Neutral Citation: [2013] IEHC 493

THE HIGH COURT

JUDICIAL REVIEW

RECORD NUMBER: 2011 No. 863 JR

IN THE MATTER OF SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 1950, AS AMENDED

BETWEEN:

TESCO IRELAND LIMITED

APPLICANT

AND

CORK COUNTY COUNCIL, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT OF MR JUSTICE MICHAEL PEART DELIVERED ON THE 8TH DAY OF NOVEMBER 2013:

1. In 2004 the applicant, "Tesco", purchased about 3.14 hectares of land close to the town of Charleville, Co. Cork, and adjacent to the N20 and Love Lane, and presumably with the intention of obtaining planning permission for a supermarket development. The lands were within the boundary of the then current Kanturk Electoral Area Local Area Plan ("LAP") 2005 – 2011, and under that LAP were zoned for residential development, subject to specific objective *'R-01 – Medium density residential development to include a mix of house types and size'*.

2. Nonethelsss, Tesco made an application for a shopping centre development on these lands, and not surprisingly perhaps, that application was refused by decision dated 16th February 2006 on the grounds that it would constitute a material contravention of the residential zoning for the lands under the LAP.

3. An opportunity presented itself towards the end of 2010 for the applicant to seek to have the zoning changed to one which would permit their development to take place, since Cork County Council published its Outline Strategy for the Kanturk Electoral Area on the 4th January 2010, and invited submissions. I will return to the events leading up to the resolution of the respondent Council dated 25th July 2011 which is the subject of the present proceedings in due course. But suffice to say that at this stage the applicant participated in the process by making submissions at all stages leading up to that resolution.

4. In November 2010 the Draft Kanturk Electoral Area LAP 2011 – 2017 was prepared which indicated a zoning in respect of the lands as "*Town Centre/Neighbourhood Centre Uses with a Specific Objective 'T-02 – Use primarily for large stand alone convenience retail development subject to high quality design and layout, particularly with regard to addressing the streetscape and the provision of parking, and satisfactory proposals to deal with traffic and access'*".

5. The publication of this Draft Plan invited submissions. Again, Tesco made a submission broadly welcoming the proposed decision with regard to the zoning of these lands. Clearly such a zoning would facilitate its plans for the site. Not surprisingly perhaps, other trading interests in the town were opposed to this zoning and made submissions against it. The Manager, having considered all the submissions, issued his Report on the 22nd February 2011 in which, inter alia, he made a recommendation at paragraph 2.3.5 thereof, that approximately 2 hectares at the northern end of the Tesco lands should revert to residential use, and that the balance of 1.4 hectares would be designated as " *'X-01' with a specific objective to reserve the site as a long term opportunity for the expansion of convenience retailing in Charleville*". He went on to state immediately thereafter:

> *"Such long term needs will arise when there is a significant increase in population of the town and its hinterland and the construction of the M20 Motorway is completed". [emphasis added]*

6. This reference to population growth and the construction of the proposed M20 Motorway is of central importance to the present application, as will be seen in due course.

7. At the next meeting of the Council on 30th March 2011 the elected members would oppose the proposal and vote to propose a material alteration which would see all the subject lands zoned residential under the new plan.

8. According to the first affidavit of Andrew Hind filed on behalf of the Council, the Council held an informal meeting with elected representatives on the 4th March 2011, ahead of the meeting to be held on the 30th March 2011 in order to hear their concerns about this recommendation. It would appear from his affidavit that the elected members considered that this recommendation did not go far enough. Among their concerns seems to have been one concerning traffic, and at least one member appears to have indicated his view that there should be no development of further retail units until such time as the M20 was completed.

9. In a further Interim Report dated 18th March 2011, the Manager stated that this site represented the "*best available site for the long term expansion of convenience retail uses within the town*", and went on to explain why he considered this to be so. He referred again to the Draft Plan and to the recommended X-01 zoning proposed therein in relation to 1.4 hectares, and stated:

> *"Supporting text in the body of the plan states that the development of the site shall be linked to a significant increase in population and acknowledges that the M20 will also contribute to the growth of the town. Development of this site is not directly contingent on the commencement or completion of work on M20 as this may be delivered before there is significant population growth in the town" [emphasis added]*

10. Nevertheless, the elected members of the Council tabled a motion for the Council meeting scheduled for the 30th March 2011.

This motion proposed that the applicant's lands should retain a residential zoning and not change to town centre retail zoning. The motion was carried.

11. I would pause at this point in the narrative to remark that it seems to be clear from the underlined sentence set forth in paragraph 9 above that as far as the Manager was concerned, the critical catalyst for a development of this site for convenience retail to be permitted would be a significant growth in population, since he states that the M20 itself might be delivered ahead of such population growth. So it is population growth which is being emphasised as being a pre-requisite for further development in the long term, rather than the construction of the M20 itself. Though I should point out that the Council refers to the word "***directly***" highlighted above, and which they say nevertheless means that it could be seen as 'indirectly' linked, and therefore linked.

