Neutral Citation: [2013] IEHC 60

THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 291 J.R.]

IN THE MATTER OF AN APPLICATION PURSUANT TO S. 50 OF THE PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED) AND

IN THE MATTER OF AN APPLICATION

BETWEEN

MARGARET McCALLIG

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

DONEGAL COUNTY COUNCIL AND P.J. MOLLOY

NOTICE PARTIES

JUDGMENT of Mr. Justice Herbert delivered the 24th day of January 2013

1. By order of this Court made on the 6th April, 2011, the applicant was granted leave to apply for judicial review for an order of *certiorari* quashing the decision of the respondent made on the 11th February, 2011, to grant permission, subject to 22 conditions, to the second notice party for a proposed wind-farm development near Glenties, Co. Donegal. Leave was also granted to seek a declaration that the 12th such condition was *ultra vires* the powers of the respondent on the ground that it was imposed to supplement an inadequate environmental impact statement and, was contrary to a Circular Letter P.D.2/07, N.P.W.S. 1/07, issued by the Department of the Environment, Heritage and Local Government. Leave was also granted to seek injunctive and other reliefs on the grounds stated in the Statement of Grounds verified by the affidavit of the applicant sworn on the 5th April, 2011. A Statement of Opposition was delivered by the second notice party on the 22nd September, 2011, verified by an affidavit of P.J. Molloy sworn on the 22nd September, 2011. A Statement of Opposition was delivered by the respondent on the 5th October, 2011, verified by an affidavit of Chris Clarke sworn on the 5th October, 2011.

2. The Statement of Grounds delivered by the applicant advanced 23 grounds. A number of these grounds were abandoned by senior counsel for the applicant at the hearing before me. I am satisfied that the remaining grounds may be stated in an abbreviated though nonetheless comprehensive form as follows.

3. The applicant asserts that the respondent erred in law and acted without jurisdiction in deciding to grant permission for the proposed development which included lands owned by her without her written consent as required by s. 34 of the Planning and Development Act 2000, and, article 22(2)(g) of the Planning Development Regulations 2001. It also included land owned by a number of other landowners without their written consent.

4. The applicant contends that the respondent erred in law and failed to comply with the principles of *audi alteram partem* and of natural and constitutional justice in failing to consider properly or at all her submissions regarding this unauthorised inclusion of her land in the proposed development, and/or in accepting an insufficient and erroneous statement dated the 23rd September, 2009, by solicitors that the landowners whose properties were within the site of the proposed development had all entered into a legal agreement to allow their lands to be developed as part of the proposed development, and/or in disregarding as an issue of disputed title her submissions that she had not consented to the inclusion of her said lands in the proposed development.

5. The applicant claims that the decision of the respondent was ultra vires as based upon a fundamental error as to the nature of the site and the lands comprised in the proposed development. She claims that the respondent considered lands to be part of that development which were not in the legal ownership of the second notice party and of which he did not have control. She claims that the respondent acted without jurisdiction in deciding to grant planning permission affecting those lands, imposing conditions which affected them and entering the same in the Planning Register thereby materially devaluing these lands.

6. The applicant submits that the respondent erred in law, and in breach of Council Directive 85/337/E.E.C. of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, O.J. L 175/40 5.7.1985, (as amended), in deciding to grant permission for the proposed development subject to a condition that a management plan be prepared for lands and habitats within the site of the proposed development in order that these lands might be managed in a sustainable way and to benefit local wildlife, in circumstances where information contained in the environmental impact statement with regard to the likelihood of wild birds being significantly affected by the proposed development was found by the respondent's Inspector to be less than robust and, where further information was not sought and considered by the respondent before reaching a decision to grant permission.

7. The applicant claims that the respondent failed to have regard to Circular Letter P.D.2/07, N.P.W.S. 1/07, from the Department of the Environment, Heritage and Local Government directing that conditions should not be imposed under s. 34(4)(a) of the Planning and Development Act 2000, for the purpose of completing an inadequate environmental impact statement, as such conditions were not a proper compliance with the requirements of Council Directive 85/337/E.E.C., (as amended), and the principle of public consultation enshrined in Council Directive 2003/35/E.C., was rendered nugatory by such conditions.

8. The applicant claims that the environmental impact statement was prepared on the erroneous assumption that no part of the development site was within a Gaeltacht area. That the respondent erred in law in deciding to grant permission for the proposed development, the entire site of which is within an important Gaeltacht area which it is government policy to sustain and promote, without first obtaining and considering information from the second notice party as to whether the cultural heritage of that Gaeltacht was likely to be significantly affected by the proposed development.

9. The applicant claims that the respondent failed to have any or any adequate regard to Council Directive 92/43/E.E.C. of the 21 May, 1992 on the conservation of natural habitats of wild fauna and flora, O.J. L 206/7 22.7.1992, (Habitats Directive) and Council Directive 79/403/E.E.C. on the conservation of wild birds, O.J. L103/1, 25.4.1979, (Conservation of Wild Birds Directive) and that the decision of the respondent to grant permission for the proposed development is contrary to these Council Directives as it was made without any proper or sufficient information on wild birds likely to be significantly affected by the proposed development and in circumstances where the respondent's Inspector drew attention to the shortcomings of the environmental impact statement in this regard.

10. The applicant submits that the decision of the respondent to grant permission for the proposed development is irrational and contrary to plain reason and to common sense.

11. A lengthy Statement of Opposition was filed in reply by the second notice party. I am satisfied that the grounds of opposition advanced by the second notice party are comprehensively set out in the following paragraphs.

12. The second notice party contends that it was reasonable for the respondent to assume in arriving at its decision to grant permission for the proposed development that the requirements of article 22(2)(g) of the Planning and Development Regulations 2001, had been complied with because Gallagher and Brennan, Solicitors, in a letter dated the 23rd September, 2009, addressed, "To whom it may concern" which was submitted to the first notice party had stated that they represented landowners with properties within the site boundary of the proposed development and confirmed that their clients had given consent in accordance with article 22(2)(g) of the Planning and Development Regulations 2001, to the second notice party to include their lands in the planning application. The second notice party also claims that any dispute as to legal title to the lands claimed by the applicant or any part of them was not a matter for the respondent to determine but was a civil matter which the applicant might litigate in appropriate proceedings.

13. The second notice party denies that any works will be carried out on any part of the applicant's lands because the second condition attached by the respondent to its decision to grant permission for the proposed development requires that the four turbines nearest to the applicant's land—T. 32, T.36, T.37 and T.38—be omitted from the proposed development for the stated reasons of reducing the risk of habitat degradation and environmental pollution associated with development in these locations and thereby eliminating any necessity for any development works to be carried out on the applicant's land as part of the proposed development.

14. The second notice party does not accept that any part of the proposed development site is located in a Gaeltacht area by reason of the fact that the maps annexed to the Co. Donegal Development Plan 2006-2012 do not show any part of the proposed development site as located in a Gaeltacht area and the first notice party did not consider that any part of the development site was in a Gaeltacht area. The second notice party submits that even if the site is within a designated Gaeltacht area, the respondents Inspector considered that the proposed development would not seriously affect the cultural heritage of that area for the reasons stated by her at p. 46 of her Report and it was within jurisdiction and lawful for the respondent to reach its decision to grant permission for the proposed development without seeking further information from the second notice party.

15. The second notice party contends that at pp. 41 to 44 inclusive of her Report the respondent's Inspector considered in some detail the information furnished in the environmental impact statement regarding aspects of flora and fauna, especially wild birds in the vicinity likely to be significantly affected by the proposed development. While accepting that the respondent's Inspector considered that an all - year - round survey would give greater confidence, the second notice party submits that the respondent was acting within jurisdiction in considering that the information contained in the environmental impact statement was sufficient.

16. The second notice party submits that the respondent acted within jurisdiction in attaching the 12th condition to the decision to grant permission for the proposed development for the stated purpose of ensuring that lands and habitats within the development site were managed in a sustainable way and to benefit local wildlife, during the construction phase of the proposed development to during its permitted life span. The second notice party contends that this 12th condition is concerned solely with detail and was not an attempt on the part of the respondent to avoid seeking further information.

17. The second notice party contends that there was nothing manifestly irrational or unreasonable in the assessment carried out by the respondent based upon the environmental impact statement and the report of their Inspector such as would warrant an order quashing the decision of the respondent to grant permission for the proposed development. The second notice party submits that the respondent had proper regard to all relevant considerations and that its decision is lawful, within jurisdiction, reasonable and not contrary to common sense.

18. In addition to a general traverse of every claim made in the applicant's Statement of Grounds the respondent opposes the application for judicial review on the grounds set out in the following paragraphs.

19. The respondent submits that it is not a function of the respondent to determine matters pertaining to the ownership of land or property. Insofar as the applicant for planning permission is required to show title to or an interest in property and, insofar as the respondent must be satisfied as to such title or interest there was sufficient evidence regarding the second notice party's ownership or control of the subject matter lands before the respondent so as to enable it to make its determination in favour of the second notice party.

20. Without prejudice to the foregoing the respondent does not admit and awaits proof that its decision to grant permission for the proposed development permits of any development on the applicant's land or imposes any condition or conditions affecting her land or requires management plans for areas including the applicant's land as alleged by her.

21. The respondent submits that in considering applications or appeals planning authorities and the respondent are required to give primary consideration to proper planning and sustainable development and it is therefore incorrect for the applicant to claim that the decision of the respondent to grant permission for the proposed development will adversely affect any subsequent planning applications in respect of her land. Further, and without prejudice to the foregoing, the respondent submits that the decision to grant permission for the proposed development does not, of itself, permit the carrying out of any development on the applicant's lands or require the applicant to submit to any restriction as regards the use of her lands so as to comply with any of the conditions imposed by the respondent on the decision to grant permission for the proposed development.

22. The respondent submits that it was exercising its discretion as a specialist body in determining the appeal in the instant case and contends that it had sufficient information on which to make a decision including, the planning application 09/30520, the material that had been before the first notice party, the applicant's appeal, the submissions thereon, and the report of its own Inspector.

23. The respondent submits that it fully complied with the principles of *audi alteram partem* and of natural and constitutional justice.

24. The respondent submits that the applicant is not entitled to rely on the provisions of Council Directive 85/337/E.E.C. (as amended) or of Council Directive 92/43/E.E.C. or of Council Directive 97/11/E.C., without pleading and specifying what (if any) provisions thereof transposed into Irish law have been infringed.

25. The respondent submits that it had adequate information in relation to the entirety of the proposed development in making its decision to grant permission. The respondent submits that it did not consider any inappropriate factors or fail to consider any appropriate factors or come to any unreasonable decision on the material before it. The respondent submits that the adequacy or otherwise of the environmental impact statement is a matter for it to determine, and denies that there is any basis for the applicant's contention that its decision to grant permission for the proposed development was unreasonable or irrational in this regard. The respondent submits that neither the environmental impact statement nor the environmental impact assessments were materially deficient as alleged by the applicant and that it did not err in imposing the 12th condition.

26. The respondent submits that the grounds advanced by the applicant do not amount to substantial grounds and the applicant is therefore not entitled to the reliefs claimed or any of them.

27. By reason of the claim by the second notice party that because of the 2nd condition attached by the respondent to its decision there can be no development on or affecting any part of the applicant's land and by reason of the non-admission on the part of the respondent that its decision permits any development on or affecting or, imposes any conditions in respect of the applicant's land, or requires a management plan for areas which include the applicant's land, the proper construction and scope of the 2nd condition became a significant issue during the course of the hearing of this application. This condition required that:-

> "Turbine numbers T.8, T.11, T.32, T.36, T.37 and T.38 shall be omitted from the scheme.
>
> Reason: To reduce the risk of habitat degradation and environmental pollution associated with the development in these locations."

28. The second notice party submits that the effect of this condition is to render unnecessary and unlawful any development works on or affecting any part of the applicant's land. This he states is so because the need for such development works,— widening of existing bog roads, surface water drains, road culverts, primary and final settling ponds, pre-buffer settlement areas, staked permeable silt screens and a peat regeneration area,—was predicated upon the construction, operation and maintenance of the four omitted turbines closest to the applicant's land, that is, T.32, T.36, T.37 and T.38. The second notice party submits that if no development works are required to be carried out on any part of the applicant's land as a consequence of the decision of the respondent, the applicant should not be granted an order of certiorari even if this Court should find that she had not consented to the making of the application for planning permission.

29. The applicant submits that the omission of these four turbines does not eliminate the necessity for development in the form of a peat regeneration area on her land and that these other works would be necessary to its construction and maintenance. The applicant submits that this peat regeneration area and four other peat regeneration areas form a material part of the overall development which must, by reason of the first condition annexed by the respondent to its decision to grant permission for the proposed development, be carried out and completed in accordance with the plans and particulars lodged with the initial application for planning permission as amended by the further plans and particulars submitted on the 23rd June, 2010, and which included all five of these peat regeneration areas. The applicant submits that the requirement for these peat regeneration areas is not dependent on the inclusion in the overall development of these four turbines or of the other two turbines also required by the terms of this 2nd condition to be omitted.

