Neutral Citation Number: [2010] IEHC 495

THE HIGH COURT

JUDICIAL REVIEW

2009 92 JR

IN THE MATTER OF S. 50 OF THE PLANNING AND DEVELOPMENT ACT 2000

BETWEEN

KEN MAHON

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

CORK CITY COUNCIL, BISHOPSTOWN COMMUNITY ASSOCIATION, CLASHDUV ESTATE RESIDENTS ASSOCIATION, JIM COLLINS, EAMON O'MAHONY, M.F. BRODERICK, MARIAN O'SULLIVAN, RAY O'SULLIVAN, MAUREEN O'BRIEN, SEAMUS COLLINS, MICHAEL BOURKE, MERCY O'CALLAGHAN, MARY SHIELS, NEASAN O'SHEA, DANIEL COKELY, LAURA EAGAR, JOHN BUTTIMER, COMMUNITIES FOR SUSTAINABLE DEVELOPMENT, GEORGE DWYER, BALLINEASPAIG FIRGROVE WESTGATE RESIDENTS ASSOCIATION, BOZENA HALY, ELIZABETH WARE AND LOWER BISHOPSTOWN RESIDENTS ASSOCIATION

NOTICE PARTIES

JUDGMENT of Ms. Justice Dunne delivered the 21st day of December, 2010

This is a matter in respect of which two sets of proceedings were brought before the court. The other proceedings are entitled the High Court, Judicial Review, Record Number 2009/645 J.R., In the matter of s. 50 of the Planning and Development Act 2000, Between Ken Mahon, Applicant and Cork City Council, Respondent.

Both proceedings relate to a green area in the vicinity of 1 Parkgate Villas, Bishopstown Road, Cork. The first set of proceedings seek an order of *certiorari* quashing the decision of the respondent to refuse the applicant's appeal against a refusal of planning permission for a development on his property at 1 Parkgate Villas, Bishopstown Road, Cork. A declaration was also sought that Policy NHR 11 of the Cork City Development Plan 2004, does not apply to the plaintiff's said land.

The relief sought in the second set of proceedings included:

> (a) an order of *certiorari* quashing the decision of the respondent to zone the applicant's lands in the 2009 Cork City Development Plan at 1 Parkgate Villas, Bishopstown Road in the City of Cork as public open space;
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> (b) a declaration that zoning of the applicant's lands at 1 Parkgate Villas, Bishopstown Road, in the City of Cork as public open space is not an appropriate zoning for the purposes of the Planning and Development Act 2000;
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> (c) a declaration that the zoning of the applicant's lands at 1 Parkgate Villas, Bishopstown Road, in the City of Cork as public open space is not an appropriate zoning for the purposes of the Planning and Development Act in the circumstances where the lands are private lands, has no designation for public purposes and are in part occupied by a house and the curtilage of a dwelling house;
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> (d) a declaration that the zoning of the applicant's lands as public open space is void for uncertainty.

Ancillary relief was also sought.

The matter came on for hearing before me on the basis that there was to be a combined hearing of the leave application and the substantive application for judicial review.

In order to have an understanding of the issues that arise in this particular matter it is important to set out something of the background to this particular matter. The applicant herein is the owner of land and premises known as 1 Parkgate Villas, Bishopstown Road, Cork, together with one Jason Healy. The lands and premises consist of a dwelling house and a green area of in or about 0.66 hectares in total. The applicant acquired the interest in the property together with Jason Healy by an indenture of conveyance dated the 28th October, 2008, made between John McCarthy, Adelaide McCarthy and Jean Morel and Denis McCarthy of the one part and Ken Mahon and Jason Healy of the other part. In the affidavit grounding this application the applicant stated that the property is identified as being zoned "Residential, Community and Local Services" on the Cork City Development Plan. He said that the subject property was not taken in charge by the local authority and so is not part of a housing estate built in that area but rather remains private land originally retained in the ownership of the builder who built the housing estate at Bishopstown, Cork.

The Decision
The decision being challenged in the first set of proceedings is the decision of An Bord Pleanála (hereinafter referred to as "the Board") to refuse the appeal of the applicant against the decision made on the 8th July, 2008, by Cork City Council to refuse permission for "construction of 44 apartments in 2 buildings, 22 apartments to each building, varying in height from 2 to 3 story, with underground car park and ancillary areas to service same, including gardens, roof gardens, private and public open space, boundary treatments and all other associated site works with connection to all main services all at Bishopscourt Drive, on part of the lands at 1 Parkgate Villas, Bishopstown, Cork."

In the course of its decision, An Bord Pleanála stated that the matters considered were:

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

The reasons and considerations given by An Bord Pleanála for its decision were as follows:-

> "The Board noted that, from the time of construction of the surrounding houses, in 1966, in accordance with the terms of the original permission (granted under Planning Authority Register Reference No. 228/65) the site of the proposed development has been continuously used and maintained as a public recreation/amenity space by the residents of this housing estate. Furthermore, the Board noted that the proposed apartment development would result in the loss of the greater part of this landscaped open area which constitutes an essential community facility for the residents of the nearby dwellings and also, which contributes positively to the visual character of the area. Accordingly the Board considered that the proposed development would seriously injure the amenities of properties in the vicinity and the visual amenities of the area and would, thereby, materially contravene policy NHR 11 of the current development plan for the area as amended. The proposed development would, therefore, be contrary to the proper planning and sustainable development of the area."

It is not in dispute that the lands at issue in this case are in the ownership of Mr. Mahon and his co-owner Jason Healy. However, it would be helpful to try and describe precisely the nature of the land at issue. The land at issue contains a single dwelling house at one corner of the .66 hectare site. From the information before the court it appears that that house is not occupied and may best be described as derelict. Apart from the house, the vast majority of the area at issue is an open area bounded on all four sides by a number of roads including Bishopscourt Lawn and Currahee Road, which leads into Cork City. It is an open area in the middle of a housing estate which was built in the 1960s. Thus the area at issue comprises a large open space surrounded by a housing estate.

Initially the applicant herein made an application for planning permission for four houses on the property on the 2nd November, 2007. That application was returned as invalid because, *inter alia*, of non compliance with Part 5 of the Planning and Development Act 2000. Subsequently on the 26th November, 2007, Cork City Council adopted Variation No. 5 to its Development Plan which amended Policy NHR 11 to include the following:-

> "That all open space in residential estates in the City along with any green area that formed part of the planning permission for development and was identified for the purposes of recreation/amenity/open space is deemed to be zoned as "public open space" to protect and provide for land for recreation, open space and amenity purposes. It is also acknowledged in relation to such areas that if the appropriate colour on the Development Plan maps (figures 9.1, 9.4, 10.1, 10.2, 10.3, 10.4 and 10.5) is not in place then it is accepted that it is for technical reasons and notwithstanding this, the areas are deemed to be zoned for recreation, open space and amenity use."