12. On the 21st April 2011 the Council published a notice that material alterations were proposed to the draft Kanturk Electoral Area LAP and again called for submissions on the proposed amendment i.e. an amendment that the Draft Plan be amended to indicate a residential zoning for the entire of the applicant's site. Submissions were invited, and were to be made before the 18th May 2011. Only two submissions were in fact made. One was from a member of the public which supported the amendment, and the other was from Tesco which opposed the amendment.

13. It is important to note the terms of the proposed material alteration to the draft plan, upon which submissions were invited by the notice published on the 21st April 2011. The Draft Kanturk LAP in its original form had shown the applicant's entire site zoned for "*Town Centre/Neighbourhood Centre Uses with a Specific Objective T -02 – Use primarily for large standalone convenience retail development ……".* The Draft Plan had gone on to refer to the proposed M20 Motorway and the fact that Charleville stood to benefit from that motorway, and had referred to an anticipated population growth. But, despite the Manager's proposal that the site be divided so that only 1.6 hectares would be zoned for retail development (the balance remaining residential), the material alteration to the draft LAP as put forward by the elected members was that the entire site revert to residential zoning, as it had been under the previous 2005 – 2011 LAP. That is the proposal upon which submissions were invited, and on which the applicant made its submissions.

14. In its submissions, Tesco proposed that that the subject lands be designated a Special Policy Area and that the proposed amendment be replaced with an objective X–01 as follows:

> *"X-01 Long Term Opportunity Site (1.4 hectares) for the expansion of convenience retail facilities and/or commercial uses subject to high quality design and layout, particularly with regard to addressing the streetscape and the provision of parking and satisfactory proposals to deal with traffic and access. Any proposals for retail development must demonstrate compliance with the provisions of the County Retail Strategy and Retail Planning Guidelines."*

15. This proposal was thought to be reasonably compatible with the views of the Manager as seen in his various reports, though the Council notes in its affidavits that the applicant's submission failed to refer to the Manager's recommendation that the long term need for the development of the site would arise when there was an increase in population, and his view that the M20 would contribute to that growth. The Council through Mr Hind has noted that the applicant's submission on the proposed material alteration made no reference to either population growth or to the construction of the M20. In response to that remark, Tesco has stated that the reason why its submission made no submission in relation to the M20 and the fact that it would contribute to growth in population, is that the Manager in his February 2011 Report simply referred to the M20 in the context of population growth, and Tesco took no issue with that statement. Tesco believes that while the construction of the M20 would facilitate population growth, that growth would not be dependent on its construction – a view that could be taken as concurring with the view of the Manager as described in paragraph 9 above, though each party says that it means different things.

16. Whatever it was intended to mean, the applicant says that nowhere in the proposal upon which submissions were invited, and which had been tabled by the members, was there any suggestion that the Council would vote, as it did in due course, to amend the Draft LAP in a way that linked any development of the applicant's site not only to a growth in population but also to the commencement of the construction of the M20 motorway. In other words, there would be no possibility of a permission being granted for the development by the applicant of any retail development on the site until the M20 was actually commenced. The applicant submits that the latter was a new proposal – a different proposal from that which had been proposed and published by notice, and upon which it was invited to make submissions, and that had it been presented in a proposal to amend the plan in the way that has now occurred, it would have made a different submission.

17. Following the receipt of submissions, the Manager prepared another Report dated 15th June 2011, and in it suggested that the proposal put forward by the elected members be excluded and replaced with a revised X-01 objective and supporting text as follows:

> *"X-01 Long term opportunity site (1.4 Ha) for the expansion of convenience retail facilities in the form of a supermarket subject to high quality design and layout, particularly with regard to addressing the streetscape and the provision of parking and satisfactory proposals to deal with traffic and access (including the submission of a Traffic and Transport Assessment). See Map on page 99 of this report."*

The additional supporting text to be included in the LAP was as follows:

> *"The need for the development of the X-01 shall be linked to a significant increase in population of the town and its hinterland reflected in the development of additional housing. The construction of the M20 Motorway will also contribute to the growth of the town". (emphasis added)*

18. Again, one notes the fact that the need is linked to population growth and not the construction of the M20, though the latter is seen as a contributor of the former. That additional text in my view supports the meaning which the applicant contends for the passage earlier referred to at paragraph 9, and as already discussed briefly in paragraphs 11 and 15 above.

