Neutral Citation: [2015] IEHC 606

THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 363 J.R.]

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

AND IN THE MATTER OF AN APPLICATION

BETWEEN

ANNA AHERNE, GLEN BARRY, DERMOT CAHILL, JOANNA CAHILL, BENNY FLAHERTY, PADDY HISTON, JIM HICKEY, COLUM HORGAN, JOHN MURPHY, BARBARA O'GORMAN, SEAMUS ROCHE, MIKE WALLEY, AIDEEN WHITSTON AND TOM WOOD

APPLICANTS

AND

AN BORD PLEANÁLA

RESPONDENT

AND

CORK DOCKYARD HOLDINGS LIMITED AND COBH TOWN COUNCIL

NOTICE PARTIES

JUDGMENT of Mr. Justice Noonan delivered the 6th day of October, 2015.

Introduction

1. The applicants seek the following reliefs in these proceedings:

> 1. An order of certiorari quashing the decision of the respondent ("the Board") to grant planning permission for a scrap metal processing facility, a waste storage facility and quayside storage at Cork Dockyard/Rushbrook Commercial Park, which decision was made on the 19th of March, 2013;
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> 2. A declaration that in making the decision the Board failed to carry out an environmental impact assessment (EIA) in accordance with s. 172 of the Planning and Development Act 2000 as amended ("the PDA");
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> 3. A declaration that condition 7 of the said grant of planning permission is ultra vires and is not severable from the remainder of the permission.

Background Facts

2. On the 17th of April, 2012, the first respondent, Cork Dockyard Holdings Ltd ("CDL") applied for permission to Cobh Town Council ("the Council") for planning permission for a development which was to include two waste facilities, namely, a metal recycling facility and a recovered waste storage facility, together with quayside storage at Rushbrook Commercial Park, a commercial/industrial park and dockyard near to Cobh in County Cork and known as Cork Dockyard. The site was formerly known as the Verolme Dockyard where ship building and ancillary activities were carried on since the mid-nineteenth century, albeit on a much reduced scale in recent years. The applicants are all local residents living in the vicinity of Rushbrook Commercial Park. Eleven of the applicants are members of the Cork Harbour Alliance for Responsible Development ("C.H.A.R.D."), an unincorporated association which together with the three other applicants, were observers in an appeal taken by CDL in respect of a decision of the council refusing permission for the proposed development.

3. Following CDL's application for permission to the Council, written objections were submitted by a number of parties including C.H.A.R.D. These objections were, inter alia, primarily concerned with the environmental impact of the proposed development and in particular with traffic issues. The Council's Town Engineer prepared a report recommending refusal of permission for five reasons, all related to the impact of traffic on the proposed development.

4. The Council issued its decision on the 7th of June, 2012 in which it refused the application for permission for six reasons as follows:

> "1. The vehicular access to the site joins a busy public road and the sight lines at this point are restricted in both directions and also the cross traffic movements likely to be generated by the proposed development would interfere with the safety and free flow of traffic on the road. The planning authority is not satisfied on the basis of the submissions made on the application, that the traffic likely to be generated by the proposed development would not endanger public safety by reason of traffic hazard.
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> 2. Having regard to the capacity of the regional road network, it is considered that the proposed development, by reason of increased HGV movement, would result in unacceptable traffic congestion and consequent traffic hazard along the R624 from Belvelly Bridge to the proposed site and would set an undesirable precedent for similar future development in the area. The proposed development would, therefore, endanger public safety by reason of traffic hazard and would be contrary to the proper planning and sustainable development of the area.

3. The existing on road parking between Carrigaloe to Cork Dockyard and the traffic movements likely to be generated by the development would interfere with the free flow of traffic especially as the road widths between this section are greatly reduced due to the on road parking by residents and train users which would endanger public safety by reason of obstruction of road users.

4. The proposed development would endanger public safety by reason of traffic hazard because the site is served by a winding and poorly aligned access road which is inadequate to cater for the additional traffic movements likely to be generated by the proposed development.

5. The proposed dockside storage area is located in a Zone A flood risk area as indicated in the Cobh local area plan contained in the Middleton electoral local area plan of 2011. The planning authority is not satisfied that the mitigation measures proposed in the EIS accompanying the planning application are adequate or sufficient to counter the risk of flooding in the area.