In the affidavit grounding his application herein, the applicant referred to that amendment and went on to say as follows:-

> "I say and believe and am advised that in deeming land to be 'public open space' rather than re-zoning it as 'public open space' the planning authority can in some cases defeat the right to compensation provided for in the Planning and Development Act 2000, in a manner not contemplated by the Oireachtas. I say that I do not accept (i) that the subject property is within the amendment Policy NHR 11, nor (ii) that I am not entitled to compensation."

A number of points were made on behalf of the applicant in respect of these lands. First of all it was said that no concession was being made by the applicant that the public have any rights over the area of land at issue. It was pointed out that the law does not recognise *jus spatiandi*. Reference was made to the fact that these lands are privately owned lands. There has been no dedication of the lands to public use.

Reference was made in the course of the submissions on behalf of the applicant to a number of judgments in relation to the construction of planning documents. In that regard reference was made to the judgment of McCarthy J. in *Re. X.J.S. Investments Limited* [1986] I.R. 750, *Kenny v. An Bord Pleanála* [2001] 1 I.R. 565, *Readymix (Éire) v. Dublin County Council and Minister for Local Government* (Unreported, Supreme Court, 30th July, 1974) and *Tennyson v. Corporation of Dun Laoghaire* [1991] 2 I.R. 527 and finally *Wicklow Heritage Trust Limited v. Wicklow County Council* (Unreported, High Court, 5th February, 1998). It might be helpful to quote from one passage from those authorities namely that of McCarthy J. in *Re. X.J.S. Investments Limited* where he stated at p. 756 of his judgment as follows:-

> "Certain principles may be stated in respect of the true construction of planning documents:
>
> (a) To state the obvious, they are not Acts of the Oireachtas or subordinate legislation emanating from skilled draughtsman and inviting the accepted canons of construction applicable to such material.
>
> (b) They are to be constructed in their ordinary meaning as it would be understood by members of the public without legal training as well as by developers and their agents, unless such documents, read as a whole, necessarily indicates some other meaning . . ."

That seems to me to be a clear statement of the approach to be taken by the court in interpreting planning documents.

The key complaint of the applicant herein is that the Board erred in looking at policy NHR 11 of the Development Plan as amended by Variation No. 5 in the context of privately owned land. It is the contention of the applicant that the policy does not apply to the land

at issue in this case as it is privately owned land. As an adjunct to that argument it is contended that a "deemed zoning objective" could not have applied to these lands. The applicant herein has not directly challenged the amendment to NHR 11, but it is contended that this does not preclude the applicant from saying that NHR 11 is not capable of being applied to the lands at issue in these proceedings.

Subsequent to the initial application for planning permission for four houses, (which was not in compliance with Part V of the Planning and Development Act 2000), the applicant submitted a further application for outline permission on the 21st November, 2007, for 4 two storey detached dwellings. That application was refused by a decision dated the 14th January, 2008, by the Planning Authority, Cork County Council. The decision was not appealed. The refusal was based on the policy NHR 11 as amended. On the 14th May, 2008, the planning permission the subject matter of this application to court was submitted. As noted previously, that application related to 44 apartments in 2 buildings together with the necessary ancillary works. Again the Planning Authority refused the application for permission on the grounds that:-

> "Having regard to the location of the proposed development within an area designated as open space in a previous planning permission granted under reference C2428 (Cork City Council Reference)/228/65 (Cork City Council Reference) and to the provisions of Policy NHR 11, of the Cork City Development Plan which states that there will be a presumption against the development of public open spaces, it is considered that the proposed development could contravene Policy NHR 11 of the Development Plan and would seriously injure the amenities of the area and of property in the vicinity. The proposed development would, therefore, be contrary to the proper planning and sustainable development of the area."

It is that decision which was appealed to the Board leading to this challenge to the decision of the Board.

In the course of the submissions herein it was stated that the amendment by way of Variation No. 5 to the 2004 Development Plan adopted by Cork City Council on the 26th November, 2007, appears to have been specifically designed to address the lands at issue in these proceedings. It was nonetheless accepted that the intention of the Planning Authority in relation to the lands is not something that may be used as a guide to the construction of Policy NHR 11, as amended. That submission is in my view correct.

Policy NHR 11 also included the following provision:

> "To protect and improve existing areas of public open space. There will be a presumption against development of public open spaces, including unzoned public open spaces within housing estates. In exceptional circumstances development of unzoned public open spaces may be considered where the public open space is not functioning effectively, due to scale, location, layout or where there is some significant community gain from its development for other purposes."

Variation No. 5 then followed that paragraph. Comment was made on the fact that whilst the first bullet point in Policy NHR 11 as amended referred to unzoned public open spaces, it was conceded by Cork City Council planners report on the planning application at issue herein, that "there are no unzoned lands within the municipal jurisdiction of Cork City Council." and accordingly it was pointed out that there are therefore no "unzoned public open spaces".

In essence, the complaint by the applicant herein is that the lands at issue herein do not constitute "open space in residential estates" as the land is in private ownership. It was contended that Variation No. 5 in introducing a concept of deemed zoning as "public open space" was not permissible. It was also submitted on behalf of the applicant that the effect of the actions of the Cork City Council amounted to an expropriation of the applicant's property. As part of the applicant's submissions it is contended that the Policy NHR 11, insofar as it could be interpreted as applying to private land is *ultra vires* and bad in law. It was also contended that Policy NHR 11 was contrary to the applicant's right to private property as protected by the Constitution and by the European Convention on Human Rights. Finally it was contended that the said policy insofar as it could be interpreted as applying to private land, is *ultra vires* and bad in law as being contrary to the scheme for a development plan set out in ss. 10 and 13 of the Planning and Development Act 2000. Therefore it is contended on behalf of the applicant that Policy NHR 11 should not be applied to these lands, given that the lands are not public open space and are lands which are privately owned.

The final point made on behalf of the applicant related to a point mentioned earlier in the course of this judgment namely, the fact that there was no *jus spatiandi*. In this regard it was contended on behalf of the applicant that the net effect of the introduction of Variation No. 5, in NHR 11, was to create a public park in respect of these lands. In that regard reference was made to the decision of Costello P. in the case of *Smeltzer v. Fingal County Council* [1997] 1 I.R. 279. In the course of his decision at p. 285 of the judgment, Costello P. commented:-

> "It was also urged on behalf of the plaintiff that public rights arose under common law in the park (as distinct from rights of way over the pathway in the park). But it is well established there can be no common law right in the public or customary right in the inhabitants of a particular place to stray over an open space ie. that is there is no *jus spatiendi* (see *Halsbury's Laws of England* (4th Ed.), vol. 34 para. 500, and *Attorney General v. Antrobus* 2 Ch. 188). I do not think that *Giant's Causeway Co. Ltd. v. Attorney General* [1905] N.I.J.R. 301 is an authority to the contrary. In that case, the court expressly held that no *jus spatiendi* existed and decided, on the facts established before it, that a public right of way over a road to the Giant's Causeway existed, and not over certain pathways."

