THE HIGH COURT

[RECORD NO. 2017 999 JR]

BETWEEN

PINEWOOD WIND LTD.

APPLICANT

AND

THE MINISTER FOR HOUSING, PLANNING AND LOCAL GOVERMENT

RESPONDENT

AND

LAOIS COUNTY COUNCIL

NOTICE PARTY

AND

[RECORD NO 2017 1000 JR]

BETWEEN

ELEMENT POWER LTD

APPLICANT

AND

THE MINISTER FOR HOUSING, PLANNING AND LOCAL GOVERNMENT

RESPONDENT

AND

LAOIS COUNTY COUNCIL

NOTICE PARTY

JUDGMENT of Ms. Justice O'Regan delivered on the 7th day of December 2018

Issues

1. Both of the above mentioned applicants have identical claims as against the Minister arising from a direction issued by the Minister on the 28th September 2017 save for the fact that Pinewood has a current application pending for planning permission for a wind farm, whereas Element does not.

2. Leave to maintain the within judicial review challenge to the Minister's decision / direction of the 28th of September 2017 was afforded by order of the 18th December 2017.

3. The statement of ground is a 21 – page document with the reliefs claimed therein divided into the following categories: -

(i) Failure to consider the applicants' submissions;

(ii) Failure to afford reasons for the decision;

(iii) Failure to have any reasons for the decision / irrationality;

(iv) Failure to carry out a strategic environmental assessment or screening for same;

(v) Failure to carry out an appropriate assessment or screening for same;

(vi) Failure to have regard to s. 15 of the Climate Action and Low Carbon Development Act, 2015.

4. The respondent Minister issued a direction to Laois County Council (which was enclosed with a letter addressed to the Chief Executive of the County Council bearing date the 28th September 2017) pursuant to s. 31 of the Planning and Development Act 2000 as amended (hereinafter "P and D Act") requiring the Planning Authority pursuant to s. 31 (2) to comply with the direction and thereby alter, in accordance with the direction, the Laois County Development Plan 2017 – 2023. The text of the direction was to delete the setback distance of 1.5 km from schools, dwellings, community centres and all public roads in all areas open for consideration for wind farm development. In addition, the development plan was to include the yellow map and to remove the red map.

Submissions

Failure to have regard to the applicants' submissions

5. The applicants' arguments are as follows: -

(a) There is an express statutory obligation on the Minister to provide reasons under s. 31 (7) (c) and s. 31 (7) (11) of the P and D Act.

(b) The wording of the section obliges the Minister to "take into consideration" the applicants' submissions and that equates to a higher standard of obligation than "having regard to".

(c) The applicants rely on the decision of Finlay – Geoghegan J. in *North Wall Property Holding Company Ltd. v. Dublin Docklands Development Authority* [2008] IEHC 305, where, at Para. 60 she considered that a person who has property

rights that could be affected by a decision taken should be given the opportunity of making submissions and having those submissions considered.

(d) The applicants argue that there is nothing in the documents relied upon by the respondent to show the submissions were given reasonable consideration.

6. The respondent's response is as follows: -

(a) Reference in s. 31 (7) (c) of the P and D Act provides that not later than two weeks after receipt of a notice by the Minister of intention to issue a direction, the manager of the relevant planning authority is obliged to publish notice of the draft direction which shall state the reasons for the draft direction, that a copy of the direction may be inspected and that written submissions may be made to the planning authority during the two week period which shall be taken into consideration by the Minister before a direction is made. The respondents suggest that this provision should be read in the light of s. 31 (8) which provides that the manager shall prepare a report on any submission under subs. 7 (c) which report is then to be furnished to the Minister. Further, subs. 9 is relevant in that the report is to summarise the views contained in the submissions. The respondents argue that a very full summary of the submissions was furnished to the minister and no prejudice arose to the applicants by reason of the fact that the full text of the submission had not been furnished and indeed the applicants have not pointed out any specific prejudice. Further, it is for the applicants to establish that the Minister failed to consider the applicants' submissions.

