NEUTRAL CITATION NUMBER [2012] IEHC 532

THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 878 J.R.]

BETWEEN

SEAN NEE

APPLICANT

AND

AN BORD PLEANALA

RESPONDENT

AND

THE COUNTY COUNCIL OF GALWAY AND PETER MEAGHER

NOTICE PARTIES

Judgment of Ms. Justice Iseult O'Malley delivered the 12th day of November 2012

INTRODUCTION

1. These proceedings concern a decision to grant planning permission by the respondent ("the Board") to the second notice party on appeal from a refusal of permission by the first notice party ("the Council"). The applicant is the owner of property adjacent to the site in question and had objected to the permission. He claims that the decision was made in a manner that is contrary to the provisions of s. 37(2) and s.34(10) of the Planning and Development Act and further that it is manifestly unreasonable and flies in the face of reason and common sense. He also alleges a breach of the Habitats Directive.

2. The first argument centres largely on the contention that the second notice party, the Planning Authority, refused a grant because the proposed development would have constituted a material contravention of the County Development Plan. In those circumstances the Board would be entitled to reverse the decision only in the limited circumstances set out in the legislation. The second issue relates to the argument that the Board did not sufficiently explain its reasons for disagreeing with the report of its inspector. The third arises mainly from the fact that the Board did not accept the very strongly expressed opposition of its own inspector. The fourth is based on the proximity of the site to an area of special conservation.

3. The permission granted is for the refurbishment of a one-bedroom cottage, approximately 28sqm or 300sqft, on the seaward side of the road near the sea in Ballyconneely, County Galway. The area is one of exceptional scenic beauty and various consequences flow from its categorisation under the planning code.

PREVIOUS PLANNING HISTORY OF THE SITE

4. The last person to reside on the site was a Mr. Matt Conneely, who died in 1985. During his lifetime the house was a one-room thatched cottage, thought to have been built in the early 20th century, with no running water or electricity. After his death the site was acquired by a Mr. von Schneider, who did not occupy it. According to the applicant the thatched roof was removed in about 1987. Among the exhibits in the case are three refusals of planning permission to Mr. Von Schneider by the first notice party, in 1989 and 1990. The reasons given on each occasion were as follows:

> (1) The extension and upgrading of the existing substandard house would constitute substantial new development in an area of outstanding scenic amenity where it is the general policy of the planning authority to limit development to cases of essential housing need. No such need has been proven and the development, if permitted, would be contrary to the provisions of the County Development Plan and to the proper planning and development of the area.
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> (2) The development would be likely to give rise to a public health hazard as the site is unsuitable to accommodate a septic tank or other suitable sewage treatment plant which would be appropriate for the development proposed.

5. It is apparent that each of these applications involved a plan to extend the house. At some stage Mr. von Schneider commenced certain unauthorised works involving the demolition of parts of the original walls and the partial building of new ones in an effort to extend the cottage to almost twice its original size. After the commencement of enforcement proceedings, a letter from the County Council in 1993 authorised him to rebuild the cottage to its original state on certain conditions, the principal of which was the removal of the extension. This was not done and the works were not completed.

6. In 2002 Mr. Meagher, the second notice party, entered into a contract to buy the site subject to planning permission. The permission sought at that stage was to complete the existing construction works and for the proposed extension and alterations, together with a new biocycle unit and raised percolation area and improvements to the existing entrance. Permission was refused by the first notice party. The reasons can be summarised as follows: the proposed structure was excessive in height and unsympathetic in design; it would be an extension to existing unauthorised works; it would by its very nature set an undesirable precedent for future development of this kind; it was in an area of High Scenic Amenity where the policy was to restrict development to cases of proven housing need - no such need had been shown - and it would be prejudicial to public health in the absence of a satisfactory method of foul effluent disposal. There was a specific determination that the proposal would contravene materially the development objectives set out in the then current Development Plan.

THE CURRENTAPPLICATION

7. The second respondent ultimately purchased the property in November 2006. In July 2009 he again applied for planning permission but this time it was simply to rebuild the cottage to its original state and size, with the demolition of the non original extensions and

reconstruction of stone walls and thatched roof. A new proprietary effluent treatment system was part of the proposal.