It is undoubtedly the case that the Cork City Council by the Variation No. 5 of Policy No. NHR 11, have not acquired any interest in the land. The Council has by means of the variation sought to ensure that there will be no development over the land.

In concluding his submissions, Mr. Galligan on behalf of the applicant made the point that he was not so much impugning what was behind the Council's objective rather, he was impugning the method chosen by the Council i.e., a method which involved no payment of compensation to the applicant.

Mr. Collins on behalf Cork City Council pointed out that there were two decisions under challenge in these proceedings, namely (i) the decision of the Board to refuse planning permission and (ii) the decisions in relation to the powers to make the development plan and to vary them. He pointed out that the decision to adopt Variation No. 5 to Policy NHR 11 did not alter the ownership of the lands and did not entitle anyone to do anything they could nor previously do. He pointed out that the piece of land in question had, in planning terms been reserved and used as public open space. He noted that the original planning in relation to this particular area had been the subject of a permission that was sought and granted after the 1963 Planning legislation came into force. A substantial residential development involving some 157 units was provided for at that time. In the course of the application for permission and consequently in the permission granted, provision had been made for "open space/open area". He examined the planning history of the area and referred to a letter from the developer's architect of the 13th March, 1965, which enclosed a number of documents including maps. On the plans submitted on behalf of the developer, Mr. Denis J. McCarthy, the lands at issue are described as "open area". The

legend attached to a plan prepared by the architect shows that the overall area of the site of the proposed development at that time constituted some 25.48 acres and in a legend on the plan the area of open space was shown as 2.54 acres, approximately 10% of the area involved. He pointed out that although there was no condition in the original planning permission for the development at Bishopscourt requiring the permission to be carried out in accordance with the plan, he submitted that it should be taken as read. The permission was indeed carried out in accordance with the plans. In fact a further application was submitted on behalf of Mr. McCarthy in 1968 and a revised site layout in relation to a proposed housing development at Bishopscourt, Bishopstown, Cork, dated the 5th February, 1968 and prepared by the same architect on behalf of Mr. McCarthy showed the open area with the dwelling house at No. 1 Park Villas, demolished. As it happened the premises were never demolished. Accordingly he pointed out that an open area was made available to the residents of the area and has been available continuously to the residents of the area and members of the public. In those circumstances he submitted that there was no clearer demonstration of what was intended and understood by all at that time. There was no evidence to suggest that prior to the applicant purchasing the lands there was any attempt to exclude anyone from the open space. The previous owner of the lands had never tried to obtain permission for development of that area. Accordingly he submitted that an integral part of the 1965 permission was the provision of open space. When the applicant's appeal came before the Board, submissions were before the Board for members of the public who availed of the land as an amenity. It is clear from the maps and plans that the roads built on the estate as provided for in the original permissions delineated the open area. If there was any doubt about this, Mr. Collins referred to the contract for the sale of the property dated the 16th September, 2007, in which there was a specific condition to the effect that the vendors make no warranty as to planning permission and general Condition 36 was "hereby deleted and no further objections requisitions or inquiry shall be raised".

The contract went on to provide that an original ordinance survey map duly marked should be furnished on closing delineating the area. It was pointed out that the applicant herein could have been under no misapprehension as to the way the land was laid out. Indeed, one might add that anyone looking at the area in question could have been under no doubt as to the way in which the land was laid out. Equally had the planning permissions obtained in 1956 and 1968 been consulted it would be clear from those that the land at issue was open space. The documents of title submitted by the applicant to the Board also showed the area in question as open land. To that extent it was submitted that the applicant bought this land with his eyes open. It was also pointed out that the purchase price for the land some €525,000 was extremely low for land that would have had development potential. It was suggested that the motivation behind the purchase was possibly a concern on the part of the applicant with an opportunity to claim compensation.

Mr. Collins went on to submit that what is at issue in these proceedings is not an expropriation of any property or right or interest that the applicant bought. On the contrary the applicant could not have expected to obtain planning permission for what had already been designated as open space. Variation No. 5 of Policy NHR 11 and subsequently the 2009 Development Plan, do no more than copper fasten the *de facto*, *de jure* position that the land was public open space.

Mr. Collins noted that the complaint of the applicant is to the effect that lands privately owned cannot be public open space. Nonetheless, Mr. Collins insisted that the applicant could never have obtained planning permission for this land.

Mr. Collins then proceeded to examine in detail the 2004 Cork City Development Plan. Under the heading Recreation Policies, at para. 8.51 the following appears:-

> "Public open spaces are one of the key elements in defining the quality of the residential environment."

The plan goes on at para. 8.54 as follows:-

> "Public open space in the City includes major parks such as Fitzgerald's Park, Bishop Lucey Park and the Lough as well as large open space areas such as the lands adjacent to Sun Valley Drive and Clashduv Road. Also included are greens and small open space areas within private and public housing estates, amenity walks, recreational areas, sports ground and the municipal golf course."

Below the description of public open space is Policy NHR 11, as it was before it was amended and as previously pointed out it contained the following paragraph:-

> "To protect and improve existing areas of public open space. There will be a presumption against development of public open spaces, including unzoned public open spaces within housing estates. In exceptional circumstances development of unzoned public open spaces may be considered where the public open space is not functioning effectively due to scale, location, layout or where there is some significant community gain from its development for other purposes."

As is now clear, Variation No. 5 included a paragraph which was intended to deal with the lands at issue in these proceedings. However, Mr. Collins pointed out that prior to the inclusion of Variation No. 5, the development could not have been permitted having regard to the existing provisions of the Development Plan in relation to public open spaces as explained by para. 8.54 and the Policy NHR 11, set out in the paragraph referred to above. This was always a private housing development with a green area within it. Under the Development Plan "public open space" included unzoned public open spaces. This meant that it included public open spaces not zoned as such.

Mr. Collins also referred to para. 11.19 of the Development Plan which indicated that where possible 10% of a gross site area in relation to certain developments would be required for public open space. It is interesting to note that the Development Plan also dealt with private open space. Paragraph 11.24 states:-

> "In apartment developments, private open space should be provided in a number of ways including: balconies, winter gardens, indoor amenity spaces, shared internal courtyards and roof garden. In townhouse and mews developments private open space should be provided in small rear yards and balconies. A detailed landscape plan should be submitted with any application for development containing shared semi private open space."

Accordingly, having regard to the way in which the question of public open space is considered and indeed, private open space, in the 2004 Development Plan, Mr. Collins submitted that the debate as to the difference between public and private open space was sterile in the context of this case. He highlighted the fact that the Planning and Development Act 2000, also contemplated a distinction between public/private open space and in that regard he referred to s. 10(2)(a) which provides as follows:-

> "Without prejudice to the generality of subsection (1), a development plan shall include objectives for –
>
> (a) the zoning of land for the use solely or primarily of particular areas for particular purposes (whether residential,

> commercial, industrial, agricultural, recreational, as open space or otherwise, or a mixture of those uses), where and to such extent as the proper planning and sustainable development of the area, in the opinion of the planning authority, requires the uses to be indicated."