19. The next meeting of the elected members of the Council took place on the 19th July 2011. At that meeting the members passed a resolution by way of "further modification" to the material alteration that the northern portion of the applicant's lands be zoned residential, and that the remaining portion comprising 1.4 hectares be zoned as a Special Policy Area with the following specific objective:

> *"X–01 Long Term Opportunity Site for the expansion of convenience retail facilities in the form of a supermarket subject to high quality design and layout, particularly with regard to addressing the streetscape and the provision of parking and satisfactory proposals to deal with traffic and access, including the submission of a Traffic and Transport Assessment. The need for the development of these lands shall be linked to a significant increase in population of the town and its*

hinterland (reflected in the development of additional housing) and to the commencement of the phase of the M20 Motorway that includes the Charleville bypass." (emphasis added)

20. By formal resolution dated 25th July 2011 the Council made the Local Area Plan subject to the modifications agreed at the meeting on the 19th July 2011.

21. The applicant complains about the final portion of this objective. They say this is new. It will be recalled that the proposed material alteration proposed by the members and on which submissions were invited was to revert the zoning of the entire site to 'residential'. If that proposal had been adopted, the zoning would have reverted to residential for the entire site. That was the proposed alteration on which the applicant made its submission, as invited. If the proposed alteration had been put to the vote as published and was rejected by the members, then the effect would have been to revert to the T-02 Town Centre/Neighbourhood Centre Uses as contained in the original Draft Kanturk LAP published in November 2010.

22. The applicant has referred to Section 20(3)(n) of the Planning and Development Act, 2000, as amended ("the Act of 2000") in this respect, and notes that it provides that the elected members when making the LAP can make it with all the proposed material alterations, or some, or even none of the proposed alterations. However, it submits that where the elected members choose to change the proposed material alteration they may do so, as provided by Section 20(3) (o) and (q) of the Act of 2000, only where the further modification to it is minor in nature, and therefore not likely to have a significant effect on the environment or adversely affect the integrity of a European site. Inter alia, the applicant submits that the way in which the proposed alteration was modified into the form which was eventually passed by the members cannot be described as a minor alteration, and has been passed contrary to these provisions..

23. The applicant submits that the decision of the Council to adopt this zoning which links it to the commencement of the M20 Motorway is in breach of the principles of fair procedures in that it was denied an opportunity to make submissions in respect of that part of Specific Objective X-01 which now links the development of the lands as a shopping centre to the commencement of the phase of the M20 Motorway that includes the Charleville Bypass, and which has never been the subject of public consultation.

24. The applicant submits also that the decision is irrational and/or unreasonable since there was no evidence before the elected members which was capable of justifying the decision in the teeth of the reports and recommendations of the Manager to the elected members that the development of the lands was not "directly contingent" on the commencement of the M20. The applicant relies also on the absence of reasons or any adequate reasons furnished by the elected members necessary to justify the decision by the Council.

25. Finally the applicant submits that the decision was made contrary to statute, since the modification to the proposal as originally put forward, and which was adopted, was not minor in nature, and was in fact a very significant departure from the proposed material alteration, therefore contrary to Section 20(3)(q)(1) of the Act of 2000.

26. I should add for the sake of completeness, that in its Statement of Grounds the applicant sought also a declaration that Section 20(3)(q) of the Act of 2000 is repugnant to the Constitution, and invalid for that reason. That relief is no longer pursued on this application, and the proceedings have been confined to reliefs sought against the first named respondent.

27. The respondent denies that there was any lack of fair procedures in relation to the zoning of the land which includes a specific objective which links any development of the lands to the commencement of the M20 Motorway. It believes that at all times the statutory procedures were correctly followed during the LAP process, and that it was clear to all concerned, including the applicant, that issues of traffic, access and the construction of the M20 were significant matters for consideration in the process, and points out that the initial Outline Strategy itself had clearly linked development and the construction of the M20 when it stated therein:

"The completion of the M20 Motorway to the west of Charleville is a priority for future development of the area."

28. The Council points out also that these issues were raised in submissions in response to the Outline Strategy, and that the Draft LAP itself raised issues of traffic and the proposed M20 Motorway. It refers to the initial zoning of the applicant's lands for Town Centre development to consist of a large stand alone convenience retail development, and to the fact that the objective for this site included a number of qualifications about the provision of parking, and satisfactory proposals to deal with traffic and access. It points out also that a shopping centre development by its nature generates substantial amounts of additional traffic, often affecting an area beyond the immediate confines of the development site itself. The Council submits that it was perfectly entitled to take account of these matters when deciding on the zoning of the applicant's lands, so that traffic issues normally associated with such a development would be addressed before any development of the site would be permitted.

29. On the other hand, the applicant in response says that while the M20 and its importance generally to the town was indeed mentioned in the Outline Strategy, there is nothing therein or in the draft LAP for Kanturk or the material amendments which indicated that the Council considered that any development of the site was premature pending the construction of the M20 Motorway, and the Charleville Bypass.