30. The application for judicial review in the instant case relates solely to the decision of the respondent on the 11th February, 2011, to grant permission for the proposed development. It was common case between the parties that judicial review was not sought by the applicant against any decision of the first notice party. However, it remains necessary to make reference to some of the documents generated and events which occurred prior to the decision of the respondent which the applicant now seeks to impugn. Pursuant to the provisions of s. 128 of the Planning and Development Act 2000, (as substituted), copies of these documents were required to be furnished to the respondent and, in the absence of any evidence to the contrary the court must assume that these documents were so furnished and were considered by the respondent before reaching its decision to grant permission for the proposed development.

31. Following a Notice of Intention to seek planning permission given on the 17th September, 2009, in the *Donegal Democrat* newspaper, the second notice party on the 25th September, 2009, applied to the first notice party, the relevant planning authority, for planning permission for a wind-farm consisting of 39 very large wind turbines together with a control building, an E.S.B. substation and compound, associated roads and a borrow pit at Glenties, Co. Donegal. The second notice party submitted the prescribed standard form application reflecting the mandatory provisions of article 22(1) of the Planning and Development Regulations 2001, (S.I. No. 600 of 2001). This form at para. 10 provides information regarding the legal interest of the applicant in the land. The following directions are given:-

> "If you are not the legal owner state the name of the owner." and
>
> "A letter of consent from the owner to make the application must be supplied as listed in the accompanying document."

32. In purported compliance with these directions two documents were submitted with the application for planning permission to the first notice party. The first document was a letter dated the 25th September, 2009, from Harley Newman, Planning and Development Consultants of Letterkenny, Co. Donegal acting on behalf of the second notice party. In the penultimate paragraph of this letter, under the heading "Consent" the author states as follows:-

> "All the landowners with lands associated with the proposal have given consent to the applicant, Mr. P.J. Molloy to make the application on their lands in accordance with article 22(2)(g) of the Planning and Development Regulations 2006. Furthermore, they have given consent to have wind turbines located within 500 metres of their dwellings to comply with para. 5.3(1)(g) of the Natural Resource Development Guidelines and Technical Standards as contained in Appendix A of

the Donegal County Development Plan 2006-2012. Finally they have given agreement if a predicted noise level of 43 dB(A)La10 is exceeded at any individual dwelling. These consents are contained in the attached letter from their solicitor Gallagher and Brennan.

An individual letter of consent is attached from Mr. Hugh McMonagle, who [sic] house is identified as No. 1 on the map attached with his consent. His consent confirms his agreement to the location of turbines within 500 metres of his house. All the other houses identified on the map are either persons covered by the Gallagher and Brennan consent letter or are located more than 500 metres from any turbine."

Annexed to this letter is a printed List headed, "Graffy/Mully Wind Farm – Landowners". This list takes the form of four parallel columns headed, "Landowner", "Address", "Folio", and "Turbine". I am satisfied on the evidence and I find that the applicant's name, address and folio number do not appear on this list.

33. The second document is the letter from Gallagher and Brennan, Solicitors, Letterkenny, Co. Donegal. It is dated the 23rd September, 2009, is addressed, "TO WHOM IT MAY CONCERN" and is headed – "Re: windfarm by Mr. P.J. Molloy at Mully/Graffey, Glenties, Co. Donegal". This letter states as follows:-

"We represent landowners with properties outlined in blue on the drawing submitted in support of the proposed wind farm by Mr. P.J. Molloy at Mully/Graffey, Glenties, Co. Donegal. I wish to confirm that the landowners have all entered into a legal agreement to allow their lands to be developed as part of this wind farm proposal. Having regard to the agreement reached between Jim Harley, Harley Newman Planning Consultants and Mr. Frank Sweeney, Area Manager, Planning Donegal County Council, I wish to confirm that my clients

(a) Give consent in accordance with article 22(2)(g) of the Planning and Development Regulations 2006, to Mr. P.J. Molloy to make the planning application on their lands and,

(b) Give consent to have wind turbines located within 500 metres of their dwellings to comply with para. 53(1)(g) of the Natural Resource Development Guidelines and Technical Standards, as contained in Appendix A of the Donegal County Development Plan 2006-2012.

(c) Give consent if predicted noise level of 43 dB(A)La10 is exceeded at any individual dwelling."

34. Article 22(2)(g) of the Planning and Development Regulations 2001 (as amended) requires that a planning application shall be accompanied,—where the applicant is not the legal owner of the land or structure concerned,—by the written consent of the owner to make the application. Appendix A of the Donegal County Development Plan 2006-2012 adopted on 11th July, 2006, provides that wind farms must not be located within 500 metres of any dwelling except where written consent of the owner has been obtained.

35. By a Notice dated the 19th November, 2009, given pursuant to the provisions of articles 22, 33 and 34 of the Planning and Development Regulations 2001, (as amended), the first notice party required the second notice party to submit Further Information in relation to the proposed development. At para. 2 of this Notice the first notice party identified five dwellings within 500 metres of turbines in respect of which the consent of the owners had not been submitted and, another six dwellings where the names submitted did not correlate with the landowners. At para. 3(a) of the Notice, the first notice party indicated that consent would be required from any third party landowners for any storm water disposal works affecting their lands. At para. 8(a) of the Notice, the first notice party required the second notice party to submit an appropriate assessment, as outlined in article 6(3) of the Habitats Directive regarding the potential impact of the proposed development on the natural habitats of wild fauna and flora to include measures to reduce and mitigate such impacts. At para. 8(d) of the Notice the first notice party sought a Method Statement in relation to the excavation, disposal and reuse of spoil including how surface water would be managed and controlled in affected areas. At para. 8(f) of the Notice, the first notice party requested a further assessment on possible risks of bog burst, peat instability and additional details on the habitats likely to be impacted upon by the construction of the extensive road network necessary for the proposed development. At para. 8(g) of the Notice, the first notice party sought additional avifauna surveys including winter surveys, breeding bird surveys and a number of vantage point surveys for birds of prey in late spring and autumn. An environmental impact statement had been submitted by Harley Newman on behalf of the second notice party to the first notice party on the 25th September, 2009, and it is a reasonable inference that these requests for further information followed upon a consideration of that document by the first notice party.

36. On the 23rd June, 2010, the second notice party submitted a revised application to the first notice party seeking planning permission for nineteen wind turbines of a smaller type, a control building, an E.S.B. substation and compound and associated site roads and works. This application provided further information to that contained in the environmental impact statement by the addition of the following reports:-

"A report dated April, 2010, by Roger Goodwillie, Applications Ecologist, which addressed the requirements at paras. 8(f) and 8(g) of the Notice as regards avifauna and related habitats.

A report dated June 2010, from Keohane Geological and Environmental Consultancy on the management of excavated materials and risk of peat landslide, addressing the requirements at paras. 8(d) and 8(f) of the Notice in this regard.

A report dated June 2010, from Enviro Centre Limited (U.K.) dealing with hydrology and ground conditions on the site and providing a surface water management plan as required by para. 8(d) of the Notice."

37. By a letter to the first notice party dated the 16th June, 2010, Harley Newman addressed the issues raised at para. 2 of the Notice.

38. Having considered this further information the Department of the Environment, Heritage and Local Government by a letter dated the 20th July, 2010, addressed to the first notice party, stated its opinion that the proposed development could significantly damage/destroy the fresh water habitats of Freshwater Pearl Mussel, Atlantic Salmon and Otter, all listed species under Annex II of the Habitats Directive, and continued as follows:-

"We have reviewed the Further Information forwarded by Harley Newman, Planning and Development Consultants on behalf of the applicants. This information provided addresses the vast majority of the concerns raised by the Department. We note the further consultations/agreements proposed with the Department in relation to bridge construction and the monitoring programme for the Surface Water Management Plan. However, we believe that the potential impacts in relation

to avi-fauna have not been fully addressed. In order to mitigate this potential impact we recommend that the following conditions be attached to the grant of permission:

> A management plan is prepared for lands/habitats within the proposed development site in order that these lands are managed in a sustainable way, which may benefit local wildlife. The plan should be agreed with the National Parks and Wildlife Service (Department of the Environment, Heritage and Local Government) and should be adopted prior to the commencement of any onsite development works."

Kindly forward any further information received, or in the event of a decision being made a copy of the same to the following address . . . ."

39. It was common case at the hearing of this application that the applicant did not raise an issue in her initial submission to the first notice party, made on the 27th October, 2009, that her land had been included in the proposed development site without her consent. She did, inter alia, object to the fact that turbines were located too close to dwelling houses and that the planning application included the consent of only one landowner with a dwelling within 500 metres of a turbine. She referred to the fact that the planning application contained a statement from a solicitor purporting to represent other landowners but objected that this was not a proper consent and did not comply with the requirements of para. 5.3(1)(g) of the Natural Resource Development Guidelines and Technical Standards as contained in Appendix A of the Co. Donegal Development Plan 2006-2012 so that the planning application could not proceed. She objected that the work required to construct the proposed wind farm as it extended over a large site would disrupt or destroy the habitats and nesting areas of wild birds in particular Red Grouse which was an endangered species. She also objected that the planning application and accompanying environmental impact statement failed to consider the effect which the proposed development would have on the local community, its language and culture.

40. Having been furnished by the first notice party with the additional information received by it from the second notice party, the applicant submitted further observations and objections to the proposed development in a letter dated the 27th August, 2010, to the first notice party. Not all of the many matters raised by the applicant in this letter are relevant to the determination of the instant application for judicial review but I find that the following submissions are clearly relevant and therefore I cite them in full:-

> "1. Application does not include all required consents
>
> (a) I have not given any consent to the developer to enter or utilise my land (Folio No. 61730F of Co. Donegal) in any way for the development of this wind farm. The plans submitted clearly indicate that my land is proposed to be used for access and drainage. No consent has been sought or granted for these or other activities on or near my land. Indeed the works proposed pose a serious threat to the integrity of my land and would undermine the right of support any landowner has from his neighbours.
>
> 9. HABITATS
>
> The level of construction activity involved in a development of this nature is clearly outlined in the various reports accompanying the application. There is no doubt that habitats will be destroyed. The lack of emphasis on detailed bird surveys is unacceptable considering the excellent range of bird species that the surrounding landscape supports. There is no reference to the Lough Nillan Bog S.P.A., south of the proposed site neither is there is any mention of a grouse conservation project occurring north of the proposed site. There is no justification for these omissions.
>
> 10. These glens are in the Gaeltacht Lar.
>
> 11. This is a thriving community of Gaeilgeoiri. The majority of residents have spent their lives here and daily conversations are conducted tri Ghaelige. Residents recognise the value of their language and culture and community effort has helped to develop and preserve it for future generations. There is evidence of this marvellous work throughout the community. The primary school is a state of the art building and there is an increase in enrolments. Many festivals are held in the community to celebrate the music, dance and folklore of the area. The Gaeltacht has shown continued growth in the past ten years. Families with roots in the area are deciding to reside here. We need this trend to continue in order to continue to preserve the language and culture. There will be a negative impact on these glens as is evident from the volume of submissions if the proposed development proceeds. People will relocate or decide not to live here in the first place. Depopulation is the last thing the Gaeltacht Lar needs."

41. The Assistant Planner of the first notice party in a report to it noted that a large number of submissions had been received from third parties after the circulation of the further information received from the second notice party. While agreeing that the avifauna surveys had not been completed to the satisfaction of the Department of Environment, Heritage and Local Government the Assistant Planner recorded that with a view to mitigating any potential impact in relation to avifauna the Department required a condition providing for a management plan to be attached to any decision to grant permission for the proposed development. The Assistant Planner noted that the applicant claimed that her consent had not been obtained to the inclusion of her land in the proposed development. The recorded response of the Assistant Planner to this submission by the applicant is as follows:-

> "Objector Margaret McCallig submitted a Folio No. 61730F but did not include a map with this to enable the planning authority to identify the land in her ownership. The planning authority is therefore precluded from confirming at this stage if the development site encroaches the objector's land and it is also noted that this observation was not raised in the objector's submissions to the Council."

I find this a most extraordinary and deeply disturbing conclusion, but as judicial review is not sought against the first notice party I shall not consider it further.

42. The Assistant Planner of the first notice party recommended that permission be granted for the proposed development but limited to eighteen smaller type turbines and subject to a large number of conditions, one of which,—No. 23—was expressed as follows:-

> "A Management Plan shall be prepared for the lands/habitat within the development site in order to ensure that these lands are managed in a suitable way in order to benefit all local wildlife. This plan shall be agreed with the National Parks and Wildlife Service and a copy of the plan following agreement with the National Parks and Wildlife Service shall be forwarded to the planning authority for written agreement:

Reason: To preserve the conservation value of the area."