Mr. Collins pointed out that for Mr. Galligan's submissions to be accepted would involve the implication that the Local Authority cannot zone private land. As Mr. Collins indicated it would be a startling proposition if that were the case. The whole ethos of the Planning and Development Act is about controlling development on private land. The fact that land is private is immaterial to the power of a local authority to control development. Therefore the argument to the effect that privately owned land could not be zoned as public open space is, in the submission of Mr. Collins, an argument which is unstateable.

Mr. Collins then described the process through which Variation No. 5 and indeed the 2009 Development Plan went before being finalised. He referred to the decision in *Finn v. Bray Urban District Council* [1969] I.R. 169, in which Butler J. stated at p. 174:-

> "I take it as clear that one of the objects of a development plan is to control and regulate the user and development of property by indicating *inter alia* the lines on which development permissions will be granted, and on which prohibitions on development and user will be imposed under other parts of the Act. As such, it affects property and may adversely affect the value of a citizen's estate in, and enjoyment of, property. Section 21 of the Act of 1963 provides a procedure and machinery whereby the owner of property within the area of operation of a proposed plan (among other interested persons and bodies) may be informed, or given the opportunity of informing himself, of any proposal which may affect him; he may be given the opportunity of objecting to the proposal and of having his objection considered by the planning authority, and he may be given the opportunity of stating his case in relation to the proposal - all this before the plan is made."

In other words there is a protection provided by statute by way of a process of consultation before a plan is made by a Planning Authority. As pointed out by Mr. Collins, both the Variation No. 5 and 2009 Development Plan went through this process. It was pointed out that the Variation No. 5 and the 2009 Development Plan were consulted upon widely before their introduction. Accordingly, it was submitted on behalf of Cork City Council that there was no analogy between the facts of this case and the decision in *Ferris v Dublin County Council* (Unreported, Supreme Court, Finlay C.J., 7th November, 1990) relied on by the applicant in which the Supreme Court considered the effect of an amendment to the Co. Dublin Development Plan passed in the year 1989 in relation to a permitted use for lands i.e., the provision of halting sites. Counsel on behalf of the applicant had relied on the *Ferris* decision to submit that Policy NHR 11 is so riddled with error and uncertainty as to be capable of implementation.

Counsel on behalf of Cork City Council proceeded then to consider in more detail the nature of Variation No. 5 of Policy NHR 11. It was accepted that the variation as indeed the Development Plan had to be read in the way suggested by McCarthy J. in *Re. X.J.S. Investments Limited* to which reference has already been made, namely, that it should be capable of being read by an intelligent but informed reader and the question is what such a reader would make of the variation or Development Plan. Insofar as Mr. Galligan on behalf of the applicant had referred to a deemed zoning as inappropriate, Mr. Collins submitted that this was not something that could be said by the applicant herein. This was fundamentally a matter for the local authority.

Mr. Collins then briefly examined the Board's actual decision. He noted that the Board's Inspector stated at p. 8 of his report as follows:-

> "After inspection of the site and a review of the grounds of appeal made by the applicant, the information received from the Planning Authority, the submission received from the Planning Authority and the observations from third parties, it would advise the Board that as a matter of fact the established and only authorised use of the larger part of the site is as public open space. The proposed development involves a material change in the use of the site from public open space to private residential use. The public open space on the site is a significant amenity for the residents of the houses within walking distance of it. The public open space also makes a positive contribution to its visual character of the area. These benefits would be lost if the development proceeded. The development would therefore cause serious injury to the amenities property in the vicinity of the site and serious injury the character to the area. As such it would be contrary to the proper planning and sustainable development of the area."

The planning inspector also examined the zoning of the site and he accepted in his examination that the development plan is ambiguous as to the zoning of the site. He noted that it was shown as zoned for residential use on the development plan map and that that was accepted at face value in the report from the Council's planner. He went on to say that it was arguable that the zoning of the site was changed to public open space by the text of Variation No. 5 to the Development Plan. He went on to note that it would be correct to state that a zoning of an area for residential use imposes a general obligation on the Planning Authority to allow and facilitate a residential use in the area. Nonetheless, he stated that it did not follow from that general principal that outline permission should be granted. He went on to state:-

> "Public open space is necessary to provide a proper level of recreational and visual amenity for areas in residential use. This applies particularly to those areas which have been developed in the suburban form that predominated in the middle of the last century. The use of the greater part of the site as open space is therefore an intrinsic part of the residential use of the wider area. The maintenance of that use as public open space is therefore justified by the residential use zoning objective that applies to the area as a whole. A grant of outline permission in this case would remove most of the public open at this location in a manner that would undermine the residential amenity of the area and so would militate against the proper protection of its residential use and hence its zoning for such use. The proposed development would therefore contravene either a residential or public open space zoning on the site and it is unnecessary to determine which zoning applied in order to decide whether the development is in keeping with the proper planning and sustainable development of the area."

It is interesting to note that the Board's Inspector went on to look at the arguments raised by the applicant herein in relation to Policy NHR 11. He stated in this regard:-

> "The grounds of appeal which refer to those issues do not overcome the fact that the site is laid out and used as public open space and has been for a considerable period of time. The loss of most of that public open space in the proposed development means that it would materially contravene Policy NHR 11 of the Development Plan as amended."

Having referred to the report of the Board's Inspector, Mr. Collins then considered the decision of the Board itself and stated that there were more than adequate grounds for the refusal of permission. The Board identified as a key feature the injury to amenities that would be caused by granting a planning permission in respect of this area.

One other matter referred to by Mr. Collins related to a condition in the original planning permissions. As mentioned previously, the developer of the lands Mr. McCarthy, originally obtained permission for the Bishopscourt scheme in 1966. A revision of that scheme accompanied by a revised site layout was submitted in 1968. Condition 2 of the original permission provided:-

> "The applicant enters into a deed of covenant with the County Council for the completion of roads, paths, sewers, drains, public lighting, open spaces etc.
>
> Reason: So that these amenities provided by these are made available to the residents of the estate."

No such covenant was actually entered into. However, Mr. Collins emphasised the fact that it was an express term of the original permission that open space be provided and such open space was in fact provided. That open space has been enjoyed for a period of 40 years. The fact that a covenant such as that envisaged by condition No. 2 was never actually completed is neither here nor there.