30. The applicant submits that this was a very significant restriction imposed upon the applicant's lands, and says that it could not reasonably have been anticipated by the applicant from anything which had preceded it. The applicant submits that it is clear from all the prior stages of the process, including the Manager's reports to the elected members, that while the M20 was referred to, as were traffic issues, and while no doubt the M20 construction was going to have a significant bearing on population growth in the town and its hinterland, there was never any indication given at any stage of the process that not only would future development of the applicant's site be linked to population growth, but also linked to the commencement of the M20 Motorway construction, which included the Charleville Bypass. Accordingly, the applicant submits that it never got an opportunity to make submissions in order to try and persuade the elected members not to impose such a restriction, the effect of which is in its opinion to postpone any development of the applicant's lands to beyond the life of the LAP itself. The applicant also refers to the fact that no other land being zoned under this LAP was subjected to a restriction that linked its development to the commencement of the M20 Motorway and the Charleville Bypass. The applicant alone was subjected to this restriction.

31. Following the commencement of these proceedings in September 2011, a decision has been subsequently taken by Government in November 2011 that the construction of the M20 will not now take place for the foreseeable future, as there is no funding available for the development. That fact was not known by the time these proceedings were commenced, even if there may have been some fears that this would occur. It does not speak to the fairness or otherwise of the procedures which led to the decision of the Council reached on the 19th July 2011 and the 25th July 2011, but it does put into sharp focus the effect which the restriction must now have for the applicant. The applicant has submitted that in effect the applicant's lands are sterilised. Mr Hind in his affidavit refers to

this submission as being disingenuous given that even the applicant proposed in his May 2011 submission proposed a special policy area designation with a description "Long Term Opportunity Site", and submits that linking development to population growth and the construction of the M20 is not to be seen as a sterilisation, but rather as a statement of fact. In his second affidavit Mr Hinds has stated that the applicant is not correct when it states that the delivery of the M20 is not related to the issue of population growth. He says that he was personally involved in the calculations of future population growth for Charleville in County Development Plan, and he says that he "knows" that the population target allocated to Charleville for 2020 was enhanced because of the proposed N20/M20 improvements.

31. The applicant refers also to the fact that its lands are the only lands within this Plan which has been subjected to this restriction in the Draft Plan. No other party's lands has been so restricted.

32. Mr Hind in his first affidavit has stated that the draft LAP itself highlighted that traffic and the construction of the M20 was relevant, and that it did so is apparent from the fact that other interested parties other than the applicant had made submissions specifically addressing these issues with respect to the applicant's lands, and refers to a comment in a submission by the Charleville Chamber of Commerce which he quotes in his affidavit and which referred to existing traffic congestion problems, and that this situation would only be exacerbated by a large development on this site "*due to constraints on accessing the site from the N20*". He refers also to the Council's response to this submission states:

> *"The long term needs will arise when there is a significant increase in population of the town and its hinterland, reflected in the development of additional housing, the provision of new employment opportunities and the construction of the M20 Motorway."*

33. Mr Hind has referred to submissions in similar vein received from the Charleville Traders and also from the National Roads Authority, and considers that "*it was therefore patently clear that traffic and the construction of the M20 was highly relevant to all development in Charleville including the applicant's lands*". He refers also to the reference in the Manager's Report in February 2011 to the applicant's site being a "long term opportunity site" and to reference to the need for development of same being linked to a significant growth in population, and further the statement that "*the construction of the M20 Motorway will also contribute to the growth of the town*". He submits that it was clear that the development was being linked to a population growth which in turn was being linked to the construction of the M20 Motorway.

34. Mr Hind blames the applicant for failing to address in any of its submissions the question of the M20 Motorway, and maintains that it is clear from the applicant's own submission in May 2011 that it was aware of the Manager's recommendations because in its May 2011 submission it stated that the proposed zoning was broadly in line with the Manager's recommendations in his February 2011 Report.

35. Not surprisingly the applicant rejects what Mr Hind has stated in this regard. In his second affidavit Finbarr Barry states that he accepts that traffic issues related to the applicant's site were referred to in the draft Kanturk Plan, and that issues such as parking and access and congestion would have to be dealt with. However, he goes on to say that these are issues which are independent of the M20 construction as such, in that they relate to capacity and linkages from the existing road network.

36. Mr Barry argues also that the extract from the submission of the Chamber of Commerce to which Mr Hind has referred and as set forth above, relates to the existing traffic flows in Charleville, and not to the M20, which again he says is a separate issue. That and other submissions referred to are, in Mr Barry's view, all talking about existing access, congestion and traffic issues, and that these are all reflected within the draft plan, and of course would have to be addressed in the context of any application by the applicant to develop the site in due course. But he denies that these remarks and comments justify the restriction imposed under the material alteration made to the draft Plan, or support the contention that the applicant had a fair opportunity to make submissions in relation to linking development to the commencement of the M20 Motorway question.