43. On the 15th September, 2010, the first notice party made a decision to grant permission, (Order: 2010P. 60453) for the proposed development, (Reference No. 09/30520), but limited to eighteen smaller type turbines and subject to 27 conditions, one of which was in the same terms as the 23rd condition suggested by the Assistant Planner. This decision was notified to the applicant on the 15th September, 2010.

44. By a Notice of Appeal, which extends to 34 pages and is dated the 8th October, 2010, the applicant appealed to the respondent from this decision of the first notice party. Relevant to the instant application the applicant submitted that the original application for planning permission was substantially incorrect and invalid and should be set aside despite the acknowledgement sent by the first notice party to the second notice party because the site identified in the application in compliance with the provisions of article 22(2)(b) of the Planning and Development Regulations 2001, encroached on her land without her consent as required by the provisions of article 22(2)(g) of those Regulations. The applicant identified the proposed development affecting her lands as, a site road, surface water drain, road culvert, primary and final settling ponds, pre-buffer settlement area and peat regeneration area. The applicant annexed to her appeal a letter dated the 5th October, 2010, from her solicitor, Cathleen Dolan, Donegal Town, addressed to the respondent to which was attached a print-out of Part 1(A) – DESCRIPTION OF THE PROPERTY and Part 2 – OWNERSHIP, of Folio 61730F. Co. Donegal and of the Folio Map of the said property. This letter stated as follows:-

> "We act for Margaret McCallig who is the registered owner of folio 61730F Co. Donegal. Our client is objecting to the Planning Permission granted for Wind Turbines at Graffy Mully, Glenties, to P.J. Molloy under reference 09/30520.
>
> It is clear from the application lodged that some of the proposed works to be carried out under the terms of that Planning Permission impinge on our client's lands which are comprised in folio 61730F Co. Donegal and in that regard we enclose a copy of their Land Registry Map showing the area on which it encroaches edged red.
>
> No permission has been granted by our client to the Applicant or to any other person to carry out works on her land. Also the access road is not a county road. It is what is termed in this area as "bog road" which means that the only people who have the right to use that road are the people who cut turf in that area. There is no general right of way over that road and no right of way and no general right of way will be granted by our client to the Applicant for the works which are proposed to be carried out.
>
> We also refer to the letter in the original application from Gallagher Brennan Solicitors proposing to act for all the Landowners. Gallagher Brennan do not and never did act for our client and should not have referred in their letter to acting for all the Landowners affected thereby."

45. The applicant also objected that other landowners within the red and the blue lines were not shown to have given written consent to the inclusion of their land in the planning application. She stated that the list of landowners annexed to the letter of the 25th September, 2009, from Harley Newman to the first notice party does not include all the landowners within those boundaries and that Gallagher Brennan Solicitors in their document dated the 23rd September, 2009, claimed only to represent "landowners" but not all landowners within these boundaries. She submitted that the first notice party had misinterpreted these documents as statements that all landowners within the red and the blue lines had given consent to their lands being developed as part of the proposed development.

46. The applicant submitted to the respondent that the entire site of the proposed development was within a Gaeltacht area and that the statement to the contrary at p. 81 of the environmental impact statement was incorrect. She referred to the provisions of Statutory Instrument No. 245 of 1956: Gaeltacht Areas Order 1956 and, to a letter, "To whom it concerns" dated the 1st October, 2010, from the regional office of the Department of Community, Equality and Gaeltacht Affairs certifying that the townlands of Graffy, Mully and other adjoining townlands are in the Gaeltacht area. The applicant submitted that it was Government policy and an objective of the Co. Donegal Development Plan 2006-2012 to protect and support the cultural heritage of this Gaeltacht area, in particular by conserving its unique cultural identity by appropriate land use policies and by other indicated policies. She submitted that the environmental impact statement accompanying the planning application, in breach of Council Directive 85/337/E.E.C., as amended by Council Directive 97/11/E.C. (Environmental Impact Assessments) failed to contain any information regarding the direct or indirect effects of the proposed development on this cultural heritage. This part of the applicant's submission to the respondent extended over three pages.

47. The applicant submitted that the bird survey and report incorporated into the environmental impact statement and the further survey and report submitted in response to the Notice for Further Information were insufficient for the first notice party or the respondent to make a proper assessment of the likely impact of the proposed development on the environment. She objected that these surveys were not sufficiently comprehensive as regards the presence on the area of the proposed development of breeding birds and raptors and, that no assessment had been carried out as to the impact of the wind-farm, including aviation warning lights, on birds in the vicinity. The applicant objected that the first notice party had endeavoured to compensate for these shortfalls and failings and for their own inability to appropriately assess the environmental impact of the proposed development on avifauna, mammals, flora and peatlands by attaching conditions and, in particular Condition 23, to their decision to grant permission for the proposed development. The applicant submitted that this infringed the provisions of Council Directive 85/337/E.E.C., as amended by Council Directive 97/11/E.C,, which required an actual assessment to be undertaken on foot of sufficient information and not, where insufficient information for that purpose was provided in the environmental impact statement, avoided by imposing mitigatory conditions.

48. By a submission dated the 9th November, 2010, Harley Newman responded to the various third party appeals to the respondent against the decision of the first notice party. On the issue of consent, they responded as follows:-

> "1. (Application is invalid, as landowners have not given consent.)
>
> Prior to the application being submitted, the matter of the significant number of consents to enable a valid application to be made was discussed with the planning authority. The planning authority advised that it would accept a letter from a solicitor confirming that he represented the landowners of the properties within the blue line demarcated on the plans submitted with the application and also confirming that the landowners had consented to the applicant making the application. The planning application was submitted with the confirmation letter from Gallagher and Brennan Solicitors dated the 23rd September, 2009, (Appendix A) with the confirmations requested by the planning authority. It is considered that the confirmation of consent contained in the solicitor's letter adequately addresses article 22(2)(g) of the Planning and Development Regulations 2006.

> It is respectfully considered that any dispute as to the legal title to lands associated with the proposed development is a civil matter, resolution of which is not within the remit of the Board or the planning authority and this is highlighted by s. 34(13) of the Planning and Development Act 2000, which states that:
>
> > 'A person shall not be entitled solely by reason of a permission under this section to carry out any development.'"

49. The following is their response to the submission that the environmental impact statement failed to address the question of whether the cultural heritage of a Gaeltacht area was likely to be significantly affected by the proposed development:-

> "2. (ABSENCE OF A CULTURAL AND LANGUAGE IMPACT.)
>
> The potential impacts of the development on the Gaeltacht, was assessed by the applicant on the basis of the Donegal County Development Plan 2006-2012 and more particularly on Map 11 of the Plan, which among other things identifies the extent of the Gaeltacht area. No part of the proposed development was located within the Gaeltacht area and this was confirmed by the planning authority in its assessment of the submissions made to it in relation to the proposed development. It would be unreasonable that the applicant should include a language impact assessment on lands not designated by the planning authority as a Gaeltacht."

50. In response to the objection that the environmental impact statement and the avian surveys had failed to address adequately the question of whether the proposed development was likely to have a significant impact on habitats, ground mammals and birds, Harley Newman submitted a further report from Roger Goodwillie, dated the 8th November, 2010, and a further report from Keohane, Geological Environmental Consultancy, dated the 4th November, 2010, which considers *inter alia*, loss of habitats. Harley Newman submitted that the information contained in the environmental impact statement, in the further information furnished to the first notice party and in this response to third party appeals to the respondent provided sufficient information to enable the respondent to carry out a full and proper environmental impact assessment in accordance with Council Directive 85/337/E.E.C. (as amended).

51. In a letter to the respondent dated the 4th November, 2010, the first notice party responded to the various third party appeals against its decision (No. 09/30520) to grant permission for the proposed development. The first notice party stated that it was satisfied that the application submitted to was valid in accordance with the provisions of the Planning and Development Regulations 2001-2008. The first notice party submitted that on the basis of information furnished with the application and in response to its Notice for Further Information it was satisfied that the relevant consent had been given by all owner/occupiers of dwellings within 500 metres of any turbines and that consent had been provided by all landowners upon whose lands the turbines were to be located. The first notice party accepted that there was no assessment of the impact of the proposed development on the Gaeltacht area but considered that a development of the nature of the proposed development would not have a detrimental impact on the cultural linguistics of this Gaeltacht area. On the issue that the bird surveys were unduly limited and therefore insufficient the first notice party submitted that:-

> "The Department of the Environment, Heritage and Local Government requested that a Management Plan would be prepared by the applicant for the lands/habitat within the development site in order to ensure that these lands are managed in the sustainable way in order to benefit all local wildlife. This plan must be agreed with the National Parks and Wildlife Service, which must be satisfied that the proposal considers the impact upon wildlife and habitat."

52. The respondent's Inspector submitted a 53 page report on the 31st January, 2011. In this report she records that she carried out an inspection on the 16th November, 2010 and the 17th January, 2011. In the first 34 pages of this report the Inspector summarises tersely but comprehensively the planning history of the matter, the contents of the various third party appeals, the response of the first notice party and the second notice party to these appeals, the provisions of the National Renewable Energy Action Plan, and Planning Guidelines—Wind-Farm Development and the Co. Donegal Development Plan 2006-2012. Her assessment commences at p. 35 of the report and concludes at page 49. The Inspector recommended that permission be granted subject to 22 specified conditions for a development of 19 smaller types turbines. In setting out the reasons which informed this recommendation the Inspector stated she:-

> "Considered that subject to compliance with the conditions set out below, the proposed development would not seriously injure the visual or residential amenities of the area, would not adversely affect the natural or cultural heritage of the area, would be acceptable in terms of traffic safety and convenience and would be in accordance with the proper planning and sustainable development of the area."

53. The respondent adopted the reasons and accepted the recommendations of its Inspector expressed in her report. Of the 22 conditions attached by the respondent to the decision to grant permission for the proposed development four—Conditions 1, 2, 12 and 13—played a central role in this application for judicial review and some others—Conditions 4, 6, 9, 10, 14 and 15 were also referred to in the course of argument. The provisions of Conditions 1, 2, 12 and 13 are as follows:-

> "1. The development shall be carried out and completed in accordance with the plans and particulars lodged with the application, as amended by the further plans and particulars submitted on the 23rd day of June, 2010, except as may otherwise be required in order to comply with the following conditions. Where such conditions require details to be agreed with the planning authority, the developer shall agree such details in writing with the planning authority prior to the commencement of development and the development shall be carried out and completed in accordance with the agreed particulars.
>
> REASON: In the interests of clarity.
>
> 2. Turbine Nos. T8, T11, T32, T36, T37 and T38 shall be omitted from the scheme.
>
> REASON: To reduce the risk of habitat degradation and environmental pollution associated with development in these locations.
>
> 12. A management plan shall be prepared for lands – habitats within the site in order that the lands are managed in a sustainable way and to benefit local wildlife. The plan shall provide for a programme of ecological monitoring (including for avifauna) to be carried out on the site, by a suitably qualified specialist during construction and for a period following the commissioning of the development. The plan shall be agreed with the National Parks and Wildlife Service and shall be submitted to and agreed in writing with, the planning authority prior to the commencement of development.

REASON: To ensure appropriate management of habitats within the site.

13. Rock and soil excavated during construction shall not be left stock piled on the site following construction works. Details of the treatment of the excavated material shall be in accordance with the details submitted to the planning authority on the 23rd day of June, 2010 and with the detailed requirements of the planning authority.

REASON: In the interests of visual amenity."

54. Condition 4, provides, *inter alia*, that the permission shall be for a period of 25 years from the date of the commissioning of the wind turbines, unless prior to the end of that period permission shall have been granted for the retention of the turbines and related ancillary structures for a further period. Condition 6, requires that prior to the commencement of development detailed design proposals for the proposed access roads and turbine bases shall be agreed with the first notice party. Condition 9, in the interests of amenities, environmental protection and public safety, stipulates that prior to the commencement of the development a Construction Management Plan shall be submitted to the planning authority for written agreement. This plan must provide details of intended construction practice for the development, including hours of working, noise management measures, off-site disposal of construction/demolition waste and proposals to ensure slope stability during the construction of access roads and turbine bases. Condition 10, requires that surface water discharged from the site be managed in accordance with the Surface Water Management Plan submitted to the first notice party on the 23rd June, 2010, and with the detailed requirements of the first notice party. Condition 15, imposes a similar obligation as regards road works: that they be carried out in accordance with the details submitted to the first notice party on the 23rd June, 2010 and with the detailed requirements of the first notice party. Condition 14, in the interests of traffic safety and public amenity requires, *inter alia*, that prior to the commencement of development a detailed traffic management plan be agreed with the first notice party.