The respondents rely on the following case law: -

(i) In *O'Brien v. An Bord Pleanala* [2017] IEHC 773, Costello J held that the board was not required to expressly engage with each individual submission and suggests that this applies equally to a s. 31 direction.

(ii) In *Langford v. An Board Pleanala* 12th March 1998 (McGuinness J.) the court accepted that there was a rebuttable presumption of validity of a decision and act of a public authority exercising statutory powers and duties, and stated that the onus of proof lies squarely on the applicant.

(b) Under s. 31 (11) the Minister is to consider the report furnished and any submissions made to him by the elected members and as the managers' report did include full submissions on the part of the applicants it was not necessary for the Minister to respond to the views expressed in the submissions.

(c) The Minister was fully engaged in the entirety of the process and accordingly would have been aware of the prior submissions made by the within applicants which were similar in substance to the submissions made by them to the Minister in this portion of the process.

(d) In *McEvoy v. Meath County Council* [2003] 1 IR 208, Quirke J. was discussing the obligation "to have regard to" and expressed himself satisfied that this duty "*is to inform itself of and give reasonable consideration to . . .*" The respondents therefore argue that the wording of "have regard to" is similar to "take into consideration".

Discussion relating to failure to have regard to the applicants' submissions

7. It is noted from the letter of the 28th September 2017 to the chief executive that the Minister indicated that he had carefully considered the report of the chief executive and by definition therefore he indicated that he had considered the summary as contained in that report of the submissions of the applicants.

8. Given that the onus of proof is squarely on the applicants to demonstrate that notwithstanding that there was no reference to the applicants' submissions in the direction or cover letter of the Minister and the given jurisprudence referred to in legal submissions, in particular having regard to the fact that a rebuttable presumption of validity exists, I am satisfied that the applicants' burden of proof has not been discharged.

Failure to give reasons

9. The applicants' arguments are: -

(a) The stated reasons within the Minister's direction relate to the deletion of the red map and the setback requirements but there is no mention whatsoever of the yellow map.

(b) The stated reasons amount to the necessary proof to intervene by issuing the draft direction but do not amount to reasons for adopting the yellow map.

(c) The applicants refer to *Connolly v. An Bord Pleanala* [2016] IEHC 624 where the court considered the purpose of reasons which was to understand the decision made, to know whether or not grounds existed to challenge same and to enable the court to engage with the judicial review process. The Supreme Court summarised the fact that it was for the decision maker to take into account relevant matters and to disregard irrelevant matters. In considering reasons, it is the view of the reasonable observer on a reasonable inquiry in determining whether or not the reasons requirement of a decision maker was properly observed.

(d) The fact that the Minister may not have had a problem with the yellow map is not a reason according to the applicants to include the yellow map in the direction to the local authority.

(e) The applicants refer to the judgment of Clarke J. in C*hristian & Ors. v. Dublin City Council (No.1)* [2012] 2 IR 506 when the court observed that though there was no general duty to give reasons in respect of general policy the means of implementation of that policy (also referred to as the nuts and bolts of the policy) did give rise to a duty to give reasons as this had the potential to impact on the rights of individuals.

(f) The applicants argue that there is nothing to suggest that reasons were given for adopting the yellow map within the decision of the Minister or indeed within the development plan of the local authority.

(g) By rejecting the red plan, it could not be said that the yellow plan was thereby reinstated.

(h) In *Tristor v. Minister for the Environment, Heritage and Local Government* [2010] IEHC 397, Clarke J, indicated that the respondent must provide reasons not only for its intervention but for the type of intervention selected. During the course of his judgment, Clarke J. indicated: -

> *"What the Minister is entitled to do is to specify the measures that need to be taken to ensure that any failure to comply with the Act is remedied. . . . The Minister was obliged to afford some appropriate level of ability to make representations to all interested parties as to the precise measures which he ought to have imposed in order to remedy the situation."*

(i) The Minister is not constrained by s. 31 to revert to the yellow plan.