8. By this stage, not surprisingly, the condition of what remained of the cottage had deteriorated significantly. As well as the roof, much of the original walls were gone and what remained on the site included some of the unauthorised rebuilding. Indeed, it was part of the submission made by the first notice party that what he was proposing would be considerably more beneficial to the landscape than the ruinous structure in being.

9. The applicant in these proceedings objected to the application. His arguments are summarised in the documentation before the planning authority as follows:

- The applicant had no housing need
- The development would be for a holiday home
- The site was located between the road and the sea and in an area of high scenic amenity value. A grant of planning permission would be contrary to the proper planning and sustainable development of the area and would set an undesirable precedent.
- Site suitability factors and the fact that the site floods in high tides.
- There was concern that future extensions will be required due to the fact that there was only one bedroom in the plan and the applicant had three small children.
- The development would affect the existing right of way used by local fishermen and farmers, and would hinder access to boats on the river crossing the site.

10. On the 24th March, 2010 the first notice party refused to grant permission. The "main reasons and considerations'" for the decision states that:

> "The proposed development has been assessed, within the restrictions imposed by the principles of proper planning and sustainable development and having regard to the policies and objectives of Galway County Council as set out in the 2009-2015 Development Plan. Based on this assessment it is considered that the proposed development would be contrary to the proper planning and sustainable development of the area and would be contrary to the objectives and policies as set out in the County Development Plan."

11. The attached Schedule set out five reasons in full as follows:

> (i) "The proposed development is located in a Class 4 rural landscape, which is designated as having a landscape sensitivity rating of "special" and a landscape value rating of "outstanding", as specified in the 2009-2015 Galway County Development Plan, where housing needs are restricted to essential residential needs of local households and family farm business. Having regard to Policy HP13 and Policy HP22 and DM Standards 6 and 36 of the County Development Plan, it is considered that the applicant has not fully demonstrated intrinsic links to build a house at this Class 4. Accordingly to grant the proposed development would be contrary to the provisions of the County Development Plan, Sustainable Rural Housing Guidelines and contrary to the proper planning and sustainable development of the area.
>
> (ii) In the absence of satisfactory evidence of a potable water supply to serve the proposed development, it is considered that the development, if permitted, would be prejudicial to public health, would seriously endanger the health and safety of persons occupying or employed in the structure and therefore would be contrary to the proper planning and sustainable development of the area.
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> (iii) The applicant has not submitted any evidence that the minimum sight distance for this type of road can be achieved in both directions at the proposed access to the site to ensure that the potential traffic hazard created as a result of the development is minimised. It is considered that the proposed development, if permitted, would endanger public safety by reason of traffic hazard or obstruction of road users or otherwise.
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> (iv) It is considered that the proposed development would endanger public safety by reason of a traffic hazard because the site is located to a poorly alignment [sic] heavily trafficked regional roadway (R341) where traffic turning movements generated by the development would interfere with the safety and free flow of traffic on the public road. Accordingly to grant the proposed development would endanger public safety by reason of traffic hazard or obstruction of road users or otherwise and be contrary to the proper planning and sustainable development of the area.
>
> (v) Having regard to the high water table, the poor natural drainage of the *in situ* soil/subsoil on site, the absence of at-value, the impervious nature of the underlying bedrock, it is considered by the Planning Authority that the safe disposal of domestic effluent on site cannot be guaranteed, notwithstanding the use of a proprietary waste water treatment system. Accordingly to grant the proposed development would be prejudicial to public health, would seriously endanger the health and safety of persons occupying the structure, would pose an unacceptable risk to surface waters, would be contrary to EPA Wastewater Treatment and Disposal Manual (2009) serving Single Houses (p.e.) _< 10 and therefore would be contrary to the proper planning and sustainable development of the area."

12. It should be noted that this decision adopts in full the recommendations and language of the Planner's report to the Council.