Mr. Dodd also on behalf of the Council, made a number of further submissions. He examined the use of expressions such as public open space, habitually used land and private open space as appears in the 2009 Development Plan. He pointed out that nowhere in the development plan does the designation of an area as public open space confer any right on the public as such. This is not an issue about ownership of land. He also pointed out that the nature of a Development Plan is that it is future looking. Nothing occurs to land as a result of zoning it in a particular way. The Development Plan simply regulates future development. It does not create or grant public access to land. He characterised the arguments of the applicant in relation to the Variation No. 5 to Policy NHR 11 as a collateral attack on Variation No. 5. he submitted that the case of *Dublin City Council v. Liffeybeat* [2005] 1 I.R. 478, relied on by Mr Galligan on behalf of the applicant in this regard did not support his arguments. He went on to add that it was quite clear from the concept of public open space as used in Variation No. 5 that there was no uncertainty as to its meaning. The phrase appears in legislation, guidelines and case law. The designation of an area as public open space does not confer any property right nor does it create a public park. In that regard he referred to a passage from the judgment in the case of *Houlihan v. An Bord Pleanála* (Unreported, High Court, 4th October, 1993), in which Murphy J. stated at p. 4 of the judgment:-

> "It was contended on behalf of the applicant that the permission which the Board purported to grant (or a condition thereof) dispensed the holder of the permission from the necessity of obtaining a licence under the Foreshore Act of 1933. This argument is without substance. Planning permission, where granted, renders law as a development which would otherwise constitute an offence under s. 24 of the Local Government (Planning and Development) Act 1963. It does not grant or confer on the applicant for permission any property rights or dispense him from the necessity of obtaining whatever wayleaves, permissions or licences as may be required under other legislation to enable the development to be completed."

Whilst that statement refers to the party obtaining planning permission, it was relied on by Mr. Dodd, to submit that equally it conferred no right or entitlement to any other party.

Ms. Butler then made submissions on behalf of the Board. She agreed that the challenge to the decision of the Board in these proceedings was a collateral attack on Policy NHR 11 and the variation thereof where there was no attempt to challenge the original policy when it was made or the variation when it was made. The 2004 plan was adopted that year. Policy NHR 11 was part of that Development Plan. She pointed out that at the time of the purchase of these lands there was a presumption against the development of public open space in the housing estate. She identified the two arguments made on behalf of the applicant as being the fact that the land was not public open space because it was privately owned and had never been taken in charge and she pointed out that the applicant knew what the position was when he purchased the land. She submitted that even before Variation No. 5 was passed there was a presumption against development.

It was pointed out by Ms. Butler that under the Planning and Development Act 2000 and its predecessor, the Local Government (Planning and Development) Act 1963 land could be zoned as open space and conditions could be included in permissions requiring their use as open space. Accordingly the provision of open space is a planning matter both in respect of zoning and the planned use. She pointed out that the lands at the heart of these proceedings were designated as open space in an application for permission granted in 1965. That permission was acted upon and a significant estate developed by the applicant's predecessor in title. Accordingly she submitted that the organised use of the lands is a use of open space. She noted that in the course of the applicant's dealings with the lands, he first made an application in relation to four houses on the site. The initial application was rejected as not being in the appropriate form. He then resubmitted a further application for outline permission in respect of four houses and that was refused. He did not appeal that refusal and at that stage made no complaint as to Variation No. 5 of Policy NHR 11. Subsequently this application was made. She points out that the applicant then knew the view of the Council because of its decision in relation to those four houses. He could have challenged the Variation No. 5 at that stage, but instead he brought a further application in May 2008, the application at issue in these proceedings. The applicant addressed none of the points made in respect of the earlier application. The only change was that the applicant increased the size of the development for which he sought outline permission. Accordingly, she noted that the applicant was someone with knowledge of the policy and the variation to the policy who took no steps to challenge it but is now seeking to impugn the decision of the Board by saying that the policy applied by the Board is in effect invalid. Again she referred to the site location maps attached to the original application for planning in 1965. She also examined the brochure provided to purchasers and the description of the layout of the Bishopscourt Estate as described to purchasers. It was an estate being sold on the basis that the site included 2 acres of open space. She said that there was clearly no doubt or confusion or vagueness in relation to what was to occur. If there was any confusion in relation to what was to happen in respect of the open space she pointed out that the only question of confusion related to the demolition of existing houses, some of which are not on the subject lands. Ms. Butler then went on to say that in effect the position was that the Board had before it, the Inspectors report which had looked at the site and its existing use and history. The established use of the property was always as open space. Indeed, when planning permission was first sought for development at Bishopscourt the subject lands were proffered as open space. There was never any doubt about this until the applicant became involved in the lands. These lands were not and never were available for development. The established use of the site was as public open space. As to whether the Board made a decision on whether the zoning was as residential or public open space zoning she contended that this was irrelevant as in either case, the lands at issue are not suitable for development.

A number of specific points were made by Ms. Butler in relation to certain arguments of Mr. Galligan. One of the points made by Mr. Galligan had been that it was not possible for a particular area to be zoned residential and zoned as public open space. He had argued that the effect of Variation No. 5 to Policy NHR 11 was that there were in effect two zonings in respect of the one piece of land. Ms. Butler pointed out that under the provisions of s. 10(2)(a) of the Act, it was possible to have a mixture of uses. Ms. Butler also addressed a complaint made by Mr. Galligan in respect of the maps accompanying the Development Plan. An issue was raised by him as to how the plan is to identify various areas according to their zoning. She argued that it was not wrong for the Board to interpret

the variation as they did in the absence of a map or a coloured map indicating the particular zoning for the subject lands. I agree with her submissions on this point.

Ms. Butler concluded her arguments by saying that the Board had to have regard to the plan having regard to the provisions of the Planning and Development Act 2000. In this case the applicant is in effect seeking the non application of the plan not, a different interpretation of the plan. Her final point was that the phrase "public open space" is a term of art in a planning context. It does not relate to the ownership of land. It applies without expropriation of the lands to which it is applied. She referred in this context again to para. 8.4 of the 2004 Development Plan. Finally she added that planning permission inures with the benefit of the lands and the residence which give the lands a public character. She made the point that it would have been impossible for Mr. McCarthy, the predecessor in title of the applicant herein and said that it would have been possible for him to have made the arguments now made by the applicant in this case. Mr. McCarthy got the benefit of planning in part because of the provision of open space. His successor in title, the applicant herein, could not claim to be in a better position than Mr. McCarthy.

In this context she referred to the fact that the planning code was a permissible delimitation of property rights in the common good which recognise the extent to which the planning code could enhance the value of land. The planning code permits an individual to do something that could not be done otherwise. The particular housing scheme was enabled by the planning permission and in that context the developer of the scheme had to develop roads, sewers, open space and so on. The applicant herein cannot claim that he has lost out by not being permitted to develop the open space because a benefit has already accrued to the original developer and the residents concerned. Accordingly, the application of policy NHR 11 to privately owned land does not interfere with the applicant's property rights. He simply cannot build on the open area as to do so would seriously injure the existing amenity.

I now want to consider Mr. Galligan's reply to the submissions of the Cork City Council and the Board. In his reply Mr. Galligan reiterated that the phrase public open space as used in NHR 11 could only be interpreted constitutionally and therefore the phrase could only mean a dedicated or designated public open space. In other words it could not apply to privately owned land. It had to be land accessible to the public over which rights existed. He accepted that the land in question had been used but according to his submissions the phrase would have to be interpreted as meaning land to which the public have rights. The variation did effect a change in the reading of Policy NHR 11.

