THE HIGH COURT

JUDICIAL REVIEW

IN THE MATTER OF SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 2000, AS AMENDED

[2019/40 JR.]

BETWEEN

GLEANN FIA HOMES LIMITED

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

URSULA O'SULLIVAN AND ALAN DUNLEA

NOTICE PARTIES

JUDGMENT of Mr. Justice Robert Haughton S.C., delivered on the 14th day of August, 2019.

Contents

1. In these proceedings the applicant seeks an Order quashing the decision of An Bord Pleanála ("the Board") dated 18th December, 2018 granting the Notice Parties leave to appeal under s.37(6) of the Planning and Development Act, 2000 as amended ("the Act"), the decision of Cork County Council granting the applicant planning permission for a development consisting of the demolition and removal of 6 partially completed residential units and the construction of 60 residential houses and associated site works at Gleann Fia, Bawnnafinny, Tower, Blarney, Co. Cork (Reg. Ref. 18/05562) (the "planning permission").

The applicant further seeks, if necessary, an Order quashing the decision of the Board to accept as valid the appeal in respect of the planning permission submitted by the Notice Parties on 10th January, 2019.

2. These proceedings concern the circumstances in which the process by which the Board may permit a person who has not made submissions or observations in respect of a planning application to a local planning authority, may nonetheless be granted leave to appeal a decision to grant a permission to the Board. It concerns the correct interpretation and application of s.37(6) of the Act.

3. The provision that entitles an applicant for planning permission, or a party making observations or submissions, to appeal to the Board appears in s.37(1)(a), which states: -

> "(1)(a) An applicant for permission and any person who made submissions or observations in writing in relation to the planning application to the planning authority in accordance with the permission regulations and on payment of the appropriate fee, may, at any time before the expiration of the appropriate period, appeal to the Board against a decision of a planning authority under *section 34*."

4. While this subsection would exclude from the appeal process any member of the public who did not raise any objections or make any submissions or observations, there is an exception provided for in s.37(6), the relevant parts of which read as follows: -

> "(6)(a) Notwithstanding *subsection (1)(a),* a person who has an interest in land adjoining land in respect of which a decision to grant permission has been made may, within the appropriate period and on payment of the appropriate fee, apply to the Board for leave to appeal against a decision of the planning authority *under s.34.*

(b) An application under *paragraph (a)* shall state the name and address of the person making the application, the grounds upon which the application is made, and a description of the person's interest in the land.

(c) […]

(d) The Board, or any member or employee of the Board duly authorised by the Board in that behalf, shall, where an applicant under this subsection shows that–

(i) the development in respect of which a decision to grant permission has been made will differ materially from the development as set out in the application for permission by reason of conditions imposed by the planning authority to which the grant is subject, and

(ii) that the imposition of such conditions will materially affect the applicant's enjoyment of the land or reduce the value of the land,

within 4 weeks from the receipt of the application grant the applicant leave to appeal against the decision of the planning authority under *subsection (1).*

(e) […]"

5. It was not disputed that s.37(6) establishes three criteria which must be established in order for the Board to be entitled to grant leave to appeal: -

(a) The applicant for leave to appeal must have "an interest in land adjoining land in respect of which a decision to grant permission has been made";

and

(b) the development in respect of which the decision to grant permission has been made must differ materially from the development as applied for because of conditions imposed by the planning authority;

and

(c) the imposition of such conditions will materially affect the applicant's enjoyment of the adjoining land in which he or she has an interest, or reduce the value of that land.

It was conceded by the Board that the applicant for leave to appeal must meet all three criteria.

6. The applicant in its Statement of Grounds asserts that there was no factual or evidential basis upon which any of the three criteria were met. As to the first, the applicant asserts that the Notice Parties' land could not be regarded as "adjoining" the land in respect of which the decision to grant permission was made as it is at a physical remove from the development site. As to the second, the applicant asserts that there is no material difference between the development as applied for and the development in respect of which a decision to grant permission was made by reason of the conditions imposed, only Conditions nos.1 and 35 being relevant. As to the third, the applicant asserts that the Notice Parties' land was not adjoining, and that there was no evidence of affect or material affect to the Notice Parties' enjoyment of their land, and/or no evidence of a reduction in value.

7. The applicant further contends that the Board did not give any adequate reasons for its decision to grant leave to appeal.

1. *Factual Background*.

8. The applicant's development site at Gleann Fia, Bawnnafinny lies to the south of the Shournagh River that in turn flows roughly east to west just south of the village of Tower, near Blarney, Co. Cork. It is intended that the proposed housing estate will open onto an existing public road (the Kerry Pike Road) which runs for about 300m before crossing the river on an old narrow bridge that barely allows room for two vehicles to pass, and is unsafe for pedestrians wishing to access the facilities of Tower village. The Notice Parties' property lies just to the north of the river, and is bounded on the west by the Kerry Pike Road, and on the south by the river. The actual property boundary on the south appears to be mid– stream.