13. The second notice party appealed this decision to the Board. The Inspector who reported to the Board recommended refusal. The result of the appeal however was a grant of permission but this was set aside in the High Court (Hedigan J) because the objector, the applicant in these proceedings, had not been notified of the appeal. No other issue was decided in those proceedings. The matter was remitted to the Board for reconsideration. The applicant and the second notice party both made representations to the Board, including legal and other professional expert submissions. Despite a further negative recommendation, from a different Inspector, the Board again found in favour of the second notice party, albeit with the attachment of a number of conditions to the grant. It is this decision that the applicant now seeks to quash.

GALWAY COUNTY DEVELOPMENT PLAN- RELEVANT POLICIES

14. Policy HP13 requires the planning authority to have regard to the Ministerial Guidelines for Sustainable Rural Housing when

considering the formulation of policies and in the discharge of its development management functions.

15. Policy HP22: The Council, subject to compliance with other policies, objectives and development management standards of the County Development Plan, requires applicants seeking to locate in Landscape Class 4 to provide a substantiated housing need to reside in the area.

16. PolicyHP24: The planning authority is to encourage the re-development of derelict/semi-ruinous buildings for commercial, residential purposes (including tourism). It is a requirement that the proposed development be designed to be externally similar to the original property using traditional materials. This Policy goes on to say that "In practice the re-development of these buildings will be permitted where they (1) can be adequately serviced and (2) have their original external walls largely intact".

17. Policy HL51 seeks to have protected and preserved in so far as is practicable the quality of the coastline, while balancing against the economic and social needs of coastal communities.

18. Policy HL53 seeks to have protected any views of special amenity value along the coastline.

19. Policy HL94, in relation to landscapes of this class, requires the preservation and enhancement of the character of the landscape where, and to the extent that, in the opinion of the planning authority, the proper planning and sustainable development of the area requires it, including the preservation and enhancement, where possible, of views and prospects and the amenities of places and features of natural beauty or interest.

20. Policy HL95 seeks the preservation of traditionally open/unfenced landscape. The merits of each case are to be considered in the light of landscape sensitivity ratings and views of amenity importance.

RELEVANT DEVELOPMENT MANAGEMENT STANDARDS AND GUIDELINES
21. DM Standard 18 relates to new access points onto Regional Roads and requires a sight distance in both directions from a distance 2.4m back from the road edge of a minimum of 120m on a road with a design speed of 85kph and 90m on a road with a design speed of 70kph.

22. DM Standard 36 states that the type of development "generally to be acceptable" in this class of landscape is restricted to the essential residential needs of local households and family farm business.

SUBMISSIONS BEFORE THE BOARD- THE FIRST APPEAL
23. The second notice party's response to the grounds of refusal were summarised by the Board's inspector as follows:

Reason No.1

- The site was purchased to undertake the renovation and restoration of the cottage to its original state
- The letter from Galway County Council in 1993 authorised the works, and as such, the applicant was entitled to rebuild the cottage as per that letter
- There was no requirement to establish an essential rural housing need as the cottage on the site was in existence
- The development plan encouraged the re-development of derelict/semi ruinous buildings
- As such, given that the Council had already permitted the restoration of the cottage, in 1993, and the fact that the cottage existed on the site, Reason No.1 was invalid

Reason No.2

- Water was proposed from a new connection to the local group water scheme and a letter of consent had been provided.

Reason No.3

- In terms of sight distances, it was proposed to relocate the entrance in order to achieve 70m in both directions

Reason No.4

- It was submitted that a traffic hazard would not be created given the sight lines demonstrated, the relocation of the entrance and the reconfiguration of the road boundary walls to accommodate a lay-by.

Reason No.5

- Given the date of the making of the application, it was entirely appropriate that the site [the rest of this line is missing]
- A revised site character assessment had been prepared for the site in accordance with EPA 2009, whereby a "T" value of 6.5 was recorded
- It was proposed to provide a percolation area for a population of 4, with a polishing filter area of 36msq.