He referred again to the phrase "deemed zoning" and stated that such phraseology was not recognised in law and was not sufficient to create a land use zoning objective. To this extent he was not in agreement with the interpretation of s. 10(2)(a) of the Planning and Development Act 2000, as suggested by Mr. Collins and Ms. Butler. Mixed use did not have the same meaning as two separate zonings at the same time. Here the effect of the variation is that a mixture of uses is contained in the one zoning. According to his submission there are conflicting zonings applicable to the subject lands.

It was his submission accordingly that the Board should have disregarded Policy NHR 11 in total together with the variation. It was his contention that the effect of the zoning coupled with Policy NHR 11 and the variation to Policy NHR 11 was such as to create an ambiguity. In those circumstances the applicant was entitled to come to court for clarification of that ambiguity. It was unfair to characterise him as being opportunistic. He was entitled to test the issue of development of this land.

In the course of his submissions, Mr. Galligan on behalf of the applicant has not sought to quash Variation No. 5 of Policy NHR 11. Having said that, the argument of the applicant is that Variation No. 5 to Policy NHR 11 does not apply to the subject lands. Indeed, reference was made to the fact that in a planners report dated the 14th January, 2008, it was stated that the lands and premises are zoned "residential, community and local services", thereby suggesting that Variation No. 5 did not apply to the subject lands. More significantly perhaps, the report of An Bord Pleanála's Inspector dated the 1st December, 2008, noted at p. 3 as follows:-

> "The Development Plan map shows the area zoned residential, community and local services. The objective of that zoning is to protect and provide for residential uses with other uses open for consideration including community and local services."

The Board's Inspector went on then to refer to Variation No. 5. He made a number of observations at p. 7 of the report including the fact that:-

> "The site was laid out as open space for the benefit of the owners of the houses in the Bishopscourt Estate in accordance with explicit and implicit undertaking by the original development as has been used and maintained as public open space for approximately 40 years. Maintenance has been carried out by the Council and by local residents.
>
> Condition No. 2 of the original permission clearly intends to provide open space on the site for the enjoyment of residents of the estate. The initial transfer of the houses to their purchasers and long use give the residents a right to use the site as open space. Copies of brochures and plans provided to purchaser at the time are submitted to demonstrate this. Therefore the applicant does not have the legal right to carry out the development".

The Inspector went on to make a number of other observations. The comments made by the Inspector as to the zoning of the site are of interest. He stated:-

> "The Development Plan is ambiguous as to the zoning of the site. It is shown as zoned for residential use on the Development Plan Map and this was accepted at face value in the report from the Council's planner. However, it is arguable that the zoning of the site was changed to public open space by the text of Variation No. 5 to the Development Plan. . . ."

The Inspector continued in the course of that paragraph to state:-

> "Public open space is necessary to provide a proper level of recreational visual amenity for areas in residential use. This applies particularly to those areas which have been developed in the suburban form that predominated in the middle of the last century. The use of the greater part of the site as open space is therefore an intrinsic part of the residential use of the wider area. The maintenance of that use as public open space is therefore justified by the residential use zoning objectives that applies to the area as a whole. A grant of outline permission in this case would remove most of the public open space at this location in a manner that would undermine the residential amenity of the area and so would militate against the proper protection of its residential use and hence its zoning for such use. The proposed development would therefore contravene wither a residential or public open space zoning on the site and it is unnecessary to determine which zoning applies in order to decide whether the development is in keeping with the proper planning and sustainable development of the area."

The Board's Inspector then went on to deal with Policy NHR 11 of the Development Plan. He went on to consider the nature of "ownership" and observed that:-

> "It is entirely conceivable that the applicant has properly obtained a freehold interest in the site but would still lack the requisite legal interest to prevent its use as public open space because of rights of way or easements that local residents have acquired over on the site due to its long use as public open space, or because an obligation to provide public open space stated or implied in the contracts between the original developer of the estate and the purchasers of the houses there could be enforced by those purchasers against the applicant."

He went on to note that the period for implementation of the conditions attached to the original planning permissions and for enforcement action under them has long since ceased. He concluded that the loss of most of the public open space in the proposed development means that it would materially contravene Policy NHR 11 of the Development Plan as amended.

There is apparent from the passages quoted above, an element of ambiguity at the heart of the Development Plan having regard to the Variation No. 5 which amended NHR 11 of the Development Plan.

During the course of argument in this case, one of the comments that was made by Mr. Collins and Ms. Butler on behalf of the Council and the Board respectively was to the effect that s. 10(2) of the Planning and Development Act 2000, allows a Development Plan to provide for a mixture of uses. That is undoubtedly so. The difficulty in this particular case is that anyone looking at the Development Plan and the maps thereto would see that the Development Plan shows the subject lands as being in an area zoned residential, community and local services. There is then the question as to whether or not the text of Variation No. 5 has changed the zoning to public open space. Certainly the Board's Inspector identified this as an ambiguity. Indeed, I would add that I have some concern about a Development Plan which "deemed" open space as "public open space". The concept of deemed zoning seems to be a strange concept in the context of a Development Plan. Having said that, I think, to paraphrase the words of McCarthy J. in *Re. X.J.S. Investments Limited* referred to at an earlier part of this judgment, a Development Plan should be constructed in its ordinary meaning as it would be understood by members of the public without legal training as well as by developers and their agents, unless such document, read as a whole, necessarily indicates some other meaning. The Development Plan as amended given the ambiguity referred to above created some confusion. Nonetheless, in the course of his submissions Mr. Galligan accepted that the subject lands have now been zoned by virtue of Variation No. 5 Policy NHR 11 as public open space.

A key element of the complaint by Mr. Galligan relates to the ability of a planning authority to zone as "public open space" land which is privately owned. He went somewhat further and contended in the course of his submissions that there was no lawful authority to include a development objective that land be zoned as public open space and he stated that s. 10(2)(a) of the Planning and Development Act, simply permitted a planning authority to zone land as open space as opposed to zoning land as public open space. Having regard to the overall provisions of s. 10 which prescribes the content of the Development Plans it does seem to me to be permissible for a local authority in its Development Plan to provide for open space and to do so having regard to a designation as public open space or private open space as may be appropriate. A development plan is by its nature forward looking and to some extent, aspirational. The specific issue that is important from the point of view of this case is whether land can be zoned as public open space when the land in question is privately owned land. That issue is at the heart of Mr. Galligan's submissions and it seems to me that thereby there is a difficulty. I will return to this question later in the course of this judgement.

One of the arguments made on behalf of the Council was that the applicant was to all intents and purposes mounting a collateral challenge to the validity of Policy NHR 11 as amended by Variation No. 5. It seems to me that the submissions of the Council in this regard are correct. As noted previously, the Board in its decision took into account the history of the subject lands and went on to state:-

> "Accordingly the Board considered that the proposed development would seriously injure the amenities of properties in the vicinity and the visual amenity of the area and would, thereby, materially contravene Policy NHR 11 of the current Cork City Development Plan as amended."

