focus for Pathway to Home services is on tackling the most significantly risky and harmful homeless living situation that manifests in Dublin. This is commonly described as "rough sleeping" and "street homelessness" whereby a person is not availing of emergency accommodation provision and has no other shelter option available. Core to reducing the extent of this living situation is the provision of a sufficient capacity of available emergency accommodation and the quality of its service delivery."

49. Mr. Downey then goes on to provide some statistics in relation to homelessness in Dublin. He says that in the period between September 2015 and September 2016, the total population in homeless accommodation in Dublin increased from 3,673 persons (comprising 2,330 adults and 1,343 children) to 5,053 persons (comprising 2,988 adults and 2,065 children).

50. Mr. Downey refers to a "rough sleeping count" undertaken by the respondent on the night of 22nd November, 2016 into the morning of 23rd November, 2016 which identified 142 persons sleeping rough. In addition, on that night, 77 persons accessed the Merchant's Quay Ireland night café, which Mr. Downey says is not a night shelter but provides respite to persons who do not access emergency accommodation. He says that the proposed development of the Premises, coupled with the development of the other facilities at Ellis Quay and Little Britain Street/Green Street, will increase emergency accommodation capacity by 230 bed spaces in Dublin. He says that:-

> "The proposed development constitutes immediate humanitarian action to open homeless facilities to ensure beds are available for all persons who are at risk of rough sleeping with the aim of preventing fatalities and/or serious harm."

51. In an affidavit sworn on 21st December, 2016 Mr. Colum Moroney, Manager of the Central Placement Service with the DRHE, identifies the number of people refused a bed in Dublin city after the allocation of all beds in emergency accommodation facilities during the period between 25th November, 2016 and 15th December, 2016. During this period, there was a total of 502 refusals of accommodation ranging from the lowest number of 9 on 9th December, 2016 to the highest number of 39 on 6th December, 2016. All of the above clearly demonstrates that there was, both on the date of the Order and thereafter a crisis in the provision of emergency accommodation for homeless persons. This was referred to in the recommendation of Ms. Igoe of 28th October, 2016 to the Chief Executive of the respondent.

52. The applicants however argue that the respondent caused or contributed to this emergency by failing to effect its Rapid Build Housing programme in a timely manner. This is addressed by Mr. Downey in his second affidavit, who says that this allegation is factually incorrect, and that the respondent has (as of the date of his affidavit, 14th December, 2016) completed 22 housing units , and a further 130 units were due to be completed and in use by the end of June of this year. In any case I would have to agree with the submission of the respondent about this issue, that even if the respondent is in some way responsible for the emergency, that scarcely makes the resolution of the problem any less urgent.

53. The applicants also advanced another argument under this heading, to the effect that the respondent effectively contrived a situation where there would not be enough time to comply with Part VIII of the Regulations, thereby enabling it to drive the proposal through relying upon the emergency powers conferred upon it by s. 179(6)(b) of the Act of 2000, and avoiding the public consultation process prescribed therein. The applicants argue that the respondent could have completed the Part VIII process and developed the Premises (assuming for the purpose of this argument that the proposal was approved at the end of the Part VIII process) within the same time-frame as it did relying on its emergency powers. However, I think that this is highly unlikely. Realistically, I don't believe it would have been appropriate for the respondent to commence a Part VIII process before taking a lease of the Premises, or without at least having entered into a written agreement for lease of the Premises with the archdiocese. There was no evidence that such an agreement was entered into, and the evidence established that a draft lease was only prepared in August, 2016 and was thereafter finalised and executed on 28th September, 2016. So the earliest the respondent could have commenced the Part VIII process was 28th September, 2016. I set out above section 179 of the Act of 2000 , and I think it is highly unlikely that there would have been sufficient time available to the respondent both to follow the procedures prescribed by s.179 of the Act of 2000 and Part VIII of the Regulations and thereafter carry out the necessary works to the Premises in order to have it available for use in December, 2016, which was the objective of the respondent.

54. For all of these reasons, I am of the opinion that, at the time of the making of the Order, and for that matter ever since, there was an emergency as regards the availability of accommodation for the homeless, and that the respondent had ample justification for its decision to invoke s. 179(6)(b) of the Act of 2000.