6. On the basis of the information available, the planning authority is not satisfied that the proposal to store up to 45,000 tonnes of waste material in Hall C does not constitute an unacceptable fire safety risk, having regard to the combustible nature of the material to be stored and the mitigation measures outlined in the submitted EIS."

5. On the 3rd of July, 2012, CDL appealed the council's refusal to grant planning permission to the Board. In this appeal, CDL reduced the scale of the proposed development by excluding from their application for permission the previously proposed waste storage facility. This in turn had a significant impact in reducing the volume of traffic movements anticipated for the development. In the grounds of appeal, CDL took issue with each of the reasons advanced by the Council for the original refusal. C.H.A.R.D. made a written submission to the Board in respect of the appeal. The Board appointed an Inspector to assess CDL's appeal and prepare a report containing a recommendation.

6. The Inspector's report which issued on the 22nd of November, 2012 considered all the issues that arose and in particular that of traffic safety. It contained what is described as an "Environmental Impact Assessment". The report concludes with the Inspector's recommendation as follows:

"13.0 RECOMMENDATION

Having considered the contents of the application including the EIS and appropriate assessments submitted by the applicant, the decision of the planning authority, the provisions of the Cobh Town Development Plan 2005 to 2011, the grounds of appeal, the submissions made to the Board in connection with the appeal, my site inspection and my assessment of the planning issues, I recommend that permission be refused for the reasons and considerations set out hereunder:

REASONS AND CONSIDERATIONS

Having regard to:

• The objective set out in the Cork County Development Plan 2009 to promote the improvement of strategic non national routes including the R624 as a link between Cobh Town and the national route network.

• The heavily trafficked nature of this regional route,

• The level of commuter and residential related on street parking in the vicinity of the dockyard entrance,

• The steep gradient of the existing access to the dockyard and the restricted sight lines in both directions at the site entrance,

• The restricted width of the R624 in the vicinity of the dockyard entrance which necessitates large vehicles crossing the median line when exiting the site,

It is considered that the proposed development would give rise to additional traffic turning movements and traffic congestion which would interfere with the free flow of traffic on a strategically important regional route, would endanger public safety by reason of traffic hazard and would, therefore, be contrary to the proper planning and development of the area."

7. It will be seen therefore that the Inspector's recommendation was based entirely on grounds relating to traffic. However, the Inspector in the course of his assessment of the traffic safety issue also said (at para. 10.08):

"In relation to the operational phase I would observe that while the carrying capacity of [*the R624*] is limited by its width and alignment it is unlikely that the relatively small increase in traffic movements (a combined total 108 for the originally proposed development or a combined total of 83 for the revised proposal) spread over a day and spatially over the 7 or 8 kilometres between Bellvelly Bridge and the site would materially impact on that carrying capacity of the road or its safety levels. Furthermore these figures for additional traffic must [be] considered in the context of the traffic generating capacity of the established industrial uses on site which may not generate so different a traffic impact as to give rise to traffic hazard."

8. On the 14th of March, 2013 the Board held a meeting at which it decided to grant permission subject to ten conditions. The Board disagreed with the Inspector on the traffic issue. The decision was signed on the 19th of March, 2013. The written decision recorded the following:

"MATTERS CONSIDERED

In making its decision, the Board had regard to those matters to which, by virtue of the Planning and Development Acts and Regulations made thereunder, it was required to have regard. Such matters included any submissions and observations received by it in accordance with statutory provisions.

REASONS AND CONSIDERATIONS

Having regard to the existing established industrial use on site, to the pattern of development in the area, to the existing buildings on site suitable to the use proposed, to the provisions of the Cobh Town Development Plan 2013-2019, to the zoning for the site, to the established entrance to the site, to the accessibility of the site, to the Cork Waste Management Plan 2004, to the provisions of the Waste Management (End of Life Vehicle) Regulations 2006, to the location of the proposal in a dockyard facility enabling convenient trans shipment of end product, to the capacity of the road fronting the site and the limited amounts of additional traffic to be generated by the proposal, the Board considered that, subject to compliance with the conditions attached, the proposal would be acceptable in terms of traffic safety and convenience, would not cause serious injury to the amenities of property in the vicinity and would, therefore, be in accordance with the proper planning and sustainable development of the area.

In deciding not to accept the Inspector's recommendation to refuse permission, the Board considered that the use of the facility for industrial purposes was well established and considered that given the limited amount of traffic movements proposed for the facility, that the proposal would not give rise to additional traffic congestion and would not be injurious to public safety.