(j) The chief executive said that there is an evidence base for the 2011 map. This informed the revisions to be made to the 2017 map, and amendments were made to reflect this policy. There is no similar statement in respect of the yellow map.

(k) The applicants argue that as there was no change in the landscape character then the identity of the areas which could accommodate wind farms should have been similar to the 2011 map. However, the 2017 map was vastly different in that it reduced substantially the areas considered to be preferred areas for wind farm development – there were four areas identified in 2011 whereas there is only one area identified in the yellow map directed to be implemented by the Minister.

10. The respondent resists the applicants' arguments as follows: -

(a) It is necessary to read the Minister's direction together with his two prior submissions to the local authority in connection with the process of formulating the development plan and it is clear from a reading of the direction and cover letter both dated the 28th September 2017, together with the prior submissions made by the Minister bearing date 17th November 2016 and the 5th May 2017, that the Minister did not have a difficulty with the yellow map save insofar as it incorporated the 1.5 km setback.

(b) The Minister has a limit on his powers under s. 31 and he is not a planning authority and cannot engage in policy but rather has a supervisory role. Therefore, the adoption of the yellow map was appropriate given that in the Minister's submissions of the 17th November 2016 when the yellow map was proposed together with the setback of 1.5 km the Minister only objected to the 1.5 km setback.

(c) The respondent referred to the judgment of Clarke J. in *Tristor* and suggests that it is a matter for the Planning Authority to determine which of the range of possible strategies that could be pursued are included in a development plan and relies on this judgment to the effect that the Minister is not entitled to impose an alternate strategy, in particular in the light of the fact that it is clear from the submissions of the 17th November 2016 that his only difficulty at that time was the yellow map incorporating the setback distance. In this regard, in *Tristor*, Clarke J. stated that it is only if the strategy as set out is non – qualifying, that the Minister can intervene.

(d) The respondents say that the test as mentioned in *Connolly* aforesaid and previously in Christian is that of the reasonable observer.

(e) The respondent relies on the Laois County Development Plan methodology identified in Appendix 5 of the draft plan as supporting the yellow map.

(f) The applicants' argument relies on a compare and contrast exercise with the 2011 plan which is not justified in the circumstances as the 2017 to 2023 development plan is a standalone document.

(g) In *Sandyford Environmental Planning and Road Safety Group Ltd. v. Dun Laoighaire Rathdown County Council*, [2004] IEHC 133 a judgment of McKechnie J. of the 30th June 2004, the court indicated that the mere fact that stated reasons were a repetition of objective A does not make the reason invalid per se if otherwise that is not the case. (The respondents have fairly identified that the comment was made in an entirely different context to the within context (see Para. 45 of that judgment) nevertheless the rationale that reasons can be valid with respect of two different portions of a given process is relied on).

(h) It is clear from Part 4 of Appendix 5 of the draft development plan and the methodology therein identified, that reasons do exist within the context of the development plan for the yellow map, namely extent of capacity for more wind farms because of the developments to date; the option for solar renewable energy and tourism promotion among other matters (matters which are not included in the 2011 WES). In this regard the respondent argues that this different methodology provides an evidence base which underpins the yellow map.

(i) The respondent points to s. 10 (8) of the P and D Act to the effect that: -

> "There shall be no presumption in law that any land zoned in a particular development plan (including a development plan that has been varied) shall remain so zoned in any subsequent development plan."

to support the fact that the applicants have no expectation as to what zoning for wind development would occur in the 2017 – 2023 development plan and the proposed compare and contrast exercise suggested by the applicants is flawed and is made in the face of s. 10 (8) above.

(j) Appropriate reasons are to be found in reason 3 in respect of the yellow map, namely that the planning authority had been advised in the Minister's submissions of the 5th May 2017, of the Minister's opinion in which it is suggested it is clear that the Minister was looking for the Planning Authority to revert from the red map to the yellow map without a setback.