24. The County Council made no response to the appeal and, as noted, the Applicant herein had not been notified.

25. The first Inspector, as mentioned above, had recommended refusal because of the issues in relation to road access and wastewater treatment. It is however worth noting that he or she considered that the proposal otherwise accorded with the principles of the policies of the County Development Plan, together with the Rural Housing Guidelines. He or she specifically considered the landscape classification and was of the opinion that the requirement to demonstrate housing need did not apply, as this was not a greenfield site. The Inspector also considered that it had been sensitively designed and did not offend against the landscape classification such as to warrant refusal on that ground.

26. The second Inspector, who reported to the Board after the original judicial review proceedings, took a different and rather more negative view.

THE SECOND APPEAL
27. The second notice party's grounds of appeal appear to have been much the same as in the first appeal. Further material was included in relation to the drainage proposal with a view to establishing that it was in fact in compliance with the EPA Manual.

28. The applicant's submission, in summary, argued that the proposed development should be refused because:

• As the site was within a Class 4 area, development would normally be restricted to the substantiation of a local housing need. There was a minimal amount of the original walls remaining intact and therefore the proposal failed to meet the criteria of HP24 of the Development Plan. The structure was a ruin that had last been occupied 28 years earlier.

• Permission in this case would constitute a harmful precedent, given the high concentration of semi-ruinous structures in the countryside within Class 3, 4 and 5 Landscape Sensitivity Areas.

• The new access could only achieve sight distances of 90m in each direction and therefore failed to comply with OM Standard 18. The road was a busy one where the maximum speed limit applied and the proposal therefore constituted a traffic hazard.

• The Group Water Scheme referred to had been disbanded in 2008 and no alternative potable water supply had been demonstrated.

• The stream crossing the site was subject to high tides and it was uncertain how vehicular or pedestrian access could be safe-guarded

• The proposed development was only 525m from the Slyne Head SAC/NHA. There were already 26 one-off houses within a 500m radius, all served by individual treatment plants. The proposed treatment plant did not comply with the EPA Code of Practice: Wastewater Treatment and Disposal Systems serving Single Houses (2009).

THE INSPECTOR'S REPORT
29. The inspector dealt with the issues under seven separate headings. His findings in relation to two matters -the water supply and the question of flooding- were in favour of the second notice party and are not in issue in these proceedings. The recommendations on the remaining five can be summarised as follows:

(a) The Principle of the Development.

The inspector considered that it would be wrong to determine that there was an existing house on the site. Of the original structure, all but a small part of the front wall and a bit of the western gable had been demolished and illegal attempts had been made to create a new house. The old dwelling was gone and "it is not coming back", not least because it was not habitable in modern terms. The proposal would therefore not entail the rebuilding or refurbishment of the former cottage but rather the building of a new cottage. Looked at in this light, one would have to apply the full rigours of Development Plan policy applying to a new house and it would therefore be necessary to establish housing need.

(b) The Development in the Context of the Galway County Development Plan

(i) Policy HP24 could not assist the developer because the structure was not derelict or semi-ruinous- it effectively did not exist at all.

(ii) Since the proposal constituted a new house, in the inspector's view, HP22 required the establishment of a housing need. Manifestly, this could not be done in this case as the building was intended to be used as a holiday home.

(iii) The importance of the Landscape Sensitivity classification required that new housing should not be permitted without substantiated housing need. The new house would change the character of the landscape because what would be built would not be what had been there previously but rather pastiche.

The new structure would intrude on views towards the bay.

The reality was that as soon as the house was complete "there would be an obligation to seek extensions to make the structure habitable by modern standards" with consequential additional impacts on the scenic amenity value of the area.

Permission would establish a highly inappropriate precedent, in that if what was legally on the site was determined to be a "structure" capable ofbeing redeveloped, one could see dwarf walls and ruinous gables throughout the area being presented as targets for holiday home development. This "could not be viewed as sustainable development".

(c) Traffic Impact

The inspector took a very strong view on this aspect and sought to impress on the Board that to permit this development would be to permit a traffic hazard and there would be accidents arising. He refers to the fact that the entrance and the site's frontage were not chosen and designed to accommodate motor vehicles. He considered that minimum sight distances of 100-11Om were essential on a busy road such as this where traffic moved at high speed.