37. On this application five affidavits have been filed by Finbarr Barry, to which Andrew Hind has sworn four by way of reply. I do not consider it necessary to set forth everything which is asserted by Mr Barry and every response made thereto by Mr Hind. It is clear that the sides are far from agreement on most issues. They see things, naturally enough, from their respective positions.

38. Before addressing some of the legal submissions made by Eamonn Galligan SC for the applicant, and by Stephen Dodd BL for the respondent, I will set forth the relevant provisions of Section 20(3) of the Act of 2000, as amended, as these are crucial to this case, as they set forth the procedures which must be adopted by the Council when adopting a draft local area plan, making a material alteration thereto by resolution of the elected members, and for making a further modification to the material alteration. It is the latter which is of central importance to the present application.

39. The relevant provisions of Section 20(3) of the Act of 2000 as amended are these:

> *" (3) (a) The planning authority shall, as soon as may be after consideration of any matters arising out of consultations under subsections (1) or (2) but before making, amending or revoking a local area plan—*
>
> *(i) send notice of the proposal to make, amend or revoke a local area plan to the Minister, the Board and to the prescribed authorities (and, where applicable, it shall enclose a copy of the proposed plan or amended plan),*
>
> *(ii) publish a notice of the proposal in one or more newspapers circulating in its area.*
>
> *(b) A notice under paragraph (a) shall state—*
>
> *(i) that the planning authority proposes to make, amend or revoke a local area plan,*
>
> *(ii) that a copy of the proposal to make, amend or revoke the local area plan and (where appropriate) the proposed local area plan, or proposed amended plan, may be inspected at such place or places as are specified in the notice during such period as may be so stated (being a period of not less than 6 weeks),*
>
> *(iii) that submissions or observations in respect of the proposal made to the planning authority during such period will be taken into consideration in deciding upon the proposal.*
>
> *(iv) that children, or groups or associations representing the interests of children, are entitled to make*

submissions or observations under subparagraph (iii).]

(c) (i) Not later than 12 weeks after giving notice under paragraph (b), the manager of a planning authority shall prepare a report on any submissions or observations received pursuant to a notice under that paragraph and shall submit the report to the members of the planning authority for their consideration.

(ii) A report under subparagraph (i) shall—

(I) list the persons who made submissions or observations,

(II) summarise the issues raised by the persons in the submissions or observations,

(III) contain the opinion of the manager in relation to the issues raised, and his or her recommendations in relation to the proposed local area plan, amendment to a local area plan or revocation of a local area plan, as the case may be, taking account of the proper planning and sustainable development of the area, the statutory obligations of any local authority in the area and any relevant policies or objectives for the time being of the Government or of any Minister of the Government.

(cc) In the case of each planning authority within the GDA, a report under subparagraph (c)(i) shall summarise the issues raised and the recommendations made by the DTA in a report prepared in accordance with section 31E and outline the recommendations of the manager in relation to the manner in which those issues and recommendations should be addressed in the proposed local area plan.

(d) (i) The members of a planning authority shall consider the proposal to make, amend or revoke a local area plan and the report of the manager under paragraph (c).

(ii) Following consideration of the manager's report under subparagraph (i), the local area plan shall be deemed to be made, amended or revoked, as appropriate, in accordance with the recommendations of the manager as set out in his or her report, 6 weeks after the furnishing of the report to all the members of the authority, unless the planning authority, by resolution—

(I) subject to paragraphs (e) to (r), decides to make or amend the plan otherwise than as recommended in the manager's report, or]

(II) decides not to make, amend or revoke, as the case may be, the plan.

(e) Where, following consideration of the manager's report, it appears to the members of the authority that the draft local area plan should be altered, and the proposed alteration would, if made, be a material alteration of the draft local area plan concerned, subject to paragraphs (f) and (j), the planning authority shall, not later than 3 weeks after the passing of a resolution under paragraph (d)(ii) (inserted by section 9 of the Act of 2002), publish notice of the proposed material alteration in one or more newspapers circulating in its area, and send notice of the proposed material alteration to the Minister, the Board and the prescribed authorities (enclosing where the authority considers it appropriate a copy of the proposed material alteration).

(f) The planning authority shall determine if a strategic environmental assessment or an appropriate assessment or both such assessments, as the case may be, is or are required to be carried out as respects one or more than one proposed material alteration of the draft local area plan.

(g) The manager shall, not later than 2 weeks after a determination under paragraph (f) specify such period as he or she considers necessary following the passing of a resolution under paragraph (d)(ii) as being required to facilitate an assessment referred to in paragraph (f).

(h) The planning authority shall publish notice of the proposed material alteration, and where appropriate in the circumstances, the making of a determination that an assessment referred to in paragraph (f) is required, in at least one newspaper circulating in its area.