(k) The respondent refers to *Christian* at Para. 76 where it is indicated that if the formal document refers to other documents then reasons can be contained within those other documents. In addition, Para. 82 of that judgment is relied

on where it is stated that a draft development plan is itself a reasoned document.

Discussion of failure to give reasons

11. In *O'Donoghue v. An Bord Pleanala* [1991] ILRM 750, at p. 757, Murphy J. stated that: - "*It has never been suggested that an administrative body is bound to provide a discursive judgment as a result of its deliberations*."

12. In my view, it is clear from the Minister's submissions of the 17th November 2016 and the 5th May 2017, when read together that the Minister was in favour of the yellow map and removal of the setback distances for the purposes of compliance with statute and guidelines.

13. Furthermore, I am satisfied that in order to ascertain reasons and the nature of same, it is necessary to read the entirety of Appendix 5 as dealing with the wind energy strategy of Laois County Council rather than highlighting small portions and taking same in isolation. In that appendix, it is mentioned that certain methodology has been used in or about developing the wind energy strategy and this coupled with the balance of Appendix 5, does in my view, set out a rational basis for the incorporation of the yellow map.

14. Although there may be no change to the landscape character of Co. Laois, nevertheless clearly there is a change to the landscape character assessment policy of Laois County Council and this of itself identifies a change from that which prevailed when formalising the 2011 map.

15. I agree that having regard to s. 10 (8) of the P and D Act, that a compare and contrast approach is not the relevant mechanism to assess the giving of reasons or the rationale behind the wind energy strategy. Notwithstanding that the draft plan refers to the 2011 map, I am not satisfied that reference in the draft development plan to the 2011 map thereby constrains Laois County Council to explain in detail any changes in the 2017 map over the 2011 map, although as aforesaid, I am satisfied that the methodology changes and the matters identified in that section of Appendix 5 do support the view that the policy of Laois County Council has changed over that which prevailed in 2011.

16. In p. 4 of appendix 5 of the draft development plan for 2017 – 2023, it is stated that the document is to clarify the Council's policy towards renewable energy development in the county. The applicants lay considerable stress on p. 22, where it states: - "Having regard to the landscape character assessment policies, amendments have been made to the areas to reflect these policies."

17. The applicants have suggested that there has been no change to the landscape and nevertheless a substantial change to the policies in 2017 over that which prevailed in 2011. It is not in my view possible to rely solely on the quoted sentence above to understand the policies which are included in the development plan for 2017 - 2023, but rather it is necessary to have regard to the entirety of the Appendix to inform oneself as to the policies of Laois County Council with regard to wind energy strategy and this of course includes the fact that it is stated that the methodology has been primarily informed by a number of considerations including existing and approved wind farms, capacity potential for solar energy, available wind data and transmission networks, settlement patterns, population densities, relevant environmental, tourism promotion and landscape policies in the development plan.

18. I am not satisfied that the applicants can succeed in a challenge to the Minister's direction by reason of an assertion that no reason was provided for the adoption of the yellow map (in circumstances where I am satisfied that having regard to the entirety of the Minister's direction and cover letter as well as his prior submissions of November 2016 and May 2017, sufficient reasons have been furnished to understand the decision and to know whether or not grounds of challenge exist and to enable the court to engage with judicial review).

There are no reasons / irrationality

19. This aspect of the applicants' grounds overlaps substantially with the suggested ground that no reasons were afforded and accordingly the foregoing paragraphs 9-18 remain relevant to the applicants' irrationality argument.