55. In the present case the challenge, by way of judicial review, is solely in the decision of the respondent and not to any decision of the first notice party. Nonetheless the alleged failure of the first notice party as planning authority to declare invalid the permission application of the second notice party for non-compliance with the provisions of article 22(2)(g) of the Planning and Development Regulations 2001 (as amended) is the basis for a major part of the applicant's challenge in this application. I am unable to accept the submissions made on behalf of the respondent and the second notice party that this Court should not consider an application for judicial review taken against the respondent rather than the first notice party where the basis of the application is some alleged infirmity in the procedures adopted by the first notice party during the first stage of the two-stage planning process. Senior counsel for these parties submitted that this alleged defect in the application for permission by the second notice party and, the alleged defect in the procedures adopted by the first notice party in examining and determining that application, were not matters to which the respondent could have had regard in considering the appeal to it by the applicant from the decision of the first notice party. The respondent, senior counsel said, could consider the matter only on the merits by reference to planning and development criteria, and it could not look behind the statutory acknowledgment sent by the first notice party to the second notice party pursuant to the provisions of article 26(2) of the Planning and Development Regulations 2001, (as amended).

56. This latter provides that where a planning authority considers that a planning application complies, *inter alia*, with the provisions of article 22, it shall stamp each document with the date of its receipt and send to the applicant an acknowledgment stating the date of receipt of the application.

57. Second 37(1)(b) of the Planning and Development Act 2000 (as amended) is as to the following material provisions in identical terms to s. 26(5) of the Local Government (Planning and Development) Act 1963:-

". . . the Board shall determine the application as if it had been made to the Board in the first instance and the decision of the board shall operate to annul the decision of the Planning Authority as from the time when it was given; . . ."

58. In the course of his judgment in *O'Keeffe v. An Bord Pleanála and Others* [1993] 1 I.R. 39, at 52, Costello J., construed these words as indicating that the respondent, "is determining the matter *de novo* and without regard to anything that had transpired before the planning authority", and he continued:-

"The Oireachtas clearly intended that if a notice of appeal was served within the statutory period then the Board should determine the application as if it had been made to it in the first place, and that it should not have any regard to what had happened before the planning authority. It would follow that I should construe this statute as meaning that no defect in the proceedings before the planning authority should have any bearing, or impose any constraints, on the proceedings before the Board."

59. This aspect of the judgment of Costello J. was unaffected by the decision of the Supreme Court in that case, (pp. 65-80). It was accepted in *Hynes v. An Bord Pleanála*, *Galway Corporation and the Attorney General* [1998], (Unreported, High Court, McGuinness J., 10th December 1997) by McGuinness J. as an authoritative statement of the law. That the question at issue before McGuinness J. in that case was very similar to the question at issue before me in the instant case may be seen in the following passages from the judgment:-

"Senior Counsel for the Applicant, Dr. Forde, submitted that the planning application made by the Developer on 12th June, 1996, was fundamentally flawed from the very outset in that the Developer stated on the planning application form simply that he was the 'owner' of the land in question. No reference whatever was made on the form to the fact part of the land was owned by Galway Corporation, nor was there any indication as to whether the Corporation was consenting to a planning application being made in respect of its land. The required content of a planning application is set out in Article 18 of the Local Government (Planning and Development) Regulations 1994 (S.I. No. 86 of 1994). Under Article 18(1)(d) it is provided that 'a planning application shall - give particulars of the interest in the land or structure held by the Applicant and, if the Applicant is not the owner, state the name and address of the owner'. Counsel submitted that this regulation is mandatory rather than directory in nature and he referred to Monaghan U.D.C. v. AIf-a-Bet [1980] I.L.R.M. 64.

Dr. Forde also referred to the decision of the Supreme Court in *Frescati Estates Limited v. Walker* [1975] I.R. 177, and in particular to the passage in the Judgment of Henchy J. (at p. 190) where the learned Judge stated

'. . . consider that an application for development permission, to be valid, must be made either by or with the approval of a person who is able to assert sufficient legal estate or interest to enable him to carry out the proposed development, or so much of the proposed development as relates to the property in question'. Counsel submitted that, on its face, the Developer's application was by this standard invalid. No indication that the Corporation was consenting to the application appeared on the Planning File (the only documentation open to the public) until 11th June, 1997, when Mr. O'Neill's letter

dated 2nd December, 1996, was placed on the file. This post-dated the Corporation's decision on the application and only shortly pre-dated the Board's decision of the 25th June, 1997."

60. Article 22(2)(a) of the Planning and Development Regulations 2001 (as amended), now goes further and requires that the applicant must either be the legal owner or have the written consent of the owner.

61. In *Hynes v. An Bord Pleanála* and Others, Senior Counsel for An Bord Pleanála, whose argument was adopted by Senior Counsel for the Planning Authority, submitted that any defect in the original application and any defect in the procedures of the Corporation were irrelevant. The decision of the Corporation made on the 10th December 1996, to refuse planning permission gave jurisdiction to the Board to adjudicate on the developer's appeal. The Board could not go behind the decision of the Planning Authority even to consider the validity of the original application. The Board properly considered the matter in the light of planning and development criteria only.

62. This submission was rejected by McGuinness J. in the following terms:-

> "There remains the question of the validity of the Developer's original application. While the Judgment of Costello J. in the *O'Keeffe* case makes it clear that it is the decision of the Planning Authority that founds the jurisdiction of An Bord Pleanála, no question of the validity of the original application arose in that case, and I would not interpret the Judgment as meaning (as suggested by Mr. Collins) that An Bord Pleanála could simply ignore a situation where the original planning application was clearly invalid. I accept that the primary duty of vetting a planning application and ensuring that it is in accordance with the relevant regulations lies with the Planning Authority but one must ask whether An Bord Pleanála would have jurisdiction to adjudicate on an appeal where the application on its face was one which would be considered invalid under the criteria set out by the Supreme Court in the *Frescati* case? Surely the answer must be no, particularly bearing in mind the cross reference from s. 26(5) to s. 26(1) of the Act of 1963. It seems to me, therefore, that I should consider the validity or otherwise of the Developer's original planning application. This may be looked at firstly in the context of the criteria established in *Frescati v. Walker* and secondly in the context of the 1994 Regulations."

63. This decision of McGuinness J. was followed by Quirke J. in *Seery v. An Bord Pleanála and Others*, (Unreported, High Court, Quirke J., 26th November, 2003, at pp. 17-22). I am also satisfied that the law in this respect is correctly stated by McGuinness J.

64. I find that the facts to which I have adverted establish that the applicant objected in her appeal to the respondent that the second notice party did not have her written consent to include any part of her land within the blue line so that his application for permission for development on or affecting that land was invalid. I am satisfied that the procedure adopted by the respondent in declining to consider this matter, raised specifically by the applicant in her appeal and referred to by the respondent's Inspector in her report at pp. 13, 29 and 30, was unfair and incorrect. The respondent had jurisdiction to consider this. I find that in as much as the respondent considered that the second notice party had established a sufficient interest to make a valid application for development on or affecting the applicant's land it proceeded upon a material error of fact which rendered its procedures unfair.

65. I find that the applicant is, and has since the 22nd April, 2005, been the full owner in possession with an absolute title of the lands comprised in Folio 61730F, Co. Donegal. I do not know how or by reference to what evidence it was claimed on behalf of the second notice party that her title was in dispute and that therefore her claim that she had not consented to the inclusion of the lands in Folio 61730F, Co. Donegal in the proposed development was not something within the competence of the respondent or the first notice party to decide. I find that a part of these lands was included within both the red line and the blue line shown on the location map submitted by the second notice party with his application to the first notice party for permission for the proposed development as required by article 22(2)(b) of the Planning and Development Regulations 2001 (as amended). This sub-article requires that this location map must to so marked as to identify clearly:-

> "(i) The land or structure to which the application relates and the boundaries thereof in red, and,
>
> (ii) Any land which adjoins, abuts or is adjacent to the land to be developed and which is under the control of the applicant or the person who owns the land which is subject of the application in blue."

66. This latter provision is if very great importance as s. 34(4)(a) of the Planning and Development Act 2000 (as amended) provides that the planning authority and s. 37(1)(b) of that Act, the Board, in deciding to grant permission for the development of land may include conditions for regulating the development or the use of any land which adjoins, abuts or is adjacent to the land to be developed and which is under the control of the applicant, if the imposition of such conditions appear to be expedient for the purpose of or in connection with the development authorised by the permission. In the instant case, the first and the thirteenth conditions attached by the respondent to its decision to grant permission for the proposed development come within this category as regards the establishment of a peat regeneration area on part of the applicant's lands contained within the blue line shown on the location map submitted by the second notice party.

67. I find that the purported form of consent provided by Gallagher Brennan, Solicitors to the first notice party was totally unsatisfactory and should not have been accepted by the first notice party. Neither the landowners said to be represented by that firm nor the extent or location of their respective lands within the blue line is identified. This is contrary to the clear object of article 22(2)(g) which is to enable the planning authority to be satisfied before considering an application for planning permission that the applicant is either the legal owner of all the land or has written consent from the owner of every part of the land subject to the application because otherwise the application is invalid and should not be entertained. (See *Frascati Estates Limited v. Walker* [1975] I.R. 177, at 190-191 per. Henchy J. for the Supreme Court).

68. As is stated in "*The Laws of England*", Earl of Halsbury, 1st Ed. 1909 (Vol. 10) paras. 760-762 inclusive and, repeated in all subsequent editions, authentication by signature is practically essential to a consent in writing and is usually essential to give it legal effect even where the statute— in the instant case the Statutory Instrument—which requires the consent to be in writing makes no reference to its form or contents. As article 22(2)(g) does not require that the consent be signed personally by the owner, it may be signed by an agent on behalf of the owner (See *London County Council v. Vitamins Limited* and *Same v. Agricultural Food Products Limited* [1955] 2 A.E.R. 299, at 232-233, per. Romer and Parker L.JJ.).

69. In my judgment the most appropriate form of consent for the purpose of complying with the provisions of article 22(2)(g) is an individual consent bearing the personal signature of the owner and which identifies the land in respect of which the consent is given by reference to parcels drawn and distinguished on a map or plan submitted by the applicant for permission in compliance with the provisions of article 22(2)(b) of the Planning and Development Regulations 2001 (as amended). A similar form of consent signed on behalf of the named owner by a stated agent is next to be preferred and, in cases of disability or incapacity may be the only form possible. A consent in the form of a multiparty list of named owners each of whose land is separately identified as aforementioned and

signed by them or by a stated agent on their behalf is also in my judgment a sufficient compliance with the provisions of article 22(2)(g) of the Planning and Development Regulations 2001 (as amended) but is more prone to error and misstatement.

70. I find that Gallagher Brennan, Solicitors were not instructed by the applicant and were not her agents to give any consent on her behalf to the inclusion of any part of her land within the red line or within the blue line. It has not been shown from which specific landowners, Gallagher Brennan, Solicitors had received authority to act as their agents in the preparation and dissemination of the consent dated the 23rd September, 2009. Unfortunately, this information was not sought by the first notice party, even after the applicant in her submission of the 27th August, 2010, clearly stated that she had not given consent to the developer to enter or to utilise her land in Folio 61730F, Co. Donegal in any way for the proposed development. I find that the applicant did not at any time consent to the proposed development on or affecting her land or any part of it and was at all times and remains totally opposed to the granting of permission for the proposed development. I am at a loss to understand how the first notice party came to accept this document dated the 23rd September, 2009, as a sufficient compliance with the provisions of article 22(2)(g). This is all the more remarkable having regard to the queries raised in para. 2 of the Notice Seeking Further Information dated the 19th November, 2009, to which I have already adverted in relation to the location of turbines within 500 metres of dwelling where the first notice party had found that five consents had not been submitted and that of the consents submitted, six names were found not to correlate with the landowners.

71. It was submitted on behalf of the respondent and the second notice party that even if this Court should find that the applicant had not consented to the proposed development on and affecting her land, as a consequence of the second condition attached by the respondent to the decision to grant permission for the proposed development that decision no longer affected any part of the applicant's land. It was submitted that the applicant was therefore no longer entitled to an order of *certiorari ex debito justitae* and the court in the proper exercise of its discretion should decline to make such an order in her favour. I find myself unable to accept this submission.

72. I find that the part of the applicant's land which was included in the application for permission for the proposed development is the area identified at para. 33 of the second affidavit of the applicant sworn on the 31st January, 2010, and shown on the plan therein exhibited and marked "M.McC.2E". The court was informed by Senior Counsel for the applicant during the hearing of this application for judicial review that this portion of the applicant's land was approximately 3 or 4 acres in extent. The land contained in Folio 61730F, Co. Donegal, is shown on plan no. 13523 of the Registry Map. Both these documents were submitted by the applicant to the respondent on the 8th October, 2010, with her appeal. This part of the applicant's land is traversed from N.W. to S.E. by an existing bog road which runs from a local county road to the N.W. of her land to land adjoining her land on the S.E. on which three of the turbines directed to be omitted by condition 2 of the decision of the respondent to grant permission for the proposed development —T.36, T.37 and T.38—were to have been located. This bog road is joined on this part of the applicant's lands by another existing bog road crossing this part of her land from N.E. to S.W. leading from the same local county road, which at this point is to the N.E. of her land. A further turbine required by Condition 2 to be omitted—T.32—was located on land adjoining the land of the applicant near the junction of this latter bog road and the local county road. It was submitted by Senior Counsel for the respondent and by Senior Counsel for the second notice party that as these turbines have been omitted, the development works on and adjoining these existing bog roads is rendered unnecessary so the applicant's land is no longer in any manner affected by the proposed development.