The argument has been made on behalf of the Council that in order to succeed in these proceedings against the Board, it is necessary for the applicant to, in effect, challenge the validity of Policy NHR 11 as amended by Variation No. 5. In that regard reference was made to the decision in the case of *Goonery v. The County Council of the County of Meath and Others* (Unreported, High Court, Kelly J., 15th July, 1999). In the extempore judgment of Kelly J. he stated at p. 17 the following:-

> "First, he says that nowhere in the reliefs sought by his client did he question the validity of the planning permission granted by Meath County Council. I do not agree. Relief No. (4) seeks a Declaration that Meath County Council did not properly determine the application for planning permission for the installation because it failed to have any adequate regard to the Environmental Impact Statement accompanying the planning application.
>
> Relief No. (11) seeks a Determination that by virtue of the provisions of Section 26(I)(A) of the 1963 Act as amended, Meath County Council could not have made a valid decision on the planning application.
>
> Whatever about the way in which these are worded, they plainly seek to impugn the validity of the decision to grant permission. If these reliefs were granted, they would undoubtedly mean in practical terms that the decision of the Meath County Council was invalid. This is particularly so in the case of relief No. (11). The mere fact that an Order was not sought quashing the permission in question does not mean that the validity of the permission was not being questioned. It was, and so the provisions of the section applied and were not complied with since the application was moved before Budd J. ex parte and not on notice as the section requires."

In this particular case it has always been stated by Mr. Galligan on behalf of the applicant that there was no challenge to the validity of Policy NHR 11 of the Cork City Development Plan 2004. That is so in the sense that no direct challenge has been brought. However, the relief sought is a declaration that that policy does not apply to the plaintiff's land. The grounds of relief include the following at para. 9:-

> "To the extent that the said Policy NHR 11 can *prima facie* be interpreted as applying to private land, such an interpretation is incorrect, *ultra vires*, and bad in law in being contrary to the scheme for a Development Plan set out in ss. 10 and 13 of the Planning and Development Act 2000."

I have to say that, as I see it, the whole tenor of the applicant's arguments before me has been a challenge to the validity of Policy NHR 11 as amended by Variation No. 5. The applicant has sought through the arguments made on his behalf sought to demonstrate

that Policy NHR 11 as amended by Variation No. 5 is (a) *ultra vires* the power of the planning authority to have made having regard to the provisions of s. 10 of the Planning and Development Act 2000 and (b) that it cannot apply to privately owned land. As I have said I not see how this could be described as anything other than a challenge to the validity of the Policy. For that reason I have come to the view that the applicant is not entitled to succeed in his proceedings against the Board in respect of its decision to refuse planning permission.

That does not dispose of the other issues raised in the second set of proceedings. The applicant has raised a number of issues in these proceedings which cause me some concern. I have already referred to the planning history of these lands. It is clear that at the time that the original permission was granted it was envisaged that these lands would be available as open space to the residents of the estate as developed. A covenant was to be executed in relation to the open space by the developer. For reasons that are not clear such a covenant was not obtained from the developer and although there were some discussions about this issue towards the end of the 1960s, nothing was done about this. There is evidence before the court to indicate that the lands at issue have been enjoyed by local residents. In the course of his submissions, Mr. Galligan referred to the fact that there was not a *jus spatiandi* over the lands. However, there may be a question as to whether or not there may be public rights of way over the land in question or local customary rights in respect of the lands. These are not issues which were argued before me and of course, the existence of such a right of way or the possibility that local customary rights have been established over the land, should there be such rights over the lands, does not affect the planning issue.

It is interesting to note in passing the provisions of s. 45 of the Planning and Development Act 2000, in relation to the acquisition of land for open spaces. In effect the position is that where a development is the subject of a planning permission which attach a condition in relation to the provision of open space, the owner of the land can be requested in writing to provide the open space and in default of so doing the planning authority may seek to acquire the land compulsorily. Compensation is payable to the landowner in such circumstances, although the compensation is limited. Nonetheless, such a provision would not avail the Council on the facts of this case. Nonetheless it emphasises the fact that compensation, albeit limited, may be payable in relation to the requirement of open space in a development.

I now want to examine further Mr. Galligan's argument to the effect that privately owned land cannot be zoned as public open space. He submitted that although it may have been the intention of the Planning Authority in 1965 and 1968 to ensure the lands were made available to the residents of the estate, the intention was not achieved. He added that Condition No. 2 of the planning permission could not create any public rights in favour of the residents of the estate and the lands remained in private ownership. That this was so is clear from the discussions that took place in 1969, albeit that those discussions were inconclusive. No doubt it may have been envisaged that the lands would have been dedicated to public use by the developer of the lands but that did not in fact happen.

Mr. Collins on behalf of the Council pointed out in the course of his submissions that the 2009 Development Plan was adopted following the normal process of consultation with the public, publication of various drafts and the preparation of a manager's report. A large number of written submissions including one from the applicant were received and considered. The elected Council subsequently resolved to make the plan at the meeting of the 27th April, 2009, and the plan duly came into operation on the 25th May, 2009. It was noted by Mr. Collins that the basis of challenge to the 2009 Cork City Development Plan included the following:-

> "1. Public open space zoning cannot apply as the land is private land and in part occupied by a dwelling.
>
> 2. The designation of public open space is void for uncertainty.
>
> 3. Zoning of land occupied by a dwelling violates the right to privacy.
>
> 4. Public open space zoning is the taking of land.
>
> 5. Failure to have regard to relevant considerations.
>
> 6. The zoning allows for public rights without any compensation."

One of the interesting aspects of these submissions made by Mr. Collins on behalf of the Council in this particular set of proceedings is to refer to the fact that the word "public" in the phrase "public open space" is descriptive of the lands. It was submitted that the word did not in itself have any additional legal effect. He went on to point out that a public open space zoning which is applicable to land has to be distinguished from:-

> "(a) The acquisition of public open space by a planning authority which involves the transfer of ownership.
>
> (c) A condition of planning permission requiring the provision of open space.
>
> (d) Taking in charge public open space."

I think there is some degree of merit in the point made by Mr. Collins that the use of the word "public" is descriptive and does not add greatly to the phrase "open space", which is a phrase used throughout the Planning and Development Act 2000. It is also true to say as Mr. Collins pointed out that the designation of land as public open space does not involve the acquisition or expropriation of land. No transfer of any interest occurs as a result. As has frequently been pointed out in relation to development plans, most recently by Irvine J. in the case of *Cicol v. An Bord Pleanála*, (Unreported, High Court, 8th May, 2008), at p. 7:-

> "The Development Plan sets out the overall strategy for the proper planning and sustainable development of the Dun Laoghaire-Rathdown functional area and in the course of so doing, identifies various areas of land which are zoned for particular uses including residential, commercial, agricultural, recreational and open space. The Development Plan also includes certain special objectives in relation to specific areas of land which the Planning Authority is committed to implementing over the lifetime of the Development Plan. In this respect, I believe it is relevant to note that any reasonably intelligent member of the public seeking guidance as to the likelihood of any proposed development meeting the approval of the Planning Authority would have regard to the entirety of the Development Plan, its respective zonings and special objectives."