(i) The planning authority shall cause an assessment referred to in paragraph (f) to be carried out of the proposed alteration of the local area plan within the period specified by the manager.

(j) A notice under paragraph (e) or (h) as the case may be shall state that—

(i) a copy of the proposed material alteration of the draft local area plan may be inspected at a stated place and at stated times during a stated period of not less than 4 weeks (and the copy shall be kept available for inspection accordingly), and

(ii) written submissions or observations with respect to the proposed material alteration of the draft local area plan may be made to the planning authority within the stated period and shall be taken into consideration before the making of any material alteration.

(k) Not later than 8 weeks after publishing a notice under paragraph (e) or (h) as the case may be, or such period as may be specified by the manager under paragraph (g), the manager shall prepare a report on any submissions or observations received pursuant to a notice under that paragraph and submit the report to the members of the authority for their consideration.

(l) A report under paragraph (k) shall—

(i) list the persons who made submissions or observations under paragraph (j)(ii),

(ii) summarise the issues raised by the persons in the submissions or observations,

(iii) contain the opinion of the manager in relation to the issues raised, and his or her recommendations in relation to the proposed material alteration to the draft local area plan, including any change to the proposed material alteration as he or she considers appropriate, taking account of the proper planning and sustainable development of the area, the statutory obligations of any local authority in the area and any relevant policies or objectives for the time being of the Government or of any Minister of the Government.

(m) The members of the authority shall consider the proposed material alteration of the draft local area plan and the report of the manager under paragraph (k).

(n) Following consideration of the manager's report under paragraph (m), the local area plan shall be made or amended as appropriate by the planning authority by resolution no later than a period of 6 weeks after the report has been furnished to all the members of the authority with all, some or none of the material alterations as published in accordance with paragraph (e) or (h) as the case may be.

(o) Where the planning authority decides to make or amend the local area plan or change the material alteration of the plan by resolution as provided in paragraph (n)—

(i) paragraph (p) shall apply in relation to the making of the resolution, and

(ii) paragraph (q) shall apply in relation to any change to the material alteration proposed.

(p) It shall be necessary for the passing of the resolution referred to in paragraph (n) that it shall be passed by not less than half of the members of the planning authority and the requirements of this paragraph are in addition to, and not in substitution for, any other requirements applying in relation to such a resolution.

(q) A further modification to the material alteration—

(i) may be made where it is minor in nature and therefore not likely to have significant effects on the environment or adversely affect the integrity of a European site,

(ii) shall not be made where it refers to—

(I) an increase in the area of land zoned for any purpose, or

(II) an addition to or deletion from the record of protected structures."

40. I have set forth what seem to me to the provisions of section 20 (3) which are relevant to the issues in this case. There are a few other paragraphs but they do not seem to have a bearing on the case. I have set forth the above paragraphs for the purpose of showing how the legislature has laid out an elaborate and detailed set of procedures for the various stages of the process leading to the adoption of a new local area plan. There are a number of stages to the process, and at each stage the plans and proposals are published and submissions are invited, whereupon the submissions are considered by the Manager, who then makes a report and recommendations for the assistance of the Council members, the latter being not binding. The members can choose to accept the recommendations of the Manager or not as they decide.

41. It will be seen in paragraph (n) thereof that the members can, having considered the manager's report decide to make or amend the local area plan "*with all, some or none of the material alterations as published*". Those alterations are those upon which submissions were invited following publication. Alternatively, the members may, as provided in paragraph (o) decide to "*change the material alteration of the plan by resolution*". Importantly, paragraph (q) provides for when this may be done and when it may not be done.

42. Such a "further modification", as it is described in (q) may be made where it is "*minor in nature*". It may not be done where, inter alia, it would result in "*an increase in the area of land zoned for any purpose*". It is clear from this scheme that where the "further modification" is "minor in nature", it is not intended by the Oireachtas that a further opportunity be given to members of the public to make submissions of the minor modification to the material alteration. Otherwise, when devising such a detailed set of procedures, it would have provided for such a further round of publication and submissions. The Oireachtas has decided that in such a case (i.e. minor modification) there is no need as a matter of fairness for that opportunity to be provided. That makes complete sense, since in circumstances where the further modification is minor in nature only, then no interested party will be adversely affected other than in a minor way, or indeed at all.

43. There is no definition or other guidance given in the Act for what is covered by "minor in nature". Each instance of such a further modification will have to be considered individually in any particular case, and all the circumstances of each case will have to be considered in order to decide whether the nature of the further modification was such that an interested party, and who complains, is or stands to be, affected by the further modification in a way that is significant, such that it is not for that party "minor in nature", and therefore one in respect of which it was, under the statutory scheme and its intention, entitled to have been given an opportunity to make a further submission before the further modification was voted through on a resolution.