The Board completed an Environmental Impact Assessment of the proposed scheme which considered the environmental impact statement submitted with the application and the report, assessment and conclusions of the Inspector in relation to the environmental impacts of the scheme, the conclusions of which were broadly accepted by the Board.

The Board considered that the environmental impacts of the proposal are acceptable and subject to compliance with the mitigation measures set out in the environmental impact statement, as conditioned by the Board, the scheme would not have unacceptable adverse effects on the environment."

9. The decision goes on to impose ten conditions to the grant of permission. Condition 7 is of particular relevance:

"7. In accordance with paragraph 3.4 of its appeal statement, the applicant, in the event that the planning authority displace car parking along the R624 in the vicinity of the site entrance in order to facilitate the proposal, shall make available car parking for use by members of the public from within its own lands on terms to be agreed with the planning authority or, in default of agreement, on such terms as shall be determined by An Bord Pleanala. The number of car parking spaces thus provided shall not exceed 20.

Reason: in the interests of orderly development."

Relevant Legislation

10. Sections 34 and 171A of the PDA, insofar as relevant to the issues that arise in these proceedings, provide as follows:

"34.—(1) Where—

(a) an application is made to a planning authority in accordance with permission regulations for permission for the development of land, and

(b) all requirements of the regulations are complied with,

the authority may decide to grant the permission subject to or without conditions, or to refuse it…

(4) Conditions under *subsection* (1), may, without prejudice to the generality of that subsection, include all or any of the following-

(a) conditions for regulating the development or use of any land which adjoins, abuts or is adjacent to the land to be developed and which is under the control of the applicant if the imposition of such conditions appears to the planning authority-

(i) to be expedient for the purposes of or in connection with the development authorised by the permission…

(b) conditions for requiring the carrying out of works (including the provision of facilities) which the planning authority considers are required for the purposes of the development authorised by the permission…

(5) The conditions under *subsection* (1) may provide that points of detail relating to a grant of permission may be agreed between the planning authority and the person carrying out the development; if the planning authority and that person cannot agree on the matter the matter may be referred to the Board for determination…

(10) (a) A decision given under this section or section 37 and the notification of the decision shall state the main reasons and considerations on which the decision is based, and where conditions are imposed in relation to the grant of any permission the decision shall state the main reasons for the imposition of any such conditions…

(b) Where a decision by a planning authority under this section or by the Board under section 37 to grant or to refuse permission is different, in relation to the granting or refusal of permission, from the recommendation in—

(i) the reports on a planning application to the manager (or such other person delegated to make the decision) in the case of a planning authority, or

(ii) a report of a person assigned to report on an appeal on behalf of the Board,

a statement under paragraph (a) shall indicate the main reasons for not accepting the recommendation in the report or reports to grant or refuse permission."

11. The relevant provisions of s. 171A are as follows:

"171A. – (1) In this part –

"environmental impact assessment" means an assessment which includes an examination, analysis and evaluation, carried out by a planning authority or the Board, as the case may be, in accordance with this part and regulations made thereunder, that shall identify, describe and assess in an appropriate manner, in light of each individual case and in accordance with Articles 4 to 11 of the Environmental Impact Assessment Directive, the direct and indirect effects of a proposed development on the following:

(a) Human beings, flora and fauna,

(b) Soil, water, air, climate and the landscape,

(c) Material assets and the cultural heritage, and

(d) The interaction between the factors mentioned in paragraphs (a), (b) and (c) …"

12. Section 172 insofar as material provides:

"172. – (1) An environmental impact assessment shall be carried out by the

planning authority or the Board, as the case may be, in respect of an application for [the relevant planning permission]…

(1B) An applicant for consent to carry out a proposed development…shall furnish an environmental impact statement to the planning authority or the Board, as the case may, in accordance with the permission regulations…

(1D) The planning authority or the Board, as the case may be, shall consider whether an environmental impact statement submitted under this section identifies and describes adequately the direct and indirect effects on the environment of the proposed development and, where it considers that the environmental impact statement does not identify or adequately describe such effects, the planning authority or the Board shall require the applicant for consent to furnish, within a specified period, such further information as the planning authority or the Board considers necessary to remedy such defect.