(d) Disposal of Effluent

The inspector considered that, having observed that the proposal was to construct a treatment plant on sand over rock

beside the sea, there was really no need to say much more. He referred to the "extensive information, documentation, design proposals, counter-argument etc given by the applicant to demonstrate how a treatment system has been engineered to show that the effluent generated by the proposed house will not cause a pollution threat" with some scepticism and remarked that this "highly engineered" system would require a high maintenance regime, difficult to implement in a holiday home. He concluded that the proposal constituted a pollution threat.

(e) The Legal Issue

The question here was whether or not the County Council had refused permission because of a material contravention of the Development Plan. The inspector noted that the first reason for refusal referred to contravention of the Plan. He was of the view, however, that the Council "clearly did not decide to refuse the proposal because it materially contravened the provisions of its Development Plan". He elaborated on this as follows:

> "The extent of non-compliance with the provisions of the Plan was not very clearly made by the planning authority. The planning authority concluded that the applicant had not *fully* demonstrated intrinsic links to build a house within this area. Determining that this *materially* contravenes the Plan could not readily be determined based upon such a loose term. The proposal evidently does not contravene any specific objective of the Plan. It may be concluded that it contradicts a number of policies. However, it is evident that one could readily select other policies within the Plan that could be used to promote this development, and indeed the applicant has done so to promote the development. In addition, it is my submission that, when due regard is had to the pattern of development in this area and to the extent of permissions that have been given by the planning authority in recent years (notably over the life-time of the last Plan as the current Plan is relatively recently adopted), it is reasonable to conclude that this could be another reason why the Board would not be restricted in its determination by Section 37(2)(b)."

30. It should be noted here that there is no evidence before the Court in relation to the matters dealt with in the last sentence.

THE DECISION OF THE BOARD

31. The decision of the Board was to grant permission in accordance with the plans and particulars submitted subject to certain conditions. The Reasons and Considerations, with the conditions attached, are set out in full as follows:

Having regard to the planning history of the site including the long established residential use of the property, the modest scale and design of the works proposed for the refurbishment of the original one bedroom cottage, the pattern of development in the vicinity and the technical details submitted in relation to the proposed wastewater treatment system, it is considered that the demolition of all non-original extensions and the refurbishment of the cottage, subject to compliance with the conditions set out below, would be acceptable in terms of protection of the visual amenities of the area and of property in the vicinity, would be acceptable in terms of traffic safety and would not be prejudicial to public health. The proposed development 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 a residential use had long existed on the site, notwithstanding the current ruinous condition of the cottage and did not accept that a residential use had ceased in planning terms. In this regard the Board considered that the current condition of the dwelling as noted by the Inspector was due more to the abortive attempts to restore/extend the cottage rather than decay due to the passage of time. Taking into account the planning history and efforts to refurbish the cottage, the Board considered that the residential use had not been abandoned and that it would be unreasonable to prevent the refurbishment and restoration of the structure to its original form given its historical standing. The Board, therefore, considered the case in the context of refurbishment of the physical dwelling and the established residential use of the site.

In relation to visual and landscape impacts the Board had regard to the nature and scale of the development and to the pattern of existing development in the vicinity and did not consider that this simple refurbishment of a modest cottage would change the character of the landscape in this area, notwithstanding the scenic and landscape rating of the area as set out in the current development plan for the area.

With regard to the issue of traffic safety, the board considered that the original entrance proposal submitted to the planning authority struck a reasonable balance between protecting visual amenity and traffic safety and considered that the sight lines achievable at the entrance would be acceptable in terms of traffic safety.

With regard to the Inspector's concerns relating to the effluent treatment system, the Board had particular regard to [the] limited size of the cottage in relation to the overall site area and had regard also to the site characterisation report and the technical proposals put forward by the applicant, and considered that the development represented an acceptable response to providing for the safe disposal of effluent and further considered that the details of installation and operation could be adequately dealt with by condition.

Regarding the Inspector's concerns with regard to precedent for refurbishment of other derelict sites of which there are many, the Board considered the subject dwelling has a specific and unusual planning history over the past 20 years which is unlikely to be shared by other derelict dwellings.