55. Having thus concluded, and before proceeding to address the question as to whether or not the development of the Premises is in material contravention of the Development Plan, I will first address the applicants' claim that they were entitled to be consulted about the proposed development, as persons affected by the development of the Premises. It is claimed that the failure to consult with the applicants is a denial of their right to fair procedures and to participate in the decision-making process. The applicants rely upon the decision of the Supreme Court in *Dellway Investments Ltd. v. NAMA* [2011] 4 I.R. 1. I cannot accept this argument. There are very specific procedures for consultation and participation in the planning process set out in the Act of 2000. There is one set of procedures where planning applications are concerned, and another where local authority development is concerned, as provided for in Part VIII of the Regulations. No consultation procedure is prescribed for development undertaken by a local authority in cases of emergency pursuant to s. 179(6)(b) of the Act of 2000, and the reason for this is perfectly obvious; a requirement to consult in such circumstances could hamper a local authority in addressing an emergency. The protection that members of the public enjoy in such circumstances is contained in s. 178(2) of the Act of 2000, which prohibits the local authority from giving effect to any development that is in material contravention of the Development Plan. I might add that the circumstances of this case are entirely different to the circumstances that gave rise to the Supreme Court decision in *Dellway*.

56. Having thus concluded, it is now necessary to address the applicants' arguments that the development of and change of use of the Premises are in material contravention of the Development Plan. The Development Plan acknowledges that an over-concentration

of institutional accommodation can have an undue impact on residential communities and on the inner city in particular. Section 5.5.11, policy QH30 and s. 16.12 of the Development Plan are not inconsistent with the objectives set out elsewhere in the Development Plan to address homelessness. Rather they recognise that there is a need to make sure that such facilities are not overly concentrated in any one area, to the detriment of that area. Policy QH30 makes it clear that there is an obligation on those proposing to provide or extend temporary homeless accommodation to satisfy the respondent (as planning authority) that the proposal will not result in an undue concentration of such uses nor undermine the existing local economy, resident community or regeneration of an area. That is the planning objective to which the procedural elements of policy QH30 are directed. The second part of policy QH30 indicates the minimum documentation that must be provided with "*all such applications*" in order to assist the respondent as planning authority in deciding whether or not the proposal meets this objective. The words "proposals" and "applications" are used interchangeably in policy QH30.

57. Section 16.12 is very similar in its content to policy QH30. It sets out the policy objective of securing an appropriate balance in the further provision of new developments of institutionalised hostel accommodation, homeless support institutions and social support institutions and/or expansion of existing such uses in electoral wards which already accommodate a disproportionate quantum, and then goes on to impose an obligation on all *applicants* to indicate that any *proposal* for homeless accommodation or support services will not result in an undue concentration of such uses, nor undermine the existing local economy, the resident community, the residential amenity or the regeneration of an area. It requires *applications* to include documentation of the same kind that is specified in policy QH30, in order to assist the planning authority in arriving at a determination as to whether or not the proposed development is consistent with the planning objective set out in section 16.12.

58. It is not disputed that the effect of the making of an Order pursuant to s. 179(6)(b) of the Act of 2000 exempts the planning authority from the requirements of s. 179 of the Act of 2000, and Part VIII of the Regulations. Nor is it disputed however that the making of such an order does not entitle a planning authority to effect development that is in material contravention of its development plan, contrary to s. 178(2) of the Act of 2000. It is the *applicants*' contention that the development of the Premises by the respondent is in material contravention of the Development Plan by reason of the failure of the respondent to support its proposal for the development of the Premises with information demonstrating that it will not result in an undue concentration of temporary homeless accommodation or support services relating thereto, nor undermine the existing local economy, resident community, or regeneration of an area. The applicants further contend that the development of the Premises for use as a facility for the homeless, coupled with the existing facilities for such purposes in the area, results in an undue concentration of the same contrary to policy QH30 and section 16.12 of the Development Plan. Moreover, the applicants submit that even prior to this development, there was already an undue concentration of such uses within 500m of the Premises, and that the development of additional facility for homeless accommodation at the Premises is such that the materiality of the contravention is beyond dispute.