(1E) In addition to any requirement arising under subsection (1D), the planning authority or the Board, as the case may be, shall require an applicant for consent to furnish, within a specified period, any further information that the planning authority or the Board considers necessary to enable it to carry out an environmental impact assessment under this section…

(1G) In carrying out an environmental impact assessment under this section the planning authority or the Board, as the case may be, shall consider –

(a) the environmental impact statement;

(b) any further information furnished to the planning authority or the Board pursuant to subsections (1D) or (1E);

(c) any submissions or observations validly made in relation to the environmental effects of the proposed development;

(d) the views, if any, provided by any other Member State under section 174 or Regulations made under that section.

(1H) In carrying out an environmental impact assessment under this section the planning authority or the Board, as the case may be, may have regard to and adopt in whole or in part any reports prepared by its officials or by consultants, experts or other advisers.

(1I) Where the planning authority or the Board, as the case may be, decides to grant consent for the proposed development, it may attach such conditions to the grant as it considers necessary, to avoid, reduce and, if possible, offset the major adverse effects on the environment (if any) of the proposed development.

(1J) When the planning authority or the Board, as the case may be, has decided whether to grant or to refuse consent for the proposed development, it shall inform the applicant for consent and the public of the decision and shall make the following information available to the applicant for consent and the public:

(a) the content of the decision and any conditions attached thereto;

(b) an evaluation of the direct and indirect effects of the proposed development on the matters set out in section 171A;

(c) having examined any submission or observation validly made,

(i) the main reasons and considerations on which the decision is based, and

(ii) the main reasons and considerations for the attachment of any conditions, including reasons and considerations arising from or related to submissions or observations made by a member of the public;

(d) where relevant, a description of the main measures to avoid, reduce and, if possible, offset the major adverse effects;

(e) any report referred to in subsection (1H);

(f) information for the public on the procedures available to review the substantive and procedural legality of the decision, and

(g) the views, if any, furnished by other Member States of the European Union pursuant to section 174."

The Environmental Impact Assessment (EIA)

13. The principle thrust of the applicants' argument in this regard is that the Board failed to carry out an EIA contrary to the requirements of the PDA. Alternatively, they argue that if such an EIA was carried out, there is no record of the Board's examination, analysis and evaluation, nor does the Board describe and assess the direct and indirect effects of the proposed development on human beings, and in particular the applicants. They further argue that insofar as the Board in its reasons and considerations stated that it completed an EIA and considered the Inspector's report, the conclusions of which were broadly accepted, the Board failed to identify which conclusions it did in fact accept and which it did not. This left the applicants in the position of being unable to identify the reasons for the decision with sufficient clarity to enable them, and indeed the court, to consider whether the decision was lawfully arrived at. A number of well known authorities in support of that proposition were relied upon.

14. The applicants further submitted that the Board failed to give any or any adequate reasons for its apparent conclusion that the traffic impacts of the proposed development were acceptable. There was accordingly a failure to comply with s. 34(10) of the PDA. Mr. Galligan SC on behalf of the applicants contended that s. 172(1H) could not avail the Board and where it does not adopt the Inspector's recommendation and finding, it must separately set out its own examination, analysis and evaluation. It was said that the fact that the Board disagreed with its Inspector's recommendation meant that the Board had to give more detailed reasons than might otherwise be the case and this was the effect of s. 34(10)(b) which requires the Board to state the main reasons for not accepting the Inspector's recommendation. The applicants relied on the judgment of Finlay Geoghegan J. in *Kelly v. An Bord Pleanála* [2014] IEHC 400 in this respect.

15. The applicants also suggest that the Board cannot rely on the Inspector's report as constituting its EIA in circumstances where the Inspector's own report does not in fact contain an EIA. Under that rubric, the applicants submit that the Inspector merely sets out a summary of the EIS but conducted no examination, analysis or evaluation as required by s. 172.

16. The only issue that arises for consideration herein relates to the impact of vehicular road traffic arising from the proposed development. This is considered in detail in chapter 8 of the EIS submitted by CDL in support of the original application to the planning authority and also in the subsequent detailed submission by CDL's experts, Messrs. Fehily Timoney and Company commenting on the individual reasons furnished by the planning authority in refusing the application and in support of the revised and more limited application on appeal to the Board.