The applicants' arguments

20. Central to the applicants' submissions in respect of a failure to have any reasons for the decision and in particular the incorporation of the yellow map in the Minister's direction is the fact that the yellow map differs from the map which was part of the 2011 – 2017 development plan without an explanation for the changes. The applicants argues that neither the respondent nor Laois County Council provided a rational explanation for the yellow map. Based on the comparisons between the 2011 situation and that of the yellow map in 2017, the applicants identifies the following examples of irrationality:

> (i) Four preferred areas were identified in the 2011 map whereas there is only one identified in the 2007 map, notwithstanding the assertion that the maps were drawn up on the basis of the same criteria without explanation.
>
> (ii) There were changes to the areas open for consideration without explanation or without any change to the landscape character assessment.
>
> (iii) The WES (wind energy strategy) policies are identical but the maps have changed.
>
> (iv) There is now available a transmission network which makes wind farming more suitable particular to lands owned by Pinewood, however this availability has not resulted in any increased area identified either as a preferred area or an open to consideration area.
>
> (v) It is argued that there is no explanation in the landscape character assessment identifying changes in the treatment to the maps whether physical policy or designation.
>
> (vi) There is a ban on contour heights of over 225 m OD without explanation.

21. The respondent counters: -

> (a) The identification of areas suitable for wind farms is a matter for planning policy with limited scope for intervention by the Minister under Article 31 (1) subs. A – D.
>
> (b) The principles in *O'Keefe v. An Bord Pleanala & Ors* [1993] 1 IR 39 apply to the policy decision of the county council.

In that case, the decision impugned was to the effect that the board having considered the evidence submitted was satisfied that the erection and operation of the station and ancillary facilities as proposed would not be contrary to the proper planning and development of the area provided that the development is undertaken in accordance with the conditions specified. The court was satisfied that the decision coupled with the detailed conditions attached and the reasons for each of same was an adequate discharge of the board's statutory duty to state the reasons for its decision. In the course of his judgment, Finlay C.J. stated: -

> *"What must be looked at is what an intelligent person who had taken part in the appeal or had been appraised of the broad issues which had arisen in it would understand from this document, these conditions and these reasons."*

(c) In the 2006 Wind Energy Guidelines (exhibited in the replying affidavit of Neil Cussen on behalf of the respondent of the 30th April 2018 at Para. 12) the objective of the Wind Energy Development Plan should set out objectives to secure the maximum potential from the wind energy resources commiserate with supporting development that is consistent with proper planning and sustainable development. The identification on the maps of the key areas where there is significant wind energy potential and where subject to the criteria such as design and landscape planning, natural heritage, environmental and amenity considerations, wind energy development will be acceptable in principle. The respondent argues that based on this objective it is clear that a development plan is not just for the purposes of maximising wind energy but must have regard to other matters such as permissions already granted and the sustainable development of the county which is in effect a balancing exercise for the Planning Authority. In accordance with *O'Keefe* aforesaid such planning policy can only be set aside if there is no basis for the decision made. At p. 71 of Finlay C.J.'s judgment in *O'Keefe* it was indicated that the court could not interfere with the decision of an administrative decision making authority merely on the grounds that it is satisfied on the facts as found it would have raised different inferences and conclusions or that the case against the decision made by the authority was much stronger than the case for it. At p. 72, Finlay C.J. indicated that: -

> *" . . it is necessary that the applicant should establish to the satisfaction of the court that the decision-making authority had before it no relevant material which would support its decision."*

(d) The respondent argues that there is no substance to the applicants' argument in respect of irrationality as the rationale and methodology is within the development plan namely Appendix 5.

(e) It is clear from the submissions of the Minister to the local authority during the earlier portion of the process, that the Minister thought that the setback and the red map constituted a breach of the statutory provisions and the guidelines whereas it is also clear that subject to a deletion of the setback, the yellow map did not constitute such a breach.

(f) The Minister's role is confined to remedying the non – compliance with the P and D Act therefore it is not the Minister's function to substitute a map which he would prefer over that which was previously supplied by the planning authority namely the yellow map, subject to the removal of that which offended the statutory requirements and guidelines namely the setback provision.

Discussion of no reasons/irrationality

22. In my view, it is clear from the introduction to Appendix 5 that same was for the purposes of clarifying the policy in respect of renewable energy and therefore it appears to me that it is necessary to review the entirety of Appendix 5 when considering such policy which would therefore include the methodology section of Appendix 5.