73. I do not accept that this is the case. I find that these bog roads also provide the only access to a peat regeneration area shown on a Peat Slide Risk Map annexed to the report from Keohane Geological Environmental Consultancy, dated June 2010, and stamped received by the first notice party on the 23rd June, 2010, in response to paras. 8(d) and 8(f) of the Notice of Further Information dated the 19th November, 2009. This peat regeneration area is shown located on the applicant's land in the area bounded by these bog roads and the Folio boundary and takes up approximately one half of the total affected acreage.

74. Four other peat regeneration areas are shown on this Peat Slide Risk Map which, with the Report, was submitted to the first notice party and stamped received on the 23rd June, 2010. A group of three peat regeneration areas with a total surface area approximately twice as large as the peat regeneration area located on the applicant's land are shown located a few hundred metres distant from her land at the junction of the N.E. to S.W. existing bog road and the local county road. They front onto this local county road: one on either side of the bog road and the other opposite the junction on the other side of the local county road. The remaining and fifth peat regeneration area, approximately one half the size of that shown located on the applicant's land, is shown located approximately 2 kilometres away in a N.E. direction from this cluster of three peat regeneration areas and, fronting on to a different local county road. The site of the proposed development is very extensive being 4 to 5 kilometres in length and 3 kilometres in depth, covering an area of 595 hectares (1,470 acres), on the southern foothills of Aghla mountain in the Townlands of Mully Graffy and Meenamanragh and, approximately 6 kilometres from the village of Glenties, Co. Donegal.

75. This Keohane Report dated June 2010, and stamped "Received" by the first notice party on the 23rd June, 2010, addresses the management of excavated material and the risk of peat landslide in relation to a proposed development of 19 turbines, site tracks (new and upgrading) an on-site control building and ancillary structures. Paragraph 7.3 of the environmental impact statement gives an insight into the sources of this "excavated material": excavation of rock, soil and peat in the construction of access roads, cranage areas, turbine assembly areas, excavation of turbine foundations, excavation of cabling trenches 1.5m deep, bridge construction and development of borrow pits. I find that this report is the basis for Condition 13 attached to the decision of the respondent to grant permission for the proposed development. It would also come within the ambit of Condition 1. This Report notes that when the original fieldwork and assessment were carried out in 2009, in the course of preparation of the seventh section of the environmental impact statement, for the purpose of assigning a likelihood of construction related peat landslide, the entire development site—of 595 hectares (1,470 acres)—had for this purpose been divided into three broad Zones designated "A", "B", and, "C".

76. By reason of the number of turbines having been reduced from 35 to 19, no proposed construction work will now take place in any Zone "B" type area. Zone "A" type areas are defined in the Report as areas with peat depths in excess of 1 metre (up to 5.6 metres locally), and where the slope is less than 5 degrees. These are identified as areas of flat to gently sloping blanket bog. In such areas the hazard ranking for peat landslides was considered insignificant but at the upper end of the range. Zone "C" type areas were identified as land where the peat cover is generally less than 1 metre thick, where rock outcroppings are frequent and slopes are variable, up to 40 degrees. In such areas the hazard ranking for peat landslides was considered negligible. The conclusion and recommendation of these experts was the same as regards both Zone "A" type areas and Zone "C" type areas was that the, "project should proceed with monitoring and mitigation of peat landslide hazards at these locations as appropriate".

77. The mitigation measures therefore proposed in section 7.5 of the environmental impact study included the following:-

> "Peat regeneration areas have been identified to accommodate the peat spoil. Areas where peat can be placed including cutaway areas near T.32, ***[the cluster of three]***, near T.36, ***[on the applicant's land]*** and near the substation near

T.14, ***[two kilometres away from the others]***. (Words in bold type are mine)

> Avoid the stockpiling of peat. It is intended to place surplus peat on the flat areas of the site where the peat has previously been removed/harvested/eroded. Peat will be placed to a depth of not greater than 1.5m on the flat areas of the site as indicated.
>
> Earthen embankments will be constructed as required to hold the peat in place. These areas will be fenced off for safety and to allow vegetation to establish. The upper layer of peat excavated will be placed on top to facilitate re-vegetation of peat. Peat will also be used to restore the areas around the turbine foundation."

78. In this Report dated June 2010, report, Keohane advised that—"with these avoidance and mitigation measures, it is considered that the development of the windfarm in Zones ""A" and "C" ***[19 turbines]*** can proceed with negligible residual risk of peat landslide". The five peat regeneration areas are shown on the plan contained in this Report. In a further Report dated the 4th November, 2010, furnished by Keohane Geological and Environmental Consulting, dealing with geology and hydrology issues raised before the respondent by third party appellants, they state that the footprint of the development area (roads, cranage areas and turbine foundations) would be approximately 7 hectares, which included existing roads. Significantly, they did not in any way seek to revise or qualify their opinion and advice given in the Report of June 2010, in relation to peat slide risk or peat spoil disposal.

79. Though the respondent in its decision on the 11th February, 2011, to grant permission for the proposed development required that six of the nineteen turbines be omitted and, these turbines were all in Zone "A" type areas—that is in areas of deeper peat—significantly in my judgment the respondent did not reduce the number of peat regeneration areas recommended by the Keohane Report. On the contrary, I am satisfied that the correct interpretation of Condition 13, is that the recommendations in the Keohane Report of June 2010, stamped "Received" by the first notice party on the 23rd June, 2010, must be implemented in full, together with any related matters of detail required by the first notice party.

80. I am therefore satisfied and I so find that the required omission of the three turbines nearest to the applicant's land—T.36, T.37 and T.38—does not, *ipso facto*, eliminate the need and requirement for this peat regeneration area on the applicant's land. To adopt the reasoning of the second notice party the omission also of turbine T.32 in the same Zone "A" type area should signify that the three peat regeneration areas in the immediate vicinity of that turbine were also no longer required and the omission of turbines T.11 and T.8, approximately two kilometres away and also in a Zone "A" type area, should signify that the nearby peat regeneration area was also no longer required. The inevitable result of such reasoning must be that all five peat regeneration areas are eliminated and the recommendation of the Keohane Report of June 2010, disregarded by the respondent. The respondent's Inspector in her Report does not recommend that any of the five peat regeneration areas be omitted. The submission of the second notice party based upon the premise that no reasonable developer would carry out the development works necessary to access and use the peat regeneration area located on the applicant's land when the other peat regeneration areas were readily accessible from local county roads is irrelevant. The second notice party or the developer may choose or may be obliged by enforcement proceedings to use this peat regeneration area on the applicant's land. In any event, the applicant's land is burdened with this condition which must affect its use and value. (See: *Frascati Estates Limited v. Walker* [1975] I.R. 177 at 190-191 per. Henchy J.). I am therefore satisfied and I find that the applicant's land remains materially and significantly affected by the decision of the respondent to grant permission for the proposed development despite the provisions of Condition 2.

81. I also cannot accede to the submission made on behalf of the respondent that if its decision of the 11th February, 2011, to grant permission for the proposed development is declared invalid the decision of the first notice party of the 15th September, 2010, to grant permission for that development remains and becomes the effective decision. Section 37(1)(b) of the Planning and Development Act 2000 (as amended) provides that the decision of the respondent shall operate to annul the decision of the first notice party. In *The State (Abenglen Properties Limited) v. Dublin Corporation* [1994] I.R. 381, at 397, Walsh J. held that a decision (in that case of the planning authority) even if held to be *ultra vires* or unsustainable in law for any reason nonetheless remained a decision for the purpose of the default provisions of s. 24(4) of the Local Government (Planning and Development) Act 1963, (now s. 34(8)(f) of the Act of 2000), so that a decision given in time, even if afterwards held to be *ultra vires* or invalid was still a decision sufficient to prevent the applicant from obtaining planning permission by default.

82. In *O'Keeffe v. An Bord Pleanála and Others* (above cited), Costello J. at p. 50 held as follows:-

> "The importance of this decision is that not only does it afford an example of an administrative decision having legal effects even if a court subsequently considered that it had been made *ultra vires* and was therefore null and void but it suggests that the court should consider the statutory context in which the administrative decision is taken and give it legal efficacy, albeit to a limited extent, if the construction of the statute so requires. It has been suggested (see *'Administrative Law'* Hogan and Morgan, p. 204) that the courts might well treat *ultra vires* decisions as being lawful until they are made unlawful by the quashing of the decision, and that it is not correct to regard them as never having had any legal effect should they be subsequently declared void. I do not think that I need to decide whether such a principle is one of general application because I think I can decide the point in this case by a construction of the provisions of the Act of 1963, which empowered the Board to take the decision which is now impugned."

83. Approaching the instant case in a similar light, it is an undeniable fact that on the 11th February, 2011, the respondent made a decision. Even if it should transpire, as a result of the judgment of this court, that this decision of the respondent was invalid and therefore cannot be followed by the making of a grant of planning permission pursuant to the provisions of s. 34(11)(b) of the Planning and Development Act 2000 (as amended) it remains a decision made after the respondent had lawfully received, accepted and considered the third party appeals in this matter. It is significant that the statute contains no default provision in respect of a failure by the respondent to make a decision as it does in the case of a failure by the planning authority to make a decision—s. 34(8). By s. 126 of the same Act of 2000, a duty is imposed on the respondent to ensure that appeals are disposed of as expeditiously as may be and to take all such steps as are open to it to ensure that insofar as practicable there are no avoidable delays at any stage in the determination of appeals. In my judgment this clearly indicates that it was the intention of the legislature that once the appeal process was activated and the appeal was not withdrawn, abandoned, or dismissed, there could be no recourse back to the planning authority, nor could its decision be reactivated should the decision of the respondent be successfully impugned. In such circumstances the respondent cannot be regarded as having made no decision at all in the matter and even if that decision can provide no legal justification for making a grant of planning permission, it continues to have legal existence as a decision for the purpose of s. 37(1)(b) of the Act of 2000 (as amended). By reason of the provisions of s. 34(11)(a) of the Planning and Development Act 2000 (s. 26(9)(a) and (b) of the Act of 1963) a decision of a planning authority to grant permission cannot result in a grant of planning permission if an appeal is taken against that decision to the respondent. The decision of the planning authority is overreached by the appeal and remains entirely ineffective unless that appeal is withdrawn, abandoned or dismissed. The intention of the Legislature that the two-part planning process should produce only one decision is further emphasised by the provision in s. 37(1)

(b) of the Act of 2000, that the decision of the respondent, "shall operate to annul the decision of the planning authority".

84. It is to be noted that it is only the "decision" of the respondent which is to have this effect and not simply the taking of the appeal to the respondent. I am satisfied that the Legislature employed the term, "annul", consciously and deliberately in order to convey, emphatically and conclusively, in the interest of clarity and certainty and in order to forefend against the possibility of administrative confusion, that upon the respondent giving its decision any prior decision of the planning authority was no longer to be regarded as a decision or as a determination and became as nothing. The Legislature did not rely upon declaring the decision of the respondent to be, "final" or, "final and conclusive" or, "taking effect as if it were the decision of the planning authority", (*i.e*. Town and Country Planning Act 1990, ss. 78 and 79—United Kingdom) or upon declaring that the decision of the planning authority be thereafter, "void" or, "void and of no effect". Having regard to the state of the law in 2000, one may reasonably infer that it did not do so because these terms were too uncertain and open to question.

85. As was held by Walsh J. in *The State (Abenglen Properties Limited) v. Dublin Corporation* (above cited):-

> "It is not possible to attribute to the Oireachtas the intention that every decision which has been proved to be unsustainable in law for one reason or another shall have the effect of giving the applicant permission for his proposed development however outrageous it might be and however contrary to both the spirit and letter of the planning laws."

86. In that case planning permission might have been obtained through the default provisions of s. 24(4) of the Act of 1963 (now s. 34(8)(f) of the Act of 2000 (as amended)). In my judgment it would be contrary to the intention of the Legislature as clearly indicated by the provisions of the Planning and Development Act 2000 (as amended) were I to accede to the submission that the decision of the first notice party, to which there was no challenge by way of judicial review, revives and becomes effective if the decision of the respondent is declared invalid or *ultra vires*.