17. These documents provide analysis of historical and current road traffic movements in the vicinity of Cork Dockyard and of the turning movements of traffic entering and leaving the dockyard. The documents note that there are currently approximately 30 people employed on the site in stark contrast to the 1960's when there were some 1400 employed there. The public road which the site adjoins is the R624, one of two roads linking Cobh with the main Cork to Youghal road, the N25, via Belvelly Bridge which links the mainland with Great Island. The documents evidence the fact that between 2007 and 2011, following the economic downturn, the volume of traffic on the R624 fell by 676 vehicles per day. It is anticipated that the development will add back 94 vehicles.

18. In 2007, the R624 was operating at 74% capacity whereas it is now at 47%. Although the EIS analysis shows that the vehicle movements which will be generated by the proposed development on site will be approximately double that of the current level, and complaint is made of this by the objectors, even at that, such movements will still only represent 82% of peak vehicle movements recorded at the site in 2006. None of this evidence has been disputed although unsurprisingly the objectors to the development seek to draw different conclusions from it than those advanced on behalf of CDL. The applicants rely on affidavits from two planning consultants which purport to offer expert evidence to the court in relation to the Board's decision. In my view, the court cannot have regard to evidence which was never before the Board in determining whether the Board's decision was lawful.

19. In a recent judgment of this court in *Ratheniska Timahoe and Spink (RTS) Substation Action Group and Another v. An Bord Pleanála* [2015] IEHC 18, Haughton J. carried out a very helpful analysis of the general principles to be applied by the court in judicial review applications concerning planning matters (at pp. 35-39). First, it is firmly established that decisions of the Board enjoy a presumption of validity. Secondly, the court cannot substitute its own view for that of an expert body such as the Board once it has been shown that there is no manifest irrationality or unreasonableness in the decision arrived at. Further, once there is any reasonable basis for that decision, the court cannot interfere. Thirdly, the court will extend curial deference to the decisions of a duly constituted expert body charged with determining issues particularly within its own area of expertise. That is not however to say that such decisions cannot be challenged where it has been demonstrated that matters which ought to have been taken into account have been overlooked or regard has been had to matters which ought not to have been considered.

20. Having considered the relevant principles, Haughton J. went on to comment (at p. 41):

> "76. It is the view of this court that the more limited test for substantive review on grounds of irrationality set by [*O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39], and reiterated in the case law derived from that case, is both well established and remains appropriate, and continues to bind the High Court at least in its review of decisions of the Board, including EIAs forming part of such decisions."

21. In the present case, the applicants contend that no EIA was carried out by the Board. However, the decision of the Board clearly records that it did carry out an EIA and the onus of proving otherwise rests upon the applicants. No evidence has been adduced to contradict the assertion of the Board contained in its decision. The applicant's secondary position is that if the Board did carry out an EIA, it was obliged to record same in writing and this it failed to do.

22. However, there is no requirement in the PDA that the Board must state in writing within its own decision what the EIA comprises and it seems to me that once it is clear from the terms of the decision and the documents therein referred to how the EIA was arrived at that this satisfies the Board's obligations under s. 172. Subsection (1D) and (1E) mandate the Board to consider whether the EIS identifies and describes adequately the direct and indirect effects on the environment of the proposed development and if it does not, to obtain from the applicant such further information as it requires to enable it to carry out an EIA.

23. Subsection (1H) expressly permits the Board to adopt in whole or in part any reports prepared by its own officials, such as the Inspector here, or by consultants, experts or other advisors such as Messrs. Fehily Timoney and Company, in carrying out its EIA. The Board is not required to separately identify, describe and assess the direct and indirect effects of the proposed development within its decision where these matters are contained within an EIS which the Board considers is sufficient to enable it to carry out an EIA. In the present case, CDL provided a comprehensive EIS which the Board were entitled to adopt, as did its Inspector, particularly in the absence of any contrary evidence on the traffic issue.

24. It seems to me that the fact that the Board reached a different conclusion than that recommended by the Inspector does not somehow alter its obligations with regard to carrying out an EIA. I cannot accept the submission of the applicants that because the Board disagreed with its Inspector's recommendation, this obliged it to provide a more detailed decision than might otherwise be the

case. I can find no warrant for such a proposition within the terms of the Act itself nor has any authority been referred to by the applicants to support it. Its obligation in this regard is confined to indicating the main reasons for not accepting the recommendation under s. 34(10) (b).