59. For its part, the respondent denies that there is an undue concentration of homeless accommodation, or support services for the same, in the vicinity of the Premises either before or after the development of the Premises for such purposes. Furthermore, the respondent contends that the reliance by the applicants upon policy QH30 and s. 16.12 of the Development Plan is misplaced, because, in the submission of the respondent, those policies are clearly predicated upon there being either an application for planning permission or a proposal for and consideration of the development pursuant to Part VIII of the Regulations. Since neither arises in this case (by reason of the development being carried out pursuant to the Order declaring an emergency) there was no obligation on the respondent to prepare the documentation that would otherwise require to be prepared pursuant to the policy QH30 or s. 16.12 of the Development Plan.

60. I was referred by counsel to many authorities concerning the principles applicable to the interpretation of a development plan. In the case of *Wicklow Heritage Trust Ltd v Wicklow County Council* [1998] IEHC 19 McGuinness J., following a review of a number of authorities, identified the following principles as being applicable at p. 35:-

> "(1) It is for the Court and not for the planning authority to decide as a matter of law whether a particular development is a material contravention of the local development plan.
>
> (2) A development plan forms an environmental contract between the planning authority and the community, embodying a promise by the Council that it will regulate private development in a manner consistent with the objectives stated in the plan and further that the Council itself will not effect any development which contravenes the plan materially. In seeking to interpret the objectives set out in a Development Plan the court should ask what a reasonably intelligent person with no relevant expertise would understand by the provisions in question.
>
> (3) The requirements of the planning law must be applied with as much stringency against the local authority as they would against a private developer.
>
> (4) It is necessary for a local authority to include all its objectives in its Plan. If it were otherwise it would mean that the local authority could totally override its own plan."

61. So how would a reasonable person with no relevant planning expertise interpret policy QH30 and s. 16.12 of the Development Plan? The first part of policy QH30 refers to all "*proposals*" to provide or extend temporary homeless accommodation or support services for homeless persons. No reference at all is made to planning applications or to the Part VIII procedure of the Regulations. It requires that such proposals are supported by information demonstrating that the proposal would not result in an undue concentration of such uses nor undermine the existing local economy, residential community or regeneration of an area. The second part of policy QH30 then prescribes the documentation to accompany all such "*applications*". The words "proposals" and "applications" are used interchangeably, providing fertile ground for argument in these proceedings. Insofar as it has led to confusion, that confusion is, I think, most readily resolved by the reference to the word "all" before "proposals" in the opening part of policy QH30, and subsequently the use of the word "such" before applications, which is clearly intended to refer back to the proposals referred to earlier. The words are also used interchangeably in s. 16.12, but here again it states that "*any* proposal for homeless accommodation or support services will not result in an undue concentration of such uses…" In my view, a reasonable member of the public, if he or she were to dwell on the issue at all, would probably resolve the issue in his or her own mind by concluding that whatever the background to the proposal, and regardless as to whomever is making the proposal it will be subject to the kind of scrutiny envisaged both in policy QH30 and s. 16.12 of the Development Plan in order to ensure that it meets the objectives of the policies set out therein. Such a person would see the objectives of the policies as paramount, and would, in my view, be highly unlikely to embark upon a consideration of the genesis of the proposal under consideration, because the policy objective of avoiding an undue concentration of such uses must, as a matter of logic, apply to all proposals. It would make no sense if the policy could be avoided, through the use of emergency provisions, by the planning authority itself, with the possible result of an over concentration of such uses.