23. Furthermore, it appears to me that the applicants are incorrect in their submissions to the effect that there has been no change advised in respect of the landscape character assessment policy of the county council in particular, if one compares the methodology identified in the earlier plan with the 2017 Appendix 5.

24. The applicants' arguments are premised on a review of the identification of the preferred areas by looking solely at the sentence contained in p. 22 of Appendix 5 which states: - "Having regard to the landscape character assessment policies, amendments have been made to the areas to reflect these policies."

25. The applicants argue that the landscape character assessment has remained the same and that may be the case, however it is clear that the sentence above relates to the landscape character assessment policies as opposed to merely the landscape character or an assessment thereof independently of the policies. It is also clear from the above quoted sentence that in fact there is a change required in the map in the 2011 plan to reflect these policies. Therefore, the sentence identifies a need for a change in the 2017 plan over that in the 2011 plan based on the 2017 policies.

26. As mentioned aforesaid, I am of the view that it is not an appropriate exercise to compare the 2017 plan with the 2011 plan on the basis that it is incumbent upon the development authority to explain any changes. I accept that the development plan of 2017 – 2023 is a standalone document, notwithstanding that, within the development plan there is various reference to the 2011 plan and its map created for the purposes of its wind energy strategy.

27. In the circumstances I am not satisfied that the applicants have discharged the burden of proof identified by Finlay C.J. aforesaid in *O'Keefe* for the purposes of securing an order of *certiorari* on the basis that the Minister acted irrationally in directing the incorporation of the yellow map subject to the removal of the setback area.

Failure to have regard to s. 15 of the Climate Change and Low Carbon Act 2015

28. The applicants' complain that the respondent erred in law in failing to have regard to s. 15 of the 2015 Act which requires relevant bodies to have regard to the furtherance of the national transition objective and the objective of mitigating greenhouse gas emissions. It is argued that there is no evidence in the map or the Minister's direction or the associated materials that the Minister had any regard to s. 15 aforesaid and as a consequence it is argued that the yellow map greatly reduces the potential for wind energy production in Co. Laois and therefore flatly contradicts the objectives identified in s. 15.

29. The respondent argues that this is not correct. It is accepted that in s. 15 (1) of the 2015 Act, a relevant body shall in the performance of its functions have regard to the furtherance of the national transition objective and the objective of mitigating

greenhouse gas emissions and adapting to the effects of climate change in the State. The respondent refers to reason 2 (a) for making the direction which states: -

> "2 (a) The Laois County Development Plan 2017 -2023 does not meet with the requirements of s. 10 (2) (n) of the P&D Act as the effect of the policy EM7, s. 6.1 (Appendix 5) and revised wind energy map 1.6.5, is to severely undermine and negate practical measures to adopt to climate change and reduce reliance on fossil fuels."

30. S. 10 (2) (n) of the P and D Act 2000 aforesaid refers to the promotion of sustainable settlement and transportation strategies including the promotion of measures to reduce energy demand in response to the likelihood of increases in energy and other costs due to long term decline in non-renewable resources, reduce anthropogenic greenhouse gases emissions and address the necessity of adaptation to climate change.

31. The respondent argues that the Minister clearly had regard to greenhouse gas emissions and climate change and therefore it is clear that consideration in accordance with s. 15 of the 2015 Act was incorporated within the Minister's direction.

32. In addition, the respondent argues that in the Minister's submission to the county council on the 5th May 2017, in seeking to move the red map from the proposed development plan it is stated *inter alia* that the plan identified in the red map: - " . . .would be significantly in conflict with national and regional policy objectives to support the development of wind energy as a crucial component of meeting Ireland's commitments to reducing greenhouse gas emissions and increasing renewable energy resources."

33. In the circumstances, in my view, having regard to the foregoing there is no substance to the applicants' argument that the Minister failed to have regard to s. 15 of the 2015 Act.