25. A similar argument was made in *Rathiniska* and dealt with by Haughton J. as follows (at p. 45):

> "83. The applicants assert that the Board failed to "record" the EIA. The applicants also aver that the Board failed to "engage" with the Inspector's assessment and disregarded his concerns which were based on broader factors. They asserted that the Board failed to give any or any proper reasons for its decision to depart from the Inspector's recommendation (that the Board seek further information). They asserted that this aspect of the decision was entirely unreasonable having regard to the potential health consequences and risks.
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> 84. The respondent and EirGrid argued that there was no evidence that the Board had failed to carry out or record a proper EIA; that there was ample evidence on which the Board could come to the conclusions and assessment that it did come to. They contended that in the light of the evidence and particularly international research which was considered by the Board, its conclusion could not be impugned for irrationality."

26. The court dealt with this issue as follows (at p. 46):

> "Decision
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> 85. The court is satisfied firstly that the Board did undertake a comprehensive EIA in relation to this aspect of the Development and that this is recorded in the body of the decision where the Board stated that it was satisfied that the information available on file was adequate to allow an EIA to be completed. It is also apparent from a reading of the decision as a whole that the Board considered and assessed the EIS, the Inspector's Report (where an assessment of the EIS and this issue was carried out by the Board's nominated officer) and other relevant documentation. The Board also expressly confirms that in forming its view it had regard to listed and publicly available documents of a scientific or guidance nature relevant to this issue. Secondly, the Board clearly had before it relevant evidence from which it could take a decision in relation to this aspect of the Development."

27. The court went on to hold that the applicants had failed to discharge the onus of proof on this issue.

28. The authorities establish that the decision in issue must give reasons of sufficient clarity to enable a proper assessment by interested parties and ultimately the court as to whether the decision is lawful - see *Kelly v. An Bord Pleanála* [2014] IEHC 400 and R (*on the application of Mellor) v. Secretary of State for Communities and Local Government* case C-75/08 [2009] ECR I-3799. Once the essential rationale for the decision is clear, the reasons furnished do not have to be discursive.

29. In *Mulhaire v. An Bord Pleanála and ESB* [2007] IEHC 478, the applicant sought leave to apply for judicial review of a decision of the Board to grant permission for a 24 metre high standing communication structure. One of the applicant's complaints was that the Board had failed to give any or any adequate reasons for its decision. That decision was arrived at contrary to a recommendation to refuse permission contained in the report of the Inspector appointed by the Board.

30. In the course of his judgment, Birmingham J. said (at p. 13):

> "In dealing with the new obligation to state the consideration on which a decision is based, Kelly J. [in *Mulholland v. An Bord Pleanála* (No. 2) [2006] 1 I.R. 453] was of the view that in order for the statement of considerations to be acceptable under law it must satisfy a similar test to that applicable to the giving of reasons. The statement of considerations must, therefore, be sufficient to give to an applicant such information as may be necessary and appropriate for him to consider whether he has a reasonable chance of succeeding in appealing, or judicially reviewing, the decision, or arm himself for such hearing or review, know if the decision maker has directed its mind adequately to the issues which it has considered or is obliged to consider and enable the court to review the decision. Thus, he concluded the criteria which must be met for the statement of considerations are precisely the same as those which apply in respect of the statement of the main reason. In *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 at 76 Finlay C.J. said: "What must be looked at is what an intelligent person who had taken part in the appeal or had been appraised of the broad issues which had arisen in it would understand from this document, these conditions and these reasons.
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> Here, if one has regard to the decision and the conditions and reasons, it is clear, therefore, that the Board has applied its mind to the issues before it. Indeed, the reasoning of the Board clearly emerges from the decision with the attached conditions. Mr. Mulhaire may, understandably, be very aggrieved at the outcome, particularly, as his arguments had carried the day before the planning authority, and with the Inspector, but he cannot be left in any doubt as to why the decision went against him. In my view, it is noteworthy that the reasons and considerations are set out here much more fully than was the case in O'Keeffe, a case with some striking similarities as it, too, involved an application for permission to erect a radio mast where An Bord Pleanála departed from its Inspector's report it decided to grant permission. As was the case in O'Keeffe, I am satisfied that the entirety of the documents clearly, and sufficiently, identify the reasons by which the Board reached its decision to grant this particular planning permission subject to these particular conditions. The applicant has placed particular emphasis on the fact that this was a case where An Bord Pleanála had decided not to follow the Inspector's recommendation to refuse planning permission. However, as is clear from *Mulholland v. An Bord Pleanála*, even here there is no obligation to provide a discursive judgment. In the present case, An Bord Pleanála expressly stated that in deciding not to follow the Inspector's recommendation it had regard to national policy, the commercial zoning of the site, and the fact that the site consisted of an existing ESB sub-station. Again, while Mr. Mulhaire may not like the conclusions reached by An Bord Pleanála, he cannot be left in any doubt as to how and why they came to their decision to depart from the Inspector's recommendation."