62. The respondent has also argued that the procedural requirements of policy QH30 and s. 16.12 were never intended to and clearly

do not apply to emergency measures, and further argues that since the proposals make it clear that the use of the Premises is temporary only, there is no contravention of the Development Plan. If there were a temporal limitation on the use of the Premises, this argument might carry some weight. A proposal that is limited to a brief period of time is unlikely to have a long-term effect on the neighbourhood. But the respondent has been very careful to avoid such a limitation, and has expended a considerable sum of money on the Premises. No doubt it does not intend to use the Premises for homeless accommodation purposes for ever more, but it does intend to do so indefinitely. The fact that the lease of the Premises to the respondent is for five years only, and that it has waived its statutory entitlement to a new tenancy, does not prevent the respondent from agreeing to terms of a new lease with the archdiocese upon the expiration of the current lease. And in any case, if it is indeed the case that there is already or will be after this development an undue concentration of such uses in the area, the period of five years may be considered long enough to have the adverse consequences contemplated by the Development Plan. That is a planning judgment for the respondent to make, but it has not done so. It can hardly be doubted either that if a third party came to it with the same proposal, the respondent would require that party to commit to a date on which the use of the Premises would cease, if it was otherwise considered likely to give rise to an undue concentration of such uses in the area. It follows therefore that the fact that the period of intended use of the Premises remains open ended defeats any argument that the restrictions set out in policy QH30 and s. 16.12 of the Development Plan do not apply to emergency measures taken by the respondent, simply because the recommendation of Ms. Igoe states that the use of the Premises is to be temporary in nature.

63. It is clear from the recommendation of Ms. Igoe to the Chief Executive of the respondent that no documentation or information of the kind required by policy QH30 or s. 16.12 was prepared by the respondent. Furthermore, it is apparent that prior to the institution of these proceedings, no consideration was given by the respondent at all to the question as to whether or not the proposed development was in compliance with the Development Plan, whether in the context of policy QH30, s. 16.12 or otherwise. The respondent did not therefore consider and form any opinion as to whether the Premises was located in an area where there was already an undue concentration of such services, or, if not, whether the development of the Premises as proposed would give rise to such an undue concentration when taken together with existing facilities. It seems that the respondent addressed this issue for the first time for the purpose of resisting these proceedings. Up to that point, the entire focus of the respondent was to address the urgent need for the provision of accommodation for the homeless.

64. It follows from this that the failure on the part of the respondent to prepare the information and documentation required by policy QH30 and s. 16.12, even though it would only be preparing it for its own consideration, constituted a contravention of the Development Plan. The question that follows from this is whether or not this amounts to a breach of s. 178 (2) of the Act of 2000? It will be recalled that that section states: "The council of a city shall not effect any development in the city which contravenes materially the development plan."

65. Referring to s. 178(2) of the Act of 2000, counsel for the respondent argued that in considering the section, it is the work itself or the change of use associated with the development that must be considered, and not the decision making process. He submitted that the meaning of the word "effect" in the section is directed to the carrying out of works, or a change of use, and that it is only the actual carrying out of works or a change of use that can give rise to a contravention of a Development Plan, and not the making of a decision to do the same. He referred to the Concise Oxford Dictionary of Current English (eighth ed.) which defines the word "effect" as meaning to "bring about or accomplish, or to "cause to exist or occur". He submits that in making a decision pursuant to s. 179(6)(b) of the Act of 2000, a local authority is not obliged to have regard to the Development Plan in the decision making process, in the same way that it is expressly obliged to do so (pursuant to s. 34 of the Act of 2000) when considering a planning application. He refers to Simons, *Planning and Development Law,* 2nd Ed., para. 12-194 in which it is stated that:-

> "In most cases in which a statutory discretion is conferred, some indication will be given in the legislation as to the matters which are to inform the exercise of that discretion. Perhaps the most comprehensive scheme is to be found in relation to the planning legislation itself. There, in deciding to grant or refuse planning permission, a planning authority or An Bord Pleanála shall consider the proper planning and sustainable development of the area. In addition, regard is to be had to a number of matters including, for example, the Development Plan".

It is submitted that since there is no such obligation in the legislation as regards the exercise of powers pursuant to s. 179(6)(b) of the Act of 2000, there is no obligation on the respondent to have regard to the Development Plan when invoking that sub-section. But yet it is accepted by the respondent that the invocation of s. 179(6)(b) of the Act of 2000 does not entitle a local authority to carry out development in breach of s. 178(2) of the Act of 2000.