44. If the further modification in question is found not to be minor in nature, it seems to me that the section has not been complied with, where that opportunity was not given to the complaining party. The Council must act in accordance with the powers provided by the Act. It must be presumed, given the presumption of constitutionality which the Act enjoys, that the constitutional right to

fairness and natural justice is fulfilled by the nature of the elaborate procedure provided for. Where those procedures are faithfully adhered to, and the section complied with in all respects, it will not be for this court to add a layer of consultation and submission that is not provided for in respect of a further modification to the material alteration. To that extent the respondent is correct when Mr Dodd submits, as he did, that the Act does not make provision for an opportunity for further consultation and submissions upon a further modification. He has relied upon for example the judgment of Charleton J. in *Wexele v. An Bord Pleanala*, unreported, High Court, 5th February 2010 at para. 13. He has relied also upon the judgment of Denham J. (as she then was) in *Dellway v. NAMA* [2011] IESC 14 where she stated that "*the right to be heard, as with other constitutional rights, is not absolute*", and to certain comments of Murphy J. in *Haverty v. An Bord Pleanala* [1987] IR 485, and of Kearns J. (as he then was) in *Evans v. An Bord Pleanala*, unreported, High Court, 7th November 2003, and of McMahon J.in *Klohn v. An Bord Pleanala* [2009] 1 IR 59, each in its own way supporting the view that the consultative process cannot have been intended to be interminable and that the opportunity to make submissions must at some point come to an end.

45. In relation to the reference to the judgment of Denham J. in *Dellway*, I would in passing note also that in her judgment she stated that:

> "*Thus applying that analysis, as the proceedings here derive from statute, there being no fixed procedures, NAMA must create and carry out the necessary procedures, NAMA must supplement it in such a fashion as to ensure compliance with constitutional justice."*

46. In the present case "*fixed procedures*" have been provided for. The question therefore is whether the provisions of section 23 (3) of the Act of 2000 have been complied with. If they have, then the applicant can have no complaint that not being given an opportunity to make a further submission before the Council adopted the "*further modification to the material alteration*" that the need for development of its land be linked not only to population growth but also to the commencement of the M20 Motorway, breached its entitlement to fair procedures. The Act of 2000 enjoys the presumption of constitutionality. The applicant as part of his reliefs originally sought a declaration that the provisions of section 20(3)(q) of the Act are unconstitutional, but it has indicated that this relief is not being pursued.

47. Mr Dodd for the respondent has submitted that the further modification put forward at the meeting on the 19th July 2011 was not significant (and was therefore minor) for a number of reasons:

> • It is clear from the evolution of the local area plan through its various stages that the need for the development of the applicant's lands was linked to the M20 Motorway. He submits that the "further modification at most simply made this more explicit.
>
> • Inserting a statement that the need for the development is to be linked to the commencement of the M20 is simply fulfilling the Council's statutory obligation to ensure that there is consistency between the local area plan and other plans such as the county development plan, and also government policy.
>
> • Regardless of whether the words were introduced by way of modification to the material alteration in relation to "X-01", it is clear that the commencement and construction of the M20 would be vary material in any consideration of "proper planning and sustainable development" in the context of any application for development of the lands in question, since the M20 is central to the vision for Charleville, the requirement for integration between land use and transportation policy as expressed in the County Development Plan and the Planning Acts, and the content of the South Western Regional Guidelines
>
> • In any event, the X-01 zoning is not itself determinative of any application for planning permission that might be made in the future, but is merely one component of what would be considered..
>
> • The words linking the need for development to the commencement of the M20 is merely making explicit the Council's thinking, which in any event was clearly evident from the documents and reports generated up to that point during the process.

48. On the question of the significance of the further modification, Mr Dodd refers to the fact that the applicant's own proposal referred to the X-01 site as a Long Term Opportunity Site, implying that even the applicant dies not consider that a need for its development arises at this point in time. He suggests that it is difficult to identify what factors would other than the M20 could give rise to such opportunity in the future. He submits also that it was clear from the preceding steps in the process that it was always the case that the existing problems of access, traffic and congestion were going to be addressed by the M20 Motorway construction.

49. Another argument put forward by the respondent is that the modification is a minor one, since in fact it was reducing the extent of the change sought to be brought about by the proposed material alteration. That is because the material alteration itself and upon which the applicant had made its submissions was one whereby the site would be zoned back to residential in its entirety – something which the applicant opposed. Mr Dodd has argued also in relation to paragraph (q) of section 20 (3) that the modification was minor because it is not likely to have significant effects on the environment or adversely affect the integrity of a European site. Given the wording of paragraph (q) it would seem that Mr Dodd seeks to confine the meaning of "minor in nature" by reference to what follows those words in the paragraph. As set forth already, paragraph (q)(i) states:

> " *(q) A further modification to the material alteration—*
>
> > *(i) may be made where it is minor in nature and therefore not likely to have significant effects on the environment or adversely affect the integrity of a European site …(emphasis added)*

50. The respondent submits also that it is not a significant modification as it was not in fact a new proposal if one compares it to the draft plan and the material alteration, but rather a compromise between the two. He characterises the further modification as involving the continued existence of what was being modified by decreasing the residential and re-affirming the retail purpose in respect of the 1.4 hectares of the site as originally published.