The Inspector also considered that the cottage would inevitably be extended from its proposed scale and in this regard the Board considered it appropriate to attach a condition restricting any further extensions to the cottage subject to planning permission.

CONDITIONS

1. The development shall be carried out and completed in accordance with the plans and particulars lodged with the application. except as may otherwise be required in order to comply with the following conditions. Where such conditions require details to be agreed with the planning authority, the developer shall agree such details in writing with the planning authority prior to commencement of development and the development shall be carried out and completed in

accordance with the agreed particulars.

***Reason**: In the interest of clarity*

2. The entrance to the site shall be as set out in the original proposal received by the planning authority on the 61h day of August, 2009.

***Reason**: In the interest of traffic safety and visual amenity*

3. The cottage shall be refurbished using traditional materials and building techniques and all works shall be carried out under the supervision of a qualified professional with specialised conservation expertise. Prior to commencement of development, full details of all the proposed materials, finishes and techniques to be used shall be submitted to and agreed in writing with the planning authority.

***Reason**: To secure the authentic restoration of the structure and to ensure that the proposed works are carried out in accordance with best conservation practice.*

4. Notwithstanding the exempted development provisions of the Planning and Development Regulations, 2001. and any statutory provision replacing or amending them, no development falling within Class 1, 3, 5 or 7 of Schedule 2, Part 1 of those Regulations shall be erected on the site without a prior grant of planning permission

***Reason**: In the interest of the amenities of the area.*

5. (a) The treatment plant and polishing filter shall be located, constructed and maintained in accordance with the details submitted to the planning authority on the 6th day of August, 2009, as revised by the further information received by the Board on the 25th day of January, 2011, and in accordance with the requirements of the document "Wastewater Treatment Manual: Treatment Systems for Single Houses", Environmental Protection Agency (current edition). No system other than the type proposed in the submissions shall be installed unless agreed in writing with the planning authority.

(b) Certification by the system manufacturer that the system has been properly installed shall be submitted to the planning authority within four weeks of the installation of the system.

(c) A maintenance contract for the treatment system shall be entered into from the first occupancy of the dwelling house and thereafter shall be kept in place at all times. Signed and dated copies of the contract shall be submitted to, and agreed in writing with, the planning authority within four weeks of the installation.

(d) Surface water soak ways shall be located such that the drainage from the dwelling and paved areas of the site shall be diverted away from the location of the polishing filter.

(e) Within three months of the first occupation of the dwelling, the developer shall submit a report from a suitably qualified person with professional indemnity insurance certifying that the proprietary effluent treatment system has been installed and commissioned in accordance with the approved details and is working in a satisfactory manner and that the polishing filter is constructed in accordance with the standards set out in the EPA document.

***Reason**: In the interest of public health.*

6. Surface water from the site shall not be permitted to drain onto the adjoining public road.

***Reason**: In the interest of traffic safety.*

7. The proposed front boundary wall shall consist of natural local stone, the exact height and location of which shall be submitted to, and agreed in writing with, the planning authority prior to commencement of development.

***Reason**: In the interest of visual amenity.*

SECTION 37(2) OF THE PLANNING AND DEVELOPMENT ACT, 2003

32. The section, as amended, provides as follows:

2(a):- subject to paragraph (b), the Board may in determining an appeal under this section decide to grant a permission even (f the proposed development contravenes materially the development plan relating to the area of the planning authority to whose decision the appeal relates:

(b) where a planning authority has decided to refuse permission on the grounds that the proposed development materially contravenes the development plan, the Board may only grant permission in accordance with paragraph (a) where it considers that-

(i) the development is of strategic or national importance;

(ii) there are conflicting objectives in the development plan or the objectives are not clearly stated insofar as the proposed development is concerned: or,

(iii) permission for the proposed development should be granted having regard to the regional planning guidelines for the area, guidelines under Section 28, policy directives under Section 29, the statutory obligations of any local authority in the area and any relevant policy of the government, the Minister or any minister of government: or

(iv) permission for the proposed development should be granted having regard to the pattern of development and

permissions granted in the area since the making of the development plan.