87. I find, on the evidence of the Keohane Report of June 2010, and the 4th November, 2010, that while a fifth peat regeneration area of this nature and size is an integral of the Peat Slide Plan fundamental to the approval of the proposed development, there is nothing, other than the initial choice which requires that it be located solely and exclusively upon this exact part of the applicant's land and nowhere else within the blue line. Apart from its Zone "A" type classification by the Keohane Report of June 2010, there is nothing otherwise unique about this part of the applicant's land. I am satisfied that the choice of this particular location in the Keohane Report was determined by three factors: the assumed consent of the applicant to the use of the site, the fact that the site lay within a Zone "A" type area and the fact that the site would be served by the same proposed site roads and the same managed drainage system as would serve the three adjacent turbines, T.36, T.37 and T.38 (now all omitted). I can find nothing immutable about this decision to locate this particular peat regeneration area on the applicant's land. On the basis of the evidence of the Keohane Reports, I am satisfied that any other location within the blue line with Zone "A" type characteristics would serve equally as well and indeed, would have to so serve if some undiscovered geological or hydrogeological fault or defect materially affecting the site on the applicant's land were to come to light. There can be no doubt whatsoever as to the dimensions and nature of this peat regeneration area. They are clearly and precisely delineated and set out in the Keohane Report of June 2010 and in other plans referred to in Condition 1 of the decision of the respondent to grant permission for the proposed development. The part of the applicant's land included within the blue line can therefore be identified with precision and isolated from the remainder of the land included within the blue line.

88. In this case the court can be reasonably certain that the intention of the respondent, had it known that Condition 13, to the extent that it required development works to be carried out and this peat regeneration area to be located on the applicant's land was beyond its powers, would have been to require the developer to provide a peat regeneration area of equivalent nature and size on other Zone "A" type land within the blue line. In the light of the foregoing I am satisfied that in this judicial review of the exercise of a quasi-judicial power by the respondent, I should apply the principle of, "enforcing the enforceable as far as it is possible—of making the thing work and not be lost". (See *Thames Water Authority v. Elmbridge Borough Council* [1983] 1 Q.B. 570, C.A. per. Dunn L.J., p. 580-1, Dillon L.J., p. 584-5 and Stephenson L.J., p. 585-6). Having regard to the very great area of land—559 hectares (1,470 acres)—within the blue line (not all, of course, Zone "A" type land) and to the wide flung nature of the proposed development, the relocation of this particular peat regeneration area of approximately .809 hectares (2 acres), on other Zone "A" type land within the blue line can in my judgment be properly regarded as a "detail" to be agreed with the first notice party within the provisions of Condition 13 and Condition 1 of the conditions attached by the respondent to its decision to grant permission for the proposed development.

89. In her report dated the 31st January, 2011, the respondent's Inspector summarised the contents of the applicant's appeal. She noted that the applicant claimed that there had been a failure to carry out bird surveys and to make an appropriate assessment of the impact of the proposed development on avifauna. The Inspector set out (p. 14) that the applicant had in particular adverted to the following matters in support of this contention:-

> "Inadequate assessment of impacts on avifauna.
>
> Official records of hen-harrier populations in Ireland are properly recorded.
>
> The survey times would not be conducive to the observations of raptors.
>
> The Journal of Applied Ecology (Appendix 7) which provides a study on the impact of upland wind farms on the distribution of breeding bird's states that breeding bird density may be reduced within a 500m. buffer of the turbines by 15-73% with buzzard, hen harrier, snipe, curlew, golden plover and wheatear most affected.
>
> No impacts of aviation lights on bird populations in the area.
>
> Based on the lack of certainty, it is prudent that the precautionary principle be applied and permission refused to protect the birds in the area."

90. At pp. 43 and 44 of her report, under the caption "IMPACTS ON FLORA AND FAUNA" the respondent's Inspector considered the submissions of the applicant and other third party appellants, the responses made on behalf of the second notice party, the environmental impact statement and, further information furnished, "to address the deficiencies in the environmental impact statement", as regards impact on local birds. The Inspector noted that this further information included a Winter Survey carried out in mid-February, a Spring Survey carried out in mid-April to establish the presence or absence of breeding species in the area of the proposed development and, Vantage Point Surveys carried out with a view to ascertaining whether raptors were present in the area of the proposed development. The Inspector noted that the site had been visited in mid-February, mid-April and in July, but only for

limited periods. The presence of a pair of Red Grouse had been noted in the Zone "A" type land adjoining the applicant's land to the north and north east. The presence of Red Grouse was also noted further west on Zone "C" type land at Stralinchy. In the decision of the respondent to grant permission for the proposed development two turbines—T. 30 and T. 35—proposed to be constructed in the Mully Hill/Stralinchy area were permitted. The Inspector noted the Red Grouse were not an "annexed" species, but were included in the then current Birdwatch Ireland list of conservation concerns. She noted that a sanctuary for this species had been established on the rearward northern slopes of Aghla Mountain, (the proposed development site is on its southern foothills).

91. The Inspector reported that the main threat to birds from wind farms arose from collisions with turbines and from disturbance of and loss of habitats. She advised that most studies suggested that except under exceptional circumstances, this risk was not sufficiently great to constitute a threat to birds living in the area of a wind farm. She offered as an example of such an exceptional circumstance a situation where a wind farm with a high density of turbines was located in an area with a high density of birds. The Inspector reported that the probability of bird mortality from collisions would be low in the case of the proposed development as the turbines were spaced well apart and the evidence suggested that bird numbers in the area were generally low. She considered that the greatest impact on Red Grouse in the area would be from habitat disturbance and fragmentation especially if construction work were to be carried out in April and May. The Inspector advised that the land adjoining the applicant's land to the north and north east in the vicinity of the proposed turbine T. 32 (subsequently required by the respondent to be omitted) provided a suitable habitat for Red Grouse and should be maintained free of development. The Inspector noted that while no survey of bats had been carried out in the area of the proposed development there were no suitable roosting areas for bats in the vicinity of the proposed turbines and the valleys close to the rivers would provide a more suitable hunting area for bats.

92. The aspect of the Inspector's report which formed the basis of the applicant's challenge to the decision of the respondent in this judicial review application lies in the following statement (p. 44):-

> "The inadequacy of the bird surveys has been extensively criticised in the submissions. I accept that the surveys are far from robust due to their limited duration, taken outside the recommended times etc. The Board will note that there is no information on migratory species, flight paths etc. and no reference to the recently reintroduced Golden Eagle. I accept that an all year round survey provides a greater level of detail and provides confidence that all significant features have been identified. Whilst the lack of detail on avifauna is noted by the Department of Environment, Heritage and Local Government, no issues with regard to particular species were raised. It was considered sufficient that a management plan for land/habitat be agreed prior to the commencement of development on the site. I note that the imposition of this type of condition has been considered acceptable in the past by the Board (05.226520)"

93. It was submitted by Senior Counsel on behalf of the applicant that it was not lawful for the respondent to have purported to grant permission for the proposed development without first seeking, by way of further information, such an all year round Avifauna Survey or surveys which, provided information on migratory bird species flight paths and reintroduced Golden Eagles in the area of the proposed development. The respondent had, he said, acted unlawfully in endeavouring to circumvent this statutory obligation by attaching a condition, (No. 12), to the purported decision to grant permission for the proposed development which required a management plan for land and habitats within the proposed development area to be agreed with the first notice party prior to the commencement of any development on site. This, Senior Counsel submitted, was also in breach of the requirement in the Council directive for public consultation. The applicant and other interested parties and bodies would have no legal right of participation in the formulation and agreement of this management plan.

94. The respondent's Inspector in her report endorsed and recommended the course suggested by the Department of the Environment, Heritage and Local Government (Development Applications Unit) in its letter of response, dated the 20th July, 2010, to the first notice party. In that response the Department stated:-

> "We have reviewed the Further Information forwarded by Harley-Newman, Planning and Development Consultants on behalf of the applicants. This information provided addresses the vast majority of the concerns raised by the Department. We note the further consultations/agreement proposed with the Department in relation to bridge construction and the monitoring programme for the Surface Water Management Plan. However, we believed that the potential impacts in relation to avifauna have not been fully addressed. In order to mitigate this potential impact we recommend that the following conditions be attached to the grant of permission:
>
> A management plan is prepared for lands/habitats within the proposed development site in order that these lands are managed in a sustainable way, which may benefit local wildlife. The plan should be agreed with the National Parks and Wildlife Service (Department of the Environment, Heritage and Local Government) and should be adopted prior to the commencement of any onsite development works."

95. Condition 12 attached by the respondent to the decision to grant permission for the proposed development is in the same terms as that recommended by the Inspector, (Condition 11, p. 51 of Report), and the same reason is given for it, "to ensure appropriate management of habitats within the site". While accepting that the bird surveys which formed part of the environmental impact statement were, "far from robust", because they did not provide any information regarding migratory species in the area of the proposed development, or of possible flight paths in that area and, did not address a possible over flying of or passage through this area by Golden Eagles that had been reintroduced into the wild in Glenveagh National Park, a relatively short flying distance to the north, and, while accepting that an all year round survey would provide confidence that "all significant features had been identified", the Inspector nonetheless, went on to recommend that permission be granted for the proposed development. The respondent accepted and acted upon these recommendations of its Inspector.

96. It is the case for the applicant that the respondent lacked jurisdiction to make a decision whether or not to grant permission under the proposed development until it had first sought and been furnished by the second notice party with data and information sufficient to enable the respondent rationally and reasonably to decide whether migratory species, avian flight paths or Golden Eagles were likely to be significantly affected by the proposed development. Senior Counsel for the applicant submitted that this was not a question of quantitative assessment of information in the environmental impact statement, which he accepted was a matter for the respondent and not for this Court, (*Kenny v. An Bord Pleanála (No. 1)* [2001] 1 I.R. 565 and *Kenny v. An Bord Pleanála (No. 2)* [2001] 1 I.R. 704. This he submitted was a question of the sufficiency of the information contained in the environmental impact statement which he said went to jurisdiction and was therefore open to challenge by way of judicial review.

97. Article 94 of the Planning and Development Regulations 2001, sets out the mandatory requirements for an environmental impact statement by reference to the provisions of the Sixth Schedule of those Regulations. Paragraph 1(c) of this Schedule provides that an environmental impact statement must contain, "data required to identify and assess the main effects which the proposed development is likely to have on the environment". At para. 2(b) of the Schedule there is a further requirement that information by

way of explanation or amplification of this information must also be furnished providing a description of the aspects of the environment likely to be significantly affected by the proposed development, including, in particular fauna and cultural heritage.

98. There can be no doubt but that s. 4.4 of the environmental impact statement in the present case supplemented by the report of Mr. Goodwillie dated April 2010, furnished in response to the Notice of Further Information served by the first notice party and by his further Report dated the 8th November, 2010, responding to wildlife issues raised by the applicant and six other third party appellants is a compliance with the provisions of the statute and of the statutory instrument in that it addresses the issue of whether avifauna was likely to be significantly affected by the proposed development. Article 111(i) of the Planning and Development Regulations 2001, provides that the respondent shall consider whether an environmental impact statement received by it in connection with an appeal complies with article 94 and if not so satisfied may issue a Notice under s. 132 of the Planning and Development Act 2000, requiring an applicant to, "submit such further information as may be necessary to comply with the relevant Article". No such Notice was issued by the respondent in the instant case. There was no positive evidence before the court that the respondent had complied at all with the provisions of article 111(i), but no issue was taken as to this: the emphasis of the submission on behalf of the applicant was that the respondent had not sought such information when the report of its Inspector rendered it imperative that it should as regards these avifauna matters.

99. In my judgment the word, "shall", in article 111(i), following the ordinary and natural meaning attached to it in a statutory context, is mandatory and imposes on the respondent an obligation of ensuring that the information contained in the environmental impact statement complies with the requirements of Article 94. As was pointed out by MacMenamin J. in *Kildare County Council v. An Bord Pleanála* [2006] IEHC 173, (Unreported, High Court, MacMenamin J., 10th March, 2006), para. 70, this assessment of the adequacy of information with regard to the likely environmental impact of a proposed development involves the exercise of a discretion on the part of the respondent (*Maher v. An Bord Pleanála* [1999] 2 I.L.R.M. 198). At para. 72 of his judgment in *Kildare County Council v. An Bord Pleanála*, MacMenamin J. held as follows:-

> "The approach adopted by McKechnie J. [in *Kenny v. An Bord Pleanála (No. 2)* [2001] 1 I.R. 407] is consistent with that of the courts of England and Wales (see *R. v. Rochdale Metropolitan Borough Council ex parte Millne* [2001] 81 P. & C.R. 27. The decision of the High Court in that decision was upheld by the Court of Appeal in an unreported decision of Pill and Chadwick L.J. on December 21st, 2000:
>
> "In my judgment what is sufficient is a matter of fact and degree. There is no blue print which requires a particular amount of information to be supplied. What is necessary depends on the nature of the project and whether, given the wording of (article 2 of the Directive), enough information is supplied to enable the decision making body to assess the effect of the particular project on the environment. I agree with Sullivan J. that the court cannot place itself in the position of reconsidering the detailed factual matters considered by the planning authority. Equally I accept that the court does have a role and there may be cases where the court can and should intervene and hold that *no reasonable local authority could have been satisfied with the amount of information which it was supplied in the circumstances of the particular case.*'"

100. At para. 73 of the same judgment MacMenamin J. held that for such an intervention to take place in this jurisdiction, an applicant would have to establish that the decision of the respondent to accept the amount of information furnished in the environmental impact statement and in any supplementary information relating to the impact of the proposed development and not to issue a notice seeking further information "plainly and unambiguously flew in the face of fundamental reason and common sense" (*The State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642, at 658 and *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39). An applicant would have to show that this was a decision which having regard to the clear intent and requirement of Council Directive 85/337/E.E.C. of 27th June 1985 (as amended) that the respondent ensure that it had adequate information and that this had been made available to the public before making such a decision, was one "which no rational or sane decision maker, no matter how misguided", would have made. In my judgment the applicant in the present case has not discharged this onus.