66. In reply to this argument, counsel for the applicants submitted that the respondent was attempting to separate the decision to undertake works and/or change the use of the Premises from giving effect to that decision. He submitted that the problem with this line of argument is that it would leave the applicants with no remedy; the decision itself could not be challenged for the reasons advanced by the respondent, and the carrying out of works would be exempt from enforcement proceedings – such as an application for injunctive relief under s. 160 of the Act of 2000 – because the carrying out of the works by the respondent would be exempt from planning permission and also from the Part VIII process provided for by the Regulations by reason of the use of s. 179(6)(b). Moreover, he submitted that all of the cases relied upon by the applicants in their submissions were challenges to decisions, which decisions were quashed by the courts because the implementation of those decisions would have constituted a material contravention of the Development Plan. In this case, the decision itself was taken in contravention of the Development Plan and it is submitted that that contravention was a material convention of the Development Plan because policy QH30 and s. 16.12 are very prescriptive and contain specific, mandatory measures to be complied with before any proposal for such development may be considered and approved. The applicants rely upon the decision of Clarke J. in *Maye v. Sligo Borough Council* [2007] 4 I.R. 678 wherein he stated at para. 53:-

> "The way in which Development Plans are set out vary. Certain aspects of the plan may have a high level of specificity. For example the zoning attached to certain lands may preclude development of a particular type in express terms. Where development of a particular type is permitted, specific parameters, such as plot ratios, building heights or the like may be specified. In those cases it may not be at all difficult to determine whether what is proposed is in contravention of the plan. In those circumstances it would only remain to exercise a judgment as to the materiality of any such contravention."

67. As to materiality, it is submitted that the test is that articulated by Barron J. in the case of *Roughan v. Clare County Council*, (Unreported, High Court, Barron J., 18th December 1996), which test was approved and applied by Clarke J. in *Maye*. In *Maye*, Clarke J. stated:-

> 50. 6.1 So far as materiality is concerned I adopt the test set out by Barron J. in *Roughan v. Clare County Council* (Unreported, High Court, Barron J., 18th December, 1996) where he stated as follows at pp. 5 to 6 of the unreported

judgment:-

> "What is material depends upon the grounds upon which the proposed development is being, or might reasonably be expected to be, opposed by local interests. If there are no real or substantial grounds in the context of planning law for opposing the development, then it is unlikely to be a material contravention."

68. It is submitted on behalf of the applicants that these proceedings have been brought on behalf of a large number of persons living in the local community and that, based on the evidence before the court, it is abundantly clear that local interests might reasonably have been expected to oppose the proposed development. It is further submitted that this is borne out by the letter of the Chief Executive of 14th November, 2016 to the third named applicant wherein he acknowledges that the failure to consult with the local community in relation to the proposed development is a matter of considerable annoyance and indeed anger to some members of the community, which the Chief Executive says is both understandable and unfortunate. For its part, in response to this the respondent argues that the letter of the Chief Executive is no more than an acknowledgement of a shortcoming of courtesy, and falls far short of demonstrating the kind of opposition required to be taken into account when considering materiality.

69. Having considered these arguments, I have come to the conclusion that the failure to apply policy QH30 and s. 16.12 of the Development Plan in considering the proposal to develop and change the use of the Premises is a material contravention of the Development Plan. I have come to this conclusion for several reasons. Firstly, as the applicants argue, it is clear that there is a high degree of specificity prescribed in the Development Plan in relation to the procedures for approval of such developments. It is clear that no effort at all was made to comply with these procedures, and that the entire focus of the respondent, perhaps understandably, was upon addressing the emergency it faced.

70. Secondly, there cannot be any doubt that the purpose lying behind this high degree of specificity was to ensure that the respondent would have available to it sufficient information to decide whether or not the proposed development would give rise to an undue concentration of such facilities in the area, to the detriment of the area. The possibility of such detriment is expressly acknowledged by the Development Plan. The argument that the respondent has no obligation to have regard to the provisions of the Development Plan in making a decision for the purpose of s. 179(6)(b) of the Act of 2000 cannot possibly be correct in light of the very express requirements of policy QH30 and s. 16.12 of the Development Plan *and* the underlying purpose of that policy and section, and also having regard to the obligation in s. 178(2) of the Act of 2000 not to effect development in material contravention of the Development Plan.