(b) Where the board grants a permission in accordance with paragraph (b), the Board shall, in addition to the requirements of Section 34(10), indicate in its decision the main reasons and considerations for contravening materially the development plan.

33. Section 34(10), in brief, requires the Board to state its main reasons and considerations for a decision, for any conditions imposed and, where the decision is different to that recommended by the inspector, the reasons for not accepting that recommendation. It is considered further below.

34. The issue that arises is whether or not the decision of the first notice party to refuse permission, which refers to contravention of the Development Plan, was on account of a material contravention of the Plan.

35. Somewhat surprisingly, the Council has chosen not to file any submissions in these proceedings and has declined to address the court on the question of the meaning of its own decision. That is of course its right, and the other parties are no doubt correct in saying that its decision should speak for itself. I simply observe that it adds a certain unreality to the task of the court.

36. That task, it should made clear, is not to decide whether or not the contravention found by the Council was in the view of the Court material but rather whether the council decided it was so.

37. The applicant makes a simple case on this issue. The legislation does not require the use of any particular formula of words by the planning authority. He argues, with force, that each of the contraventions identified must be considered to be material because otherwise permission would not have been refused.

38. The Board and the second notice party make the case that the word "material" is a term of art. They point to, for example, the difference between "a change of use" and a "material change of use".

39. They further argue that if the Council had considered the contraventions to be material it would have used the word. That it had its attention drawn to the question is clear from the fact that it had been pleaded as an issue in the original judicial review proceedings. The Council also had the opinions of Counsel for the parties, both of which referred to the argument, before it.

40. It seems to me that the Act itself does maintain a distinction between material and non-material contraventions. The section relied on specifically provides that the Board may grant permission "even if' the refusal is for a material contravention. That would make little sense if every refusal by a planning authority for contravention of a Plan was to be deemed to be for a material contravention. It would also have the effect of very significantly reducing, if not abolishing, the jurisdiction of the board in cases not coming within the excepted categories. I do not believe that to be the intent of the section.

41. I concur with the view of the second inspector that the formulation adopted by the council was loose. I note his view that the proposal under consideration did not contravene any objective of the Development Plan, and the view of the first inspector that it accorded with the "principles of the policies" of the plan. I also take into account the fact that the Council did not make any representation in the appeal process.

42. There is also no doubt but that the Council was aware, when approaching its decision in this case for the second time, that if it did not use the word "material" the Board was likely to conclude that that the identified contravention was not considered to be such. The word was not used and I have come to the conclusion that this must have been by deliberate choice on the part of the Council. The refusal of permission by the Council was not, therefore, by reason of a material contravention.

43. It would be desirable, having regard to the potential impact of the section, if planning authorities expressed themselves more directly on this issue.

44. It follows that I do not consider that s.37 (2) has application in the present case.

SECTION 34 AND O'KEEFFE UNREASONABLENESS

45. Section 34, as mentioned earlier, requires the board to state its reasons when it disagrees with the recommendation of the inspector. The argument under this heading is that in coming to conclusions which differed from those of its inspector the Board did not give adequate reasons.

46. It is well established by the authorities that the obligation imposed on the board to give reasons is not to give a discursive judgment, or to provide detailed reasoning equivalent to the highly professional and detailed report of the inspector- see, e.g., *O'Neill vAn Bord Pleanala [2009] IEHC 202*. It is also clear that where conditions are imposed they are to be read in conjunction with the reasons.

47. In making the case that the Board acted unreasonably, the applicant has to meet the standard set out by the Supreme Court in *O'Keeffe v An Bord Pleanala [1993] 1 IR 39*. That requires him to demonstrate that the Board had before it, in relation to any particular issue, "no relevant material which would support its decision". The applicant says that he can meet that standard.