34. In accordance with the judgment of Kearns J. in *Evans v. An Bord Pleanala* [2004] WJSC-HC 4037 (7th November 2003) the fact that s. 15 of the 2015 Act was not recited in the direction does not mean that proper consideration was not given. In the Evans matter, it was argued that the board had failed to take into account government policy, however, at p.23 of the judgment it was held non – recitation of the guidelines was not sufficient evidence on the part of the applicants to demonstrate that the respondent failed to have regard to the guidelines.

Failure to have conducted a strategic environmental assessment (SEA)

35. The applicants' argue that the respondent erred in failing to carry out a SEA or screening for SEA of the yellow map. In the statement of grounds, it is argued that this requirement arises as a consequence of Directive 2001/42/EC. However, as argued by the respondent, this portion of the applicants' claim herein does not involve an assertion that the Minister failed to transpose the EU directive into Irish law. The respondent further attempts to avoid this ground on the basis of the provisions of Regulation 3 of SI 691 of 2011 dealing with the content of the grounds in a Statement of Grounds for judicial review, namely that the applicants should state precisely each ground giving particulars where appropriate and identifying in respect of each ground the facts or matters relied upon as supporting the ground.

36. In submissions, the applicants rely on Regulation 9 of SI 435/2004. It is argued by the applicants that in the definition section "competent authority" includes the Minister's direction as competent authority is defined as an authority or authorities which are jointly responsible for the preparation of a plan or programme or modification to a plan or programme. Thereafter there is a mandatory requirement under s. 9 (1) to carry out an SEA of all plans and programmes prepared for agricultural, forestry, fishery, energy, industry, transport, etc. and which sets out the framework for future development. The applicants argue that reference to energy incorporates reference to the Wind Energy Strategy within the Laois County Development Plan and therefore is captured by the requirement in Regulation 9 to conduct an SEA.

37. The respondent's argument is to rely on Regulation 3 (2) of SI 435/2004 which provides *inter alia* that the provisions of Articles 9 - 17 thereof shall not apply to the making or variation of a development plan under s. 9 – 12 of the P and D Act 2000.

38. S. 10 of the P and D Act 2000 refers to a development plan which should set out the overall strategy for proper planning.

39. S. 31 (17) provides that the Minister's direction is deemed to have immediate effect and its terms are considered to be incorporated into the plan, or, if appropriate, to constitute the plan. The respondent therefore argues having regard to the foregoing that it is clear that Regulation 9 of SI 435/2004 does not relate to the Minister's direction.

40. The applicants counter that if there is any ambiguity in the respondent's argument relative to the non – application of Regulation 9 of SI 435/2004, then the provisions should be read as applying to the Minister.

41. No such ambiguity has been pointed out and in my view the argument presented by the Minister aforesaid is correct.

Appropriate assessment

42. The applicants argue that an appropriate assessment pursuant to Regulation 42 of SI 477/2011 has not been carried out nor has there been a screening for same. It is argued that there is a breach on the part of the Minister to comply with Regulation 42.

43. The respondent argues that in fact this obligation must be read in the light of Regulation 42 (20) which states :-

> "For the avoidance of doubt, notwithstanding that the making, adoption and consent procedures relating to plans and projects which fall under the Planning and Development Acts 2000 and 2011do not come within the scope of these regulations . . .".

Accordingly, SI 477 of 2011 does not apply to the Minister's decision which as aforesaid under s. 31 (17) forms part of the County Council Development Plan.

44. The applicants accepts that there is no challenge to the implementation or transposition of the EU Directive and therefore in order to avoid the implications of Regulation 42 (20) as requiring the Minister's directive to be preceded by an appropriate assessment or screening for same, it will be necessary to find some ambiguity in the effective exclusion provided in Regulation 42 (20), however, again, no such ambiguity has been identified by either the applicants or indeed by the court.

Conclusion

45. In the circumstances I am not satisfied that the applicants have discharged the burden required to secure an order for *certiorari* and other relief, and accordingly the relief claimed in the statement of grounds is refused.