51. It seems to me that the arguments put forward in this regard by Mr Dodd are directed more to whether it would be reasonable and permissible for the material alteration to the draft plan to have included the wording which linked the need for development of the applicant's lands to the commencement of the M20 Motorway. The answer is that it would, and for at least some of the reasons set forth in the summary of Mr Dodd's submission set forth in paragraph 47 above. But of course, in that event the applicant would have had the opportunity to make submissions on that proposal, just as it made its submission on the material alteration actually published

in relation to the residential zoning for the entire site.

52. I agree with the submission made by Mr Galligan for the applicant that if the further modification proposed by the members on the 19th July 2011 would have constituted a material alteration if it had been included in the original draft plan, it would have had to be put on display so that interested parties could have the opportunity to make submissions thereon in accordance with the statutory procedures provided in that regard. If it comes reasonably within any sensible view of what is a material alteration, it cannot be seen as meeting the description of being "minor in nature". On the contrary it is a modification which would come within section 20(3)(e) of the Act of 2000. It must in my view be seen in that light. The further modification was therefore a matter in respect of which the Act intends that there would be publication and an opportunity for submissions to be made and considered, and reported on by the Manager, ahead of the passing of any resolution to amend the draft plan in accordance with it.

53. If that is so, and I believe it to be correct, then the further modification proposed on the 19th July 2011 cannot be seen as "minor in nature" on that occasion, as "minor" must exclude anything which is substantial in the sense of being of substance as opposed to some insignificant or immaterial 'tweaking' to the material alteration under consideration. In the present case there is no question of the further modification put forward on the 19th July 2011 being mere 'tweaking'. Rather it was a totally different proposal to that which sought a return of the entire site to residential zoning. The fact that the M20 and population growth and so forth had been a live issue during the process is in my view not relevant to the essential question as to whether the further modification put forward was minor in nature and one therefore that could be dealt with under section 20(3)(q) of the Act. That fact does not speak to the nature and character of the further modification. Neither is it correct to limit the concept of "minor" to the words which follow it in the section, namely "*and therefore not likely to have significant effects on the environment or adversely affect the integrity of a European site*". Those words in fact emphasis the real purpose of limiting the further modifications permitted to be those which are minor, because a modification which is likely to be one which has a significant effect on the environment or adversely affect the integrity of a European site is one clearly upon which public consultation would be required. It confirms the central importance of public consultation in relation to any significant or substantial change which the further modification seeks to achieve. If the further modification is in fact a material alteration in disguise, it cannot have the protection from public consultation which is provided in section 20(3)(q)(i) of the Act. It is not "minor in nature". In the present case it was an entirely different material alteration in reality.

54. In my view the decision made on the 19th July 2011 and the subject of the resolution of the Council on the 25th July 2011 is a nullity. It is a decision made in breach of the requirements of the Act. It does not fall to be condemned because of any breach of general constitutional principles of fair procedures, as was the case in Dellway, but rather because it is a decision taken in breach of the statutory procedures provided, and which reflect fair procedures, and fairly protect property rights.

55. It is also argued by the applicant that the decision of the 25th July 2011 is in breach also of section 20(3)(q)(ii). Without going into that argument in detail and Counsels' submissions, I should say that in the circumstances of this case I agree with the applicant's submissions. The decision of the 25th July 2011 does "*result in an increase in the area of land zoned for any purpose*". The 2005 - 2011 LAP zoned this entire site residential. The material alteration proposed by the elected members on the 30th March 2011 was to retain that zoning for the entire of the applicant's site. However, the further modification sought to zone 1.4 hectares differently, namely the retail use as set forth in the X-01 objective – "*a Special Policy Area with the following specific objective: Site for the expansion of convenience retail facilities [etc] ……* ". Such a zoning increases the amount of land to be reserved for retailing by re-zoning some land previously zoned residential. The words of the section are clear and unambiguous in this regard.

56. The applicant has also argued that the decision made on the 25th July 2011 was irrational/unreasonable, and also that the Council failed to provide reasons or any adequate reasons for it decision. In view of my conclusion that the decision is in breach of the statutory procedures and is a nullity, it is unnecessary to reach any conclusion on these further grounds upon which relief is sought.

57. For the reasons I have given, the applicant is entitled to an order of certiorari. However, I will hear Counsel for the parties as to what form the order to be made should take.