31. In the present case, the Board has stated that it completed an EIA which considered the EIS, the Inspector's report and his conclusions which were broadly accepted. Whilst the applicants criticise the use of the word "broadly", I think it is clear from a reading of the decision as a whole that this is a reference to the fact that the Inspector's conclusions on the evidence were accepted with the exception of his recommendation to refuse permission. On the traffic issue, the Inspector said in his report that while increased traffic on the R62 is likely to occur, this will be minimal. Despite that finding, the Inspector came to a conclusion that the additional traffic turning movements and traffic congestion would interfere with the free flow of traffic and endanger public safety. This was clearly a different conclusion from that arrived at by the Board which considered that given the limited amount of traffic movements proposed, the proposal would not give rise to additional traffic congestion and would not be injurious to public

safety.

32. Accordingly, the Board reached a different conclusion from the Inspector based on the same evidence. This was entirely a matter for the judgment of the Board arrived at by the use of its own experience and expertise, which the Board was not only entitled but obliged to engage. Whether from the traffic perspective the proposed development is acceptable or not from a planning point of view is a qualitative determination of precisely the kind that this court cannot review once there is any evidence which supports it and plainly there is. Similarly, the Board considered that the environmental impacts of the proposal are acceptable and here again, this is entirely a value judgment solely within the province of the Board to make. There was more than ample evidence which justified this conclusion, which could not by any stretch of the imagination be regarded as unreasonable or irrational.

33. Indeed, it seems to me that when one considers the decision as a whole and in particular the conditions imposed, it is perfectly clear that the Board explicitly engaged with the traffic issue which concerns the applicants herein. Whilst it might be said that the reasons given for disagreeing with the Inspector's recommendation are not particularly discursive, I am of the view that the applicants have been left in no doubt as to the reasons for the Board's decision.

34. Accordingly, on this issue, I am satisfied that the Board duly carried out the requisite EIA in accordance with the requirements of the PDA. I am further satisfied that there is nothing irrational or unreasonable about the reasons given by the Board for its decision and that the applicants have failed to discharge the onus of rebutting the presumption of validity enjoyed by the Board's decision in this respect.

Condition 7

35. As appears from its terms, condition 7 is conditional on the happening of an event which may or may not occur in the future. Irrespective of whether it does occur, the Board has determined that the development may proceed.

36. The applicants argue that this condition is invalid for a number of reasons. They rely on *Ashbourne Holdings Limited v. An Bord Pleanála* [2003] 2 I.R. 14 as authority for the proposition that the requirement for the applicant to cede a part of its own land abutting or adjoining the development cannot be expedient for the purposes of or in connection with the development as required by s. 34(4)(a)(i) of the PDA. The authorities demonstrate that this remains the case irrespective of whether the developer consents to the imposition of such condition. The condition in issue in *Ashbourne Holdings* was clearly a condition which could have no conceivable benefit to the development itself. I do not think that the same can be said of the condition in this case. The provision of the parking spaces, if it occurs, will be the direct result of the removal of the car parking spaces on the R624 immediately adjacent to the entrance to Cork Dockyard. This will create a significant tangible benefit to the development in improving the sight lines and thus the access/egress to and from the development. There is an element of quid pro quo here which was entirely absent in *Ashbourne Holdings*.

37. However, the parameters of the condition are undefined. The number of spaces to be provided could be anything from 1 to 20. The location of the spaces, presumably outside of the development lands, could be anywhere within the 44 acres comprising Cork Dockyard. Depending on their location, the car parking spaces may have an impact on residential development adjoining the Cork Dockyard. It remains to be determined when the spaces are to be provided following removal of parking on the R624. It also remains to be determined during what periods the spaces will be available or if the car park will be permanently open. Similarly, it remains to be decided whether these spaces will be free to the public or subject to charges and if so who the beneficiary will be of such charges.