48. I propose to deal with these related topics together.

49. At first glance the most obvious matter calling for explanation is the difference between the view of the inspector that there is no house left on the site and that its residential use ceased a long time ago, on the one hand, and the decision of the Board that residential user has continued to the present day. Certainly, the photographs of the site in its current condition would, I think, lead many people to the conclusion that the inspector was right. However, the issue is one of planning law and the concepts that properly belong to that area. The Board refers to the planning history of the site in support of its view. The last person to physically occupy it certainly used it as a residence. The next purchaser applied for planning permission three times, albeit unsuccessfully, with the intention of retaining its residential character. The illegal efforts by that owner at rebuilding and extending appear, again, to have been residential in purpose. The application made by the present owner, the second notice party, before he had actually purchased it was on the same basis. The current application is also for a residence, although on a reduced scale. It seems to me that the reasons for the Board's decision on this point are adequately framed. On the facts it is not manifestly unreasonable for the Board to hold that the residential user of the site had not ceased. The inspector took a different view, but his colleague who wrote the first report did not.

50. In relation to the undesirability of setting a precedent of this sort, the Board was confident that the site had a sufficiently unusual planning history which was unlikely to be shared by other derelict buildings. That is something very much within the Board's area of experience and expertise. It was also entitled to deal with the possibility of what the inspector considered to be the inevitability of extensions to the proposed development by imposing Condition No.4.

51. On the issue of the entrance and traffic safety the Board had before it two proposals. It decided that the first one submitted was adequate. The applicant says that this is "extraordinary" having regard to the inspector's report. The respondents argue that the inspector does not refer to the proposed works on the entrance, which involve raising the gradient to the entrance and creating a lay-by on the road, and that he thereby fell into the error of assuming that the entrance was to be used in its current condition. In fact the inspector was dealing with a subsequently proposed alternative entrance and associated works. The Board reverted to the previous proposal and found it to be more acceptable. The Board is bound to "have regard to" the guidelines and standards relating to matters of this kind but it is not bound to apply them in every case. There is simply no basis for saying that it did not have regard to relevant matters or took a decision that flew in the face of common sense. In coming to this conclusion it disagreed with the inspector but, again, it is entitled to do that.

52. The proposed effluent disposal system, which is a treatment system as opposed to a septic tank, was the subject of detailed professional presentations. It is clear that the Board considered this material and that it imposed the conditions it did in respect of the system to ensure that concerns in relation to its efficacy and the need to maintain it would be met. The combination of reasons and conditions makes this abundantly clear. Again, in my view there was relevant material before the Board to support that decision.

THE HABITATS DIRECTIVE

53. The applicant made the claim in his Statement of Grounds and in his written submissions that the site was located in a candidate Special Area of Conservation ("cSAC"). His affidavit, more cautiously, asserts that it is "on or near" such an area. It is in fact some 525m from the Slyne Head cSAC. The applicant argues that this does not affect the requirement that there be an assessment by the Board of the impact of the proposed development on the cSAC pursuant to the provisions of the Habitats Directive- Council Directive 92/43/EEC on the Conservation of Natural Habitats and Wild Fauna and Flora. The Directive was transposed into national law by the European Communities (Natural Habitats) Regulations, 1997/2002. In particular the applicant raises concerns in relation to the disposal of effluent from the site and the potential for water pollution.

54. Article 6 of the Directive imposes various obligations in relation to SACs and cSACs. Article 6(3) reads in relevant part as follows:

> *Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site ...*

55. The report of the inspector to the Board is accompanied by an Inspector's Report Discharge Form. This document includes a section headed "Habitats Directive -Article 6(4) (Natura 2000 Site)". There are two questions to be answered by the inspector: firstly, "Is it likely to be affected?" and secondly, "Have compensatory measures been recommended?" It has already been noted that the inspector was unhappy about the characteristics of the site in the context of the effluent treatment system. However, when signing off on his Report Discharge Form his answer to these two questions was in the negative.

56. The applicant argues that that decision should be made by the Board and not by the inspector.

57. In my view the Board is only obliged to conduct an assessment where it has reason to consider that it is "likely" that a proposed development will have a "significant effect" on the SAC. In the circumstances of this case and having regard to the scale of the proposed development as well as its distance from the cSAC, given the view of the inspector and the lack of evidence to the contrary, it was manifestly entitled to accept that there was no such likelihood.

58. I will therefore refuse the reliefs sought.