101. Though not in any way legally constrained to accept or to act on it, the respondent had before it the recommendation of its Inspector that permission be granted for the proposed development subject to a land/habitat management plan being put in place before the commencement of any development. In Circular Letter P.D. 2/07 and N.P.W.S. 1/07, directed to all county and city managers, directors of services for planning and, town clerks, the Department of the Environment, Heritage and Local Government advised that it considered that Council Directive 85/337/E.E.C., required that a planning authority must have before it adequate information on the potential effects of the proposed development, including any proposed mitigation measures, when making its decision. The Circular went on to instruct that accordingly, under no circumstances should a planning authority use compliance conditions to complete an inadequate environmental impact study or to request the development of appropriate mitigation measures in such circumstances. The Circular Letter then continued as follows:-

> "In any such case where a developer has not provided adequate information in respect of environmental or natural heritage impacts or has not supplied adequate information on the nature or impact of appropriate mitigating measures, the appropriate course for the planning authority is to require the developer to submit further information in accordance with Article 33 of the Planning and Development Regulations 2001.
>
> **Appropriate Compliance Conditions**
> It is appropriate to attach compliance submissions to monitor the effectiveness of proposed mitigation measures in relation to known environmental effects, or mitigation measures proposed in an environmental impact study that must be implemented. Planning authorities should however, ensure that the developers are applying correctly any mitigation measures proposed in the application, in a way that minimises the resource implications for the authorities".

102. As noted by the respondent's Inspector in her Report in its letter dated the 20th July, 2010 to the first notice party the Department of the Environment, Heritage and Local Government, while adverting to the fact that the potential impacts in relation to avifauna had not been fully addressed in the environmental impact statement and supplementary information nonetheless considered that such potential impacts could be mitigated by attaching a condition requiring a lands/habitats management plan to any grant of permission. This letter was required to be before the respondent (s. 128(1)(a)(ii) as substituted by s. 21 of Act No. 27 of 2006). It was accepted on all sides that the respondent would have been aware of Circular Letter P.D. 2/07 and N.P.W.S. 1/07. In her Report the respondent's Inspector also pointed to the fact that the above letter of the 20th July, 2010, raised no issues with regard to any particular species of bird. The Department clearly did not consider that there was insufficient evidence on this topic for the respondent to make a decision or that in the circumstances the making of such a decision without requiring further information on this topic would amount to an infringement of its own guidelines.

103. An avifauna survey carried out in July 2009, which forms the basis of s. 4.4 of the environmental impact statement, found that

the bird species seen in the area of the proposed development were not rare either in Donegal or nationally. This survey was said to have been carried out in time to obtain a good impression of nesting birds. It stated that because of the lack of suitable local habitats the area was of minimal importance as regards bats. Hooded Crows, Ravens and Kestrels were seen in the area. Golden Plover and Dundin were not seen. Red Grouse droppings were seen in the area of the proposed turbine T. 32 (since directed to be eliminated by the decision of the respondent). A single Curlew was seen near Lough Ea, some 1.8km from the nearest proposed turbine. There was anecdotal evidence that a Golden Eagle had been seen in 2001, about 2km west of the proposed development site. It was considered that Plover were likely to occur in the proposed development site area in autumn at a time when they were moving about prior to migration.

104. A further avifauna survey was carried out by Mr. Goodwillie, in mid-February 2010, in response to the Notice for Further Information served by the respondent. This took the form of a vantage point survey for raptors and three transects of what was stated to be a representative area of the site of the proposed development for the purpose of locating wintering birds. Apart from Ravens and Hooded Crows no birds of prey were seen. A pair of Red Grouse was seen in the area of the proposed turbine T. 32 (since directed by the respondent to be eliminated). A Dipper was seen in a stream near the proposed turbine T. 2, at the extreme N.E. end of the proposed development site from the applicant's lands. Application for permission for this proposed turbine was abandoned at the planning authority stage. Two Whooper Swans were observed on Lough Ea. Another transect survey was carried out by Mr. Goodwillie in mid-August 2010, with a view to identifying protected breeding species, particularly Hen-Harriers. Apart from Hooded Crows and Magpies no birds of prey were seen. A local farmer reported that two Golden Eagles had been seen on the top of Aghla Mountain,—the proposed development is located on the lower southern slopes of this mountain—in 2007, but to his knowledge had not been seen since then. Mr. Goodwillie stated that the low number of birds found in the area of the proposed development on these surveys was corroborated by data held by the National Parks and Wildlife Service of the Department of the Environment, Heritage and Local Government. The absence of Hen-Harriers and Merlin in the area of the proposed development was confirmed by this data and separately, by the findings in a General Survey carried out by Scott and Norriss which included this area.

105. In a submission to the respondent dated the 4th October, 2010, and received on the 7th October, 2010, from Ralph Sheppard of Gaia Associates, Environmental Consultants, on behalf of another third party appellant, he stated that Red Grouse were known to be breeding on Aghla Mountain and almost certainly on the bog plateau on the south side of that mountain. He referred to a Birdwatch Ireland census of 2006-2008 which identified 4,200 birds of this species present in the whole island of Ireland. He considered that the construction of turbines on this bog plateau would lead to a further decline in the numbers of this endangered species. This opinion was also expressed by other third party appellants some of whom referred to the establishment of the Cró Na mBraonain habitats and grouse sanctuary three years previously on the reverse (northern) side of Aghla Mountain from the proposed development. Application for permission for proposed turbines in all Zone "A" type land and also all Zone "B" type land—similar to Zone "A" type land, but with somewhat steeper slopes of between 5 degrees and 10 degrees—the type of bog plateau being referred to by Mr. Sheppard, was either abandoned at the planning authority stage by the second notice party or was disallowed by the respondent in its decision.

106. Mr. Sheppard considered that the sighting of the single Curlew near Lough Ea was very significant and should have resulted in a further survey of that area to establish if a group of Irish breeding species was present. Lough Ea is on the southern side of the R.253 and approximately 1.8km away from the nearest turbine permitted by the respondent. Mr. Sheppard accepted that Hen-Harriers were not known to be present in the area of the proposed development but stated that Peregrine and Merlin were both known from the area. This later statement is at odds with what Mr. Goodwillie stated was the data held by the National Parks and Wildlife Service. Mr. Sheppard stated that Golden Plover were present in the area of the proposed development during the breeding season. He pointed out that Red Grouse, Golden Plover, Merlin, Hen-Harrier and Peregrine are all listed in Annex 1 of Council Directive 09/147/E.C. of 30 November 2009 on the conservation of wild birds, O.J. L 175/40 5.7.1985 (E.U. Birds Directive). He considered that the proposed development would have a serious impact on important wildlife and habitats in the area.

107. The surveys carried out by Mr. Goodwillie were criticised by other third party appellants as having been carried out post-dawn and pre-dusk, outside the recommended dates and in lowland areas and along roadsides where, it was said, Red Grouse and birds of prey were unlikely to be found. A third party appellant submitted that research by the National Parks and Wildlife Service had established scientifically that Golden Eagles avoided wind farms and flew a circuitous route for that purpose. This third party appellant submitted that the proposed development would stand in the path of an existing straight and safe flight-path between nesting areas in Glenveagh and in the Bluestack Mountains.

108. A further Report from Mr. Goodwillie, dated the 8th November, 2010, was submitted by the second notice party to the respondent in reply to these various third party appeals. In it, Mr. Goodwillie accepted that Red Grouse would be affected by the construction work connected with the proposed development if this work were to be carried out in the nesting season of April and May. He referred to a leading article by James W. Pearce-Higgins and others in the *Journal of Applied Ecology*, 2009, No. 46, pp. 1323-1331, entitled "The Distribution of Breeding Birds Around Upland Wind-Farms", which reported their finding that Red Grouse did not otherwise show any negative response within 500m of active wind-farms. Mr. Goodwillie stated that there were no suitable cliff breeding sites for Peregrines in the area. He stated that his familiarity with the existing literature and his experience of available habitats gave him confidence that no interesting bird species was missed in the July, February and April surveys, despite the time constraints imposed by planning deadlines. He accepted that the article by Pearce-Higgins *et al.,* had reported that some reduction in Curlews breeding within 100m to 800m of wind turbines had been demonstrated. In his opinion there were no likely nesting habitats for Curlews within the area of the proposed development. Mr. Goodwillie stated that the Winter Survey had been done in February 2010, rather than in January because of the severe weather in the latter month, but he considered that milder weather would not have produced a different result. Because of planning time constraints a summer survey could not be done in 2010 as it was in 2009, so April was chosen instead. He stated that in April all migratory species would be in residence in the area and Hen-Harriers and other birds of prey would be most visible while establishing territories. The site transects were designed to traverse habitats where Snipe, Curlew, Golden Plover, Red Grouse, Ring-Ouzel and Wheatear and other rarer bird species might occur. He stated that small common bird species would not be affected by the construction or operation of the proposed development.

109. In their report entitled "The Distribution of Breeding Birds Around Upland Wind-Farms", Pearce-Higgins and others, the authors state that they had used data from twelve upland wind farms in the United Kingdom built between 1996 and 2002. To their knowledge this was the first such multi-site comparison examining wind-farm effects on the distribution of breeding birds. Six survey visits at twelve day intervals had been made between mid-April and end-June employing walking transects conducted every three hours from dawn to dusk avoiding periods of strong winds, heavy precipitation and poor visibility. Raptor flights were mapped to provide an index of flight activity and, flight heights were estimated. The authors stated that levels of turbine avoidance suggest that breeding bird densities may be reduced within a 500m buffer zone of turbines by 15% to 53%, with Buzzard, Hen-Harrier, Golden Plover, Snipe, Curlew and Wheatear most affected. The occurrence of Red Grouse was greater close to access tracks and no evidence of turbine avoidance by Red Grouse was evidenced. These birds also showed no consistent avoidance of overhead power lines. The authors were satisfied that the evidence emphasised the need for a strategic approach to ensure that wind-farm development avoided areas with high densities of potentially vulnerable species. They found considerable evidence for localised reduction in breeding-bird density

on upland wind-farms. No examination had been carried out as to whether this was due to avoidance as a behavioural adaptation consequent on collision mortality or reduced productivity or both.

110. While accepting that further avifauna surveys, whether all-year-round surveys or surveys limited to migratory birds, flight paths or Golden Eagles in the area of the proposed development might enhance the store of knowledge available to the respondent in deciding whether or not the proposed development was likely to have significant effects on avifauna in the area, I cannot accept that it was irrational and plainly and unambiguously flying in the face of fundamental reason and common sense for the respondent to have considered that without this additional material, the environmental impact statement and supplementary material was sufficient to comply with the requirements of article 94 of the Planning and Development Regulations 2001. I do not accept that the environmental impact study and supplementary material contained no information on migratory species and made no reference to the recently reintroduced Golden Eagle. However, the fact that the respondent's Inspector considered that the avifauna surveys were "far from robust" and provided no information on migratory birds, flight-paths or Golden Eagles does not, as submitted by the applicant, mean that the respondent in the exercise of its statutory discretion could not have concluded that the information provided by the second notice party in the environmental impact statement and supplementary material was a sufficient description, explanation and amplification of the aspects of the environment, including fauna, likely to be significantly affected by the proposed development. These criticisms by the Inspector were a factor to be taken into account by the respondent in deciding whether or not the information was adequate but was not in any way conclusive in the matter. I am satisfied that it was reasonably and rationally open to the respondent to conclude that the information contained in the environmental impact study and supplementary material in this case was adequate and a proper compliance with the provisions of article 94 of the Planning and Development Regulations 2001 (as amended).

111. However, Senior Counsel for the applicant submitted that the respondent had not in fact considered that the information contained in the environmental impact statement and supplementary material complied with the provisions of article 94 of the Planning and Development Regulations 2001, (as amended). He submitted that the respondent's Inspector in her Report had found that the environmental impact statement and supplementary material lacked information on avifauna necessary to enable a decision to be made on whether the proposed development was likely to have a significant effect on avifauna and that the respondent had accepted this finding. This acceptance, he said, was evidenced by the attachment by the respondent of Condition 12 to its decision to grant permission for the proposed development with the object of providing a solution, by means of a management plan, for possible significant effects on avifauna by the proposed development which could not be considered at that time because of the inadequacy of information contained in the environmental impact statement and supplementary material. No other evidence of this alleged decision on the part of the respondent that the information was inadequate was adduced by the applicant despite what was held by McCarthy J. in *O'Keeffe v. An Bord Pleanála* [1993] (above cited), at 79, regarding the burden of proof in applications for judicial review of administrative decisions.