38. All these matters are to be determined by agreement between the applicant and the planning authority or in default of agreement, to be determined by the Board. That agreement or determination will not however involve any public consultation as it might in circumstances where a de novo application for planning permission for a car park were made. Even if a separate planning application were deemed to be necessary, it might be said that the outcome has already been to an extent predetermined by the Board's decision in relation to condition 7. In my view, there must also be considerable doubt as to whether the creation of a car park on CDL's lands could be regarded as a mere point of detail such as envisaged by s. 34(5).

39. Apart from these concerns, the applicants submit that condition 7 imposes an obligation on CDL in respect of lands which it currently owns but of course may not at the time the condition comes into effect, if ever. It is perfectly possible that some or all of the lands potentially available for the car park could be disposed of in the future separately from the lands comprising the development. Were that to occur, it is difficult to see how a condition of the planning permission which attaches to and enures for the benefit of the development lands, could be enforced against successors in title to different lands as some form of easement or even compulsory purchase order. Mr. Mulcahy SC for the Board fairly conceded that this may well be a weakness in s. 34(4)(a) which itself refers to the imposition of conditions regarding adjoining lands controlled by "the applicant" for permission.

40. For these reasons, I cannot see how condition 7 could be enforced by an interested party if the event it anticipates comes to pass. Clearly a condition which is unenforceable must equally be *ultra vires* the Board.

41. In that event, the issue then becomes whether condition 7 is severable from the remainder of the permission.

42. In *Bord na Mona v. An Bord Pleanála and Another* [1985] I.R. 205 this issue was considered by Keane J. (as he then was) as follows (at p. 211):

> "On principle, it seems wrong that a planning permission should be treated as of no effect simply because a condition attached to it, which has nothing to do with planning considerations, is found to be ultra vires. Again, if a condition of a peripheral or insignificant nature attached to a permission is found to be ultra vires, it seems wrong that the entire permission should have to fall as a consequence. But where the condition relates to planning considerations and is an essential feature of the permission granted, it would seem equally wrong that the permission should be treated as still effective, although shorn of an essential planning condition. This view is supported by English authority: see the speeches of Lord Reid, Lord Morris of Borth-y-Gest and Lord Upjohn in Kingsway Investments (Kent) Limited v. Kent County Council [1971] A.C. 72.
>
> The question remains, accordingly, as to whether the invalid condition in the present case can be regarded as an inessential condition or one which is not related to planning considerations or is peripheral or insignificant in its nature. I think that the answer to this question is quite clear. There can be no doubt as to the power of the planning authority to impose a condition of this nature, provided that it is framed in a reasonable manner. It unquestionably relates to planning and could not, on any view, be described as trivial or insignificant. On the contrary, to treat the permission as authorising the plaintiff to carry out a major development without making any contribution whatever to the improvement of the road

> network which would be necessitated by their development would be to treat them as having been granted a permission which it was never the intention of the legislature that they should have. It seems to me that, in these circumstances, it is not possible to sever the offending condition from the permission and, accordingly, the decision to grant permission must be treated as a nullity in its entirety."

41. The views of Keane J. were added to by McCarthy J. in delivering his judgment in the Supreme Court in *State (F.P.H Properties S.A.) v. An Bord Pleanála* [1987] I.R. 698 where he said (at p. 711):

> "Unless it can be demonstrated that the respondents would have granted the relevant permissions subject only to the other conditions, if it had been advised that the impugned condition was invalid, in my view the impugned condition is not severable from the remainder of the permissions. Having regard to the contents of the Inspector's report and, in context, taking the condition as it stands alongside its fellows, I am far from satisfied to hold that such would be the case…. I am content to hold that the permissions cannot stand with the conditions severed from them. To hold otherwise would be to rewrite the permissions."

42. The Board have determined here that the development can proceed irrespective of whether the car parking is ultimately removed from the R624. Clearly therefore the Board envisaged a situation where the development would take place without condition 7 ever becoming effective. It seems to me it must follow, virtually by definition, that the Board cannot have regarded condition 7 as essential to the development. Had it done so, it would presumably have required the provision of such parking as a prerequisite to the commencement of the development. It cannot be said therefore that the permission which would remain shorn of condition 7 is one which had never been envisaged by the Board.

43. It follows in my view that condition 7 is severable from the permission which otherwise stands.

44. For these reasons, I will dismiss this application. .