71. Moreover, as a general proposition, Simons opines at para 12-94 that:-

> "Before embarking on development, a local authority should therefore address its mind to the question as to whether or not the particular development represents a material contravention of the Development Plan. Presumably no responsible local authority would proceed with the development unless it was satisfied that there was no material contravention involved, and thus it would seem that a decision to proceed with a particular development should, by definition, indicate that the local authority was of the view that there was no material contravention."

72. The procedural elements of policy QH30 and s. 16.12 do no more than prescribe how the respondent should comply with this obligation. Even if these requirements were not set out in the Development Plan, there would in my view be an obligation on the respondent to consider whether or not the proposed development contravenes the Development Plan, in view of s.178(2) of the Act of 2000. The question as to whether nor not the change of use of the Premises might contribute to or give rise to an undue concentration of such facilities in the area, with the attendant detrimental consequences surmised by the Development Plan, is clearly an important one, and one that is likely to be of significant interest and concern to the residents in the area. As a matter of fact, the development of the Premises has attracted local opposition, which the Chief Executive of the respondent has described as understandable. In any case in my view, the people of the locality have real and substantial grounds for such concerns.

73. It follows from the above that the Order must be quashed, not because the development and change of use of the Premises is in material contravention of the Development Plan (about which I make no finding), but because in failing to comply with the specific procedures for such developments set out in policy QH30 and s. 16.12 of the Development Plan, and in particular in failing to consider and make any decision upon the question as to whether or not the development and change of use of the Premises will contribute to or give rise to an undue concentration of such facilities in the area, or have the detrimental consequences described in policy QH30 and s. 16.12, the respondent, in making the Order, has effected development in material contravention of the development plan.

74. Finally, I should add that it was strongly urged on behalf of the respondent that the decision as to whether or not the development and change of use of the Premises gives rise to an undue concentration of such facilities in the area, such as to have the adverse consequences referred to in policy QH30 and s. 16.12 is a decision that requires planning expertise and as such is a matter for the respondent as planning authority, and not the court, and further that any such decision is only amenable to judicial review in accordance with the well-established principles laid down by the Supreme Court in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39. Counsel for the respondent posed the following rhetorical question – even if the applicants are correct about the number of facilities and support services for homeless in the Carman's Hall area, how is the court to arrive at any conclusion as to whether or not these constitute an undue concentration in the area? I think that counsel is correct that the question as to what constitutes an undue concentration of such facilities, and the effect that they might have in any given area is a matter requiring planning expertise and calls for planning judgement. The difficulty in this case is that it is clear that the Order was made without any regard to these matters at all. Not only was there no material before the Chief Executive upon which to base a decision that the development of the Premises would not give rise to an undue concentration of such facilities, no decision to this effect was taken at all by the respondent. The change of use of the Premises may or may not constitute a material contravention of the Development Plan, but since there has not been compliance with either policy QH30 or s. 16.12 of the Development Plan, and since the respondent has not otherwise given any consideration to this question, there is no decision to review in this regard. (whether in accordance with the *O'Keeffe* principles or otherwise).

75. I am very mindful of the potential consequences of this decision, not just for the respondent but for those most vulnerable people who are benefiting from the Premises. I am also mindful of the commitment given by the Chief Executive of the respondent, in his letter to the third named applicant of 14th November, 2016, to consult with the local community before deciding to extend the use of the Premises beyond the 2017/2018 winter period. Accordingly, I will hear counsel in relation to the orders that must flow from this conclusion.

76. Finally, I mentioned earlier that the respondent has raised an issue as to the capacity of the first and second named applicants, specifically it is claimed that as unincorporated associations, they do not have the capacity or legal personality to bring these proceedings. If I had made a decision adverse to the applicants, then it would be necessary for me to address these arguments in

order to be able to address the issue of costs. However, since I have found in favour of the applicants, and since the third named applicant is an individual whose entitlement to bring forward the proceedings is in no way challenged (or in doubt), it is unnecessary for me to address the question as to whether or not the first and second named applicants had capacity to bring the proceedings.