112. In that case, Finlay C.J., p. 76 and McCarthy J., p. 79, held that the respondent is entitled to express the reasons for its decisions by reference to the reasons given for conditions together with the terms of those conditions. The reason given by the respondent for imposing Condition 12 was, "to ensure appropriate management of habitats within the site". In the absence of any other evidence I must accept that this was the *bona fide* and sole reason why the respondent considered it appropriate to attach Condition 12 to its decision to grant permission for the proposed development.

113. This was also the reason given by the respondent's Inspector for recommending in her Report (p. 51, Condition 11) that such a condition be attached to any decision to grant permission for the proposed development. While it is long established in law that the respondent is not bound by any findings of fact or, obliged to accept any recommendation made by its Inspector in her or his report, it is clear that in the instant case the respondent accepted this particular recommendation of its Inspector. It is further clear from those sections of the Inspector's Report to which I have referred earlier in this judgment that the impetus behind the imposition of this condition came from the Department of the Environment, Heritage and Local Government in its submission of the 20th July, 2010, to the first notice party. This submission, as noted by the Inspector in her Report raised no issues with regard to any particular bird species. This latter point is of importance as regards the alleged lack of reference to Golden Eagles in the environmental impact statement and supplementary material (which I am not satisfied is correct) because it is the National Parks and Wildlife Service of that Department which is endeavouring to reintroduce Golden Eagles into the wild in Glenveagh National Park.

114. It is utterly improbable that the Department of the Environment, Heritage and Local Government would recommend that this condition be attached to any grant of permission for the proposed development for the reasons submitted by the applicant. To do so, would be to recommend a course of action condemned by its own Circular Letter P.D. 2/07, N.P.W.S. 1/07 directed to all county and city managers, directors of services for planning and town clerks. It was accepted on all sides that the respondent would have been aware of the existence and contents of this important circular letter. In it the Department advised that it considered that Council Directive 85/337/E.E.C., required that a planning authority must have before it adequate information on the potential effects of the proposed development, including any proposed mitigation measures, when making its decision and, that accordingly under no circumstances should a planning authority use compliance conditions to complete an application in a way that minimised this requirement. I am quite unable to accept that the respondent's Inspector and the respondent, despite the reason given for Condition 12, in fact employed it as a device to consciously and deliberately do exactly what was expressly disapproved in Circular Letter P.D. 2/07, N.P.W.S. 1/07. It would require the very strongest evidence to establish such a case and the only evidence in the present case was a particular construction and, in my judgment an incorrect construction placed upon a paragraph (4th paragraph, p. 44), in the Inspector's Report. In my judgment this misconstruction comes from conflating the Inspector's criticisms of the avifauna surveys underpinning the environmental impact statement and supplementary material and, the concern of the Department of the Environment, Heritage and Local Government to ensure that the land within the proposed development site would be managed in such a way as to benefit local wildlife.

115. It is significant that the respondent's Inspector, while adverting to criticisms by third party appellants of the avifauna surveys underpinning the environmental impact statement and supplementary material and, while accepting that these surveys were, "far from robust" and, while focusing attention on what she considered—perhaps incorrectly—was a failure to provide information on migratory species, flight-paths and Golden Eagles, does not conclude that without further information about these matters it would not be possible to make a proper decision as to whether the proposed development was likely to have a significant effect on avifauna. The Inspector refers to the criticism by the Department of the Environment, Heritage and Local Government that potential impacts in relation to avifauna had not been fully (the emphasis is mine) addressed in the environmental impact statement and supplementary material. However, it is clear from the solution proposed by the Department that it was not concerned with any lack of information about flight-paths, migratory and other species including Golden Eagles, or other data in the environmental impact statement and supplementary material, but with the absence of a management plan for the 595 hectares, (1,470 acres), within the development site addressing such matters (identified in the environmental impact statement and supplementary material) as the need to protect nesting birds during construction and maintenance works, the importance to local and migratory birds of healthy and carefully managed blanket bog, wet-lands and water courses and the prevention of habitat degradation by over-grazing. In my judgment the

fact that the respondent's Inspector added the sentence,—"The plan shall provide for a programme of ecological monitoring (including for avifauna) to be carried out on the site by a suitably qualified specialist during construction and for a period following the commission of the development"—to the draft submitted by the Department of the Environment, Heritage and Local Government and, that the condition so extended was accepted by the respondent does not alter the purpose of Condition 12 or the intention of the respondent in imposing it. I am quite satisfied that the sole purpose for attaching Condition 12 to the decision to grant permission for the proposed development was, as the reason given for it states, "to ensure appropriate management of habitats within the site" and for no other purpose.

116. I do not consider that the decision in *R. v Cornwall County Council* [2001] Env. L.R. 25 *per*. Harrison J. is of any assistance to the applicant and, is distinguishable on its facts from the present case. In that case Harrison J. found that following, "the strong advice", of English Nature Cornish Wildlife Trust and Cornwall Bat Group, that bats, (a protected species within annex IV(a) of the Habitats Directive), or their resting places, "may be found in the mineshafts if surveys were carried out", the Planning Committee of Cornwall County Council concluded that those surveys should be carried out. That being so, Harrison J. held that despite the advice of English Nature and Cornish Wildlife Trust that the surveys should be carried out before any development was commenced rather than before planning permission was granted, the permission granted was unlawful because Cornwall County Council could not know that they had full environmental information and, could not rationally conclude that there were no likely significant environmental effects until the surveys were completed and they had been furnished with the data. As I have demonstrated in the instant case, contrary to what was submitted by the applicant, the respondent's Inspector did not, nor did the Department of the Environment, Heritage and Local Government recommend that further surveys be carried out nor, did the respondent conclude that they ought to be.

117. Article 94, Schedule 6 of the Planning and Development Regulations 2001, provides at subpara. 1(c) and 2(b) that an environmental impact statement shall contain data required to identify and assess the main effects which the proposed development is likely to have on the environment, together with further information by way of explanation and amplification, describing aspects of the environment likely to be so affected, in particular cultural heritage. It was accepted on all sides at the hearing of this application that the environmental impact statement and supplementary material furnished by the second notice party did not contain any information which would enable the respondent to consider whether the cultural heritage of the area of the proposed development, as an important Gaeltacht area, was likely to be significantly affected by the proposed development. It was accepted that this omission was due to a genuine but nonetheless surprising error on the part of the first notice party as to the boundaries of this very important Gaeltacht area. I am satisfied that the Certificate from the Department of Community, Equality and Gaeltacht Affairs, dated the 1st October, 2010, and exhibited at para. 21 of the applicant's second affidavit sworn on the 31st January, 2012, demonstrates conclusively that the entire proposed development sites lies within this Gaeltacht area. Section 143(1)(a) of the Planning and Development Act 2000 (as substituted) requires that the respondent in performing its functions must have regard to Government policies and objectives. It was accepted by all parties that it was Government policy to preserve and promote Gaeltacht areas. The evidence established that this was also the policy of the first notice party. Though he referred to this section in argument, I do not believe that senior counsel for the applicant assumed the onus of establishing *(Glancré Teoranta v. An Bord Pleanála* [2006], (Unreported, High Court, MacMenamin J., 2nd May, 2006)) that the respondent in reaching its decision in the present case had failed to comply with the provisions of this subsection.

118. In her Report, the respondent's Inspector (p. 46) considers the matter under the caption, "Impacts on Cultural Heritage" in the following terms:-

> "The impacts of the development on cultural and linguistic heritage that the Gaeltacht provides have been raised in the submissions. Chapter 6 of the Environmental Impact Statement (Material Assets) provides reference to cultural heritage. The main focus of this chapter is on archaeology and architectural heritage, with only fleeting reference to the cultural significance of the Irish language. This is perhaps understandable on the basis that the site appears to be specifically excluded from the Gaeltacht area as defined in Map 11 on the Plan. However, the inclusion of a number of the townlands within the subject site in the place names (Ceantair Ghaeltachta) Order 2004, which declares the official Irish language version of placenames in Gaeltacht areas, suggest that the site is within the designated area. This is further supported by the map showing the extent of the Donegal Gaeltacht on the Udaras na Gaeltachta web site.
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> The Donegal Gaeltacht is one of the largest in the country and is of significant cultural importance. The Plan seeks to protect this important cultural resource and its goal is 'to maintain and develop the Gaeltacht as a vibrant and sustainable community wherein the Irish language and culture can flourish'. Various policies and proposals are incorporated into the Plan to preserve, protect and promote the language and culture of the Gaeltacht, whilst at the same time allowing it to develop. With the exception of multiple housing units, the Plan does not identify particular land uses, which it is considered would pose a threat to the language and culture of the Gaeltacht areas requiring language impact assessment. I note that the Windfarm Development Guidelines make no reference to negative impacts on language arising from windfarm development.
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> The concerns raised by the observers relate to depopulation of the area and loss of attractiveness due to the development of a windfarm whilst substantial and persistent population decline would impact significantly on the ability of the area to support and maintain the facilities/activities to sustain and promote the Irish language, I am not aware that there is any compelling evidence than appropriately sited windfarms would result in population decline or render an area less attractive for housing. Conversely, there is evidence to suggest from surveys carried out in other countries such as Scotland, Britain, USA, Denmark, etc. (with significant installed capacity), that public opinion usually shifts to become more strongly in favour of windfarms once the turbines are installed and operational, *i.e.,* that acceptance grows with familiarity.
>
> The highest proportion of turbines will be located in the area stretching from Graffy Bridge north-eastwards towards Dalragan More. This is an area with a very low population density. The few inhabited houses that do exist are long established residences and there is no evidence, even in the absence of the proposed windfarm, that the area has proved an attractive location for new dwellings."

119. It was submitted by senior counsel on behalf of the applicant that the environmental impact statement did not contain any information or data to enable the respondent to identify and to assess the likely effects, adverse or beneficial, which the proposed development might have on the cultural heritage of this Gaeltacht area. I am satisfied that the requirement to provide such information by way of explanation and amplification of the data required to identify and assess the main effects which the proposed development was likely to have on the environment, was not, in the instant case, mandatory. This was not, as the Inspector pointed out in her Report a proposal to develop multiple housing units in the area which might well affect its cultural heritage. The adequacy of the information contained in an environmental impact statement is a matter for the respondent and, as was pointed out by Harrison

J. in *R. v. Cornwall County Council* (above cited), para. 37, the requirement to provide such information does not arise if the respondent considers that it is not required to identify and assess the likely effect of the proposed development on the cultural heritage of this area. If the respondent considered that it required such information, it was empowered by provisions of article 111(2) of the Planning and Development Act Regulations 2001, to serve a Notice seeking that information from the second notice party.

120. As para. 2(b) of Schedule 6 of the Planning and Development Regulations 2001 makes separate reference to human beings, landscape, material assets, architectural heritage and archaeological heritage, the term, "cultural heritage" must be intended to refer to the unique inheritance of shared knowledge, customs and useful arts derived from living in this particular area and environment, including, but not confined to such matters as, language, folklore, music, dance, crafts, traditional artefacts and methods of doing things. This may of course be inter-related with one or more of the other factors mentioned in this subparagraph. The Inspector records in her Report that the concerns of local third-party appellants was that the proposed development would cause existing inhabitants to leave the area and deter prospective inhabitants from taking up residence there and substantial population decline would be likely to significantly affect the cultural heritage of the area. It is very difficult to see how the cultural heritage of the area could otherwise be affected by a wind farm development. In her Report the Inspector considered habitation patterns and trends in the area and objective evidence of the impact of wind-farms on population numbers and habitation choices derived from surveys carried out in other E.U. States with significant numbers of wind-farms and, in the U.S.A. In my judgment, it is being entirely unrealistic to expect that the respondent should have required the second notice party to provide further information and data on this issue. I am satisfied that the respondent was entitled rationally and reasonably to consider that it did not require further information from the second notice party in order to assess whether the proposed development was likely to have adverse or beneficial affects on the cultural heritage of this Gaeltacht area.

121. In light of the foregoing, I am satisfied that in the exercise of my discretion, I should decline to make an order of *certiorari* pursuant to the provisions of s. 50 of the Planning and Development Act 2000, and O. 84 of the Rules of the Superior Courts quashing the decision of the respondent made on the 11th February, 2011, to grant permission for the proposed development. In the Statement required to ground application for judicial review, the applicant additionally seeks further and other relief. In my judgment, the appropriate remedy to be granted to the applicant in this case, is a Declaration that the decision of the respondent insofar as, and to the extent that it purports to decide to grant planning permission in respect of or in any manner affecting the land of the applicant or any part of it, is void. The filed statement contains no claim for a permanent injunction or for damages.