Mr. Collins also distinguished the process of taking in charge from zoning of land as public open space. Having taken land in charge that land does not become "public" open space. It is interesting to note that the phrase public open space is used in many parts of the 2009 Development Plan, for example, para. 11.4 in relation to Parks Strategy states:-

> "Current policy in relation to the development of parks in areas of public open space in the city is contained within the Parks Strategy 2000."

Paragraph 11.6 refers to an audit of public open space which is being carried out by the parks section. Paragraph 11.11 includes the following:-

> "There will be an emphasis on quality and insuring that all public open space is overlooked by surrounding homes so that this amenity is owned by the residents and it is safe to use. It is important that the public realm is considered as a useable integrated element in the design of the development, that children's play areas are sited where they will be overlooked but not a nuisance and there is a clear definition between public, semi private and private space."

Policy 11.3 which follows that objective states *inter alia*,

> "There will be presumption against development on all open space in residential estates in the city, including any green area/public amenity area that formed part of an executed planning permission for development and was identified for the purposes of recreation/amenity open space and also <u>including land which has been habitually used as public open space. Such lands shall be protected for recreation open space and amenity purposes.</u>"

The policy went on to refer to the provision and promotion of high quality open spaces which are well designed suitably proportioned and accessible to the surrounding community.

It is interesting also to look at references to private open space such as that contained in para. 17.19, which states:-

> "Exceptional circumstances will be assessed on their merits on a case by case basis and in such instances sufficient private and semi private open space (or, open space for use by all the occupants of the proposed development) should be provided. Gated (semi private) developments are not considered an appropriate development type in the city (see policy 16.13) and therefore semi private open space should be provided as part of private space provision for residential (or other) development."

It seems to me when considering the Development Plan as a whole the use of the phrases "public open space", "semi private open space" and "private open space" are generally descriptive of the type of open space that may exist within the planning authority's functional area.

It is interesting to look at para. 17.61 which relates to private and semi private open space. It states as follows:-

> "The provision of communal/semi private open space should be provided as part of private space provision for residential developments to the standards set out in table 17.5. The quality of private and semi private open space will be crucial to successful residential development. Table 17.5 sets out private open space standards. A reduction in private open space standards will be considered to facilitate the development of small infill sites in city centre and inner urban areas. In townhouse and mews developments private open space should be provided in small rear yards and balconies. Front garden space will not be considered as private open space for calculating purposes."

When considering the terms used in the course of the 2009 Development Plan such as public open space, private open space and semi private open space, one can see that the Council is attempting to categorise the various types of open space within the functional area of the Council. For example within apartment developments, open space in the form of terraces, balconies and roof gardens are of importance. They are described as private open space in the sense that only those with particular rights of access can use the spaces involved. The term semi private open space would appear to be applicable to smaller housing developments, although there is of course, no specific definition of that term within the Development Plan. The phrase at issue in these proceedings is the phrase "public open space". It is not unfair to say that that term is intended to be descriptive of an open space to which members of the public have or may be intended to have access. There is no doubt that in the context of the lands at issue in these proceedings the public have enjoyed access to the lands at issue for in excess of 40 years whether as of right or not. The lands have been landscaped and footpaths have been laid across the land as has previously been described. There is no doubt that the public have used the lands as an amenity. That is not to say that the public necessarily have rights over the land.

As I have previously mentioned the effect of zoning of land can be to benefit the owner of land, for example, in circumstances where agricultural land is zoned for development. The zoning in a Development Plan does not have to be maintained in successive Development Plans and accordingly such land can be de-zoned. That naturally enough will have the effect of de-valuing the land. No complaint can be made about that by the landowner. In those circumstances can it be said that the applicant in these proceedings is in a position to make the case that the zoning of land in these circumstances has resulted in an unjust attack on his property rights within the meaning of Article 40.1 of the Constitution, in circumstances where no compensation has been provided to him? The answer to that question must be in the negative. A change in zoning does not entitle the applicant to compensation even though the value of his land may have been reduced as a result.

There is no doubt but that the difficulty in this case springs from the fact that the Council, when it originally granted permission for the development of the lands at Bishopstown, failed to follow through on its condition attached to the planning permission in relation to the provision of open space. To that extent, the Council has resorted to the use of zoning to achieve what could and should have been achieved by the enforcement of the condition in the original planning permission. It is unsatisfactory that the Council has resorted to the use of zoning for the purpose of dealing with this matter so long after it should have been sorted out.

Nevertheless, as a general proposition I cannot see any basis for saying that a zoning as "public open space" is not permissible having regard to the Planning and Development Act 2000. It is the case that zoning the lands in question as public open space does not have the effect of the acquisition of the land by the council involving a transfer of ownership. Zoning of the land regulates the use and development of the land.

A feature of the difficulty in this case can be seen from the terms in which public open space is referred to in the 2009 Development Plan. I have already referred above to para. 11.11 of the 2009 Development Plan. There is no issue as to the desirability of ensuring the availability of public open space, but in para. 11.11 it is noted that "there will be an emphasis on quality and ensuring that all public open space is overlooked by surrounding homes so that this amenity is owned by the residents and is safe to use". It goes on to refer to the fact that there should be a clear definition between public, semi private and private space. If one then considers Policy 11.3 it is clear that such open space is intended to be accessible to the surrounding community. I note that the Policy has reference to "land which has been habitually used as public open space. Such lands shall be protected for recreation, open space and

amenity purposes". There is no doubt that the land in this case has been habitually used by members of the public. To say that it has been habitually used as "public open space" is to my mind a somewhat different matter. The lands at issue in this case are privately owned lands. If one then looks at the zoning objective 15, in relation to public open space, it states that the objective is "to protect, retain and provide for recreational uses, open space and amenity facilities with the presumption against developing land zoned public open space for alternative purposes, including public open spaces within housing estates".

It refers to the protection, retention and provision of such open space. The lands herein are privately owned and one has to ask what is to stop the owner of the land from enclosing the property which he owns. Clearly, zoning of the lands as public open space does not have the effect of making the lands available to members of the public in the Bishopstown area. I should add that given my view that the use of the term "public open space" is descriptive in form, it is not clear that the applicant would be in any different position had the lands in question merely been zoned as "open space".

The proceedings in this case involved a combined leave and substantive hearing. I have reached the conclusion that the applicant is not entitled to the reliefs sought in these sets of proceedings given my view that the zoning is future looking and to some extent aspirational. It does not deprive the applicant of ownership of the land. I cannot see any basis upon which the applicant has been deprived of compensation he would otherwise have been entitled to obtain.

I do have a concern about one aspect of the zoning. That relates to the question as to whether or not the zoning of the lands as public open space could be understood to include in the dwelling house and its curtilage. There is an issue as to whether the zoning of the house and its curtilage is appropriate or proportionate having regard to the overall objectives of the development plan and I will hear the parties further on this aspect of the case.