9. The planning history in respect of the applicant site is of some relevance. An application for planning permission made to Cork County Council ("the Council") in 2007 was refused, but was granted on appeal by the Board, subject to conditions, on 29th August 2007. This planning permission (Reg. Ref. PL04.221641) to the applicant's predecessor, Coleman Brothers Developments Ltd. on 29th August 2007 was for the demolition of two houses, and the construction of 168 residential units and associated site works and "an amenity walk into the north of the site and the construction of a footbridge over the Shournagh River."

Condition 2 provided: -

"2. None of the dwellings hereby permitted shall be occupied prior to the construction of the footpath on the northern side of Kerry Pike Road linking the western side of the proposed entrance with the village centre of Tower. The footpath width and design details shall be in accordance with the requirements of the planning authority.

Reason: In the interests of public safety."

Condition 18 provided: –

"18. The developer shall pay to the planning authority a financial contribution as a special contribution under section 48(2)(c) of the Planning and Development Act 2000 in respect of the provision of a footpath linking the western side of the proposed development with the village centre of Tower and the upgrading of the bridge, including pedestrian facilities, and including any necessary interim measures. The amount of the contribution shall be agreed between the planning authority and the developer or, in default of such agreement, the matter shall be referred to the Board for determination. The contribution shall be paid prior to the commencement of the development or in such phased payments as the planning authority may facilitate and shall be updated at the time of payment in accordance with changes in the Wholesale Price

Index – Building and Construction (Capital Goods), published by the Central Statistics Office."

10. Development commenced pursuant to this primary permission but only limited works were carried out before the recession that began in 2008 brought an end to building work.

11. On 15th June, 2018 the applicant sought planning permission from the Council for a development consisting of the demolition and removal of 6 partially completed residential units and the construction of 60 residential houses and associated site works at the Gleann Fia site. The application was accompanied by an engineering Design Report of Martin Peters Associates which referred to the fact that a new pedestrian bridge adjacent to the existing vehicular bridge over the Shournagh River would be required to provide full pedestrian connectivity from the site to Tower village centre. The Design Report proposed locating the pedestrian bridge as shown on Drawing 181013/C/008PL1 ("PL1"), with footpath connections to the public footpath also shown on that plan. The planning application did not however seek planning permission for construction of the bridge, the development works being confined to an area within the red line identified on Site Location Map 1808(PD)200 ("the red line site").

12. Drawing PL1 headed "Proposed Pedestrian Connectivity" shows the red line site, opening onto the Kerry Pike Road which leads north-westwards to Tower Bridge. It shows a dotted blue line denoting pedestrian connectivity along an existing public footpath, part of the way to the existing bridge. At a certain point short of the river the blue dotted line leads into orange dots which continue across the river; an arrow to the orange dots over the river describes "POSSIBLE LOCATION OF PEDESTRIAN BRIDGE", which crosses the river just to the northeast of and parallel to the existing Tower Bridge. At the point that the footpath reaches the north bank it crosses a long disused railway track and is then shown as branching right and left:

- The branch leading to the right runs north east and is denoted in large blue dots and described as "POSSIBLE FOOTPATH LINK TO AMENITY WALK" and is marked on the drawing as running along a black line which was thought to denote the boundary of the Notice Parties' property. This branch soon links up with green dots which denote "Amenity Walk as identified in Blarney – Macroom Municipal District Local Area Plan" Also known as the "Loop" walk, this dotted green walkway follows the line of the disused railway track which in turn runs parallel to the river, before reaching an apex at the end of the blue dotted "possible footpath a link to amenity walk", and thence turning northwards.

- The branch to the left (west) is also denoted by large blue dots which link up with the marked "EXISTING FOOTPATH" leading to Tower village. This branch as drawn crosses a triangular corner of the Notice Parties' land (marked with solid black lines) close to the existing bridge, although their ownership is not identified by name on the plan. Another arrow pointing to the blue dots where they branch off is accompanied by the words "CONNECTION TO AMENITY WALK".

13. It transpires that the Notice Parties' ownership probably extends *ad medum filum* and therefore incorporates the proposed footpath link to the Loop Walk, the disused railway line, and half of the proposed pedestrian bridge. The black line on PL1 where it coincides with the blue dotted line of the "Possible Footpath Link to the Amenity Walk" probably demarks the physical boundary between the old railway line and that part of the Notice Parties' property lying to the north of that line.

14. It is common case that the Notice Parties' property, excluding the river and railway line, is removed from the applicant's development site by some 238 metres as the crow flies or 311 metres by the Kerry Pike Road.

15. Despite the fact that the application Design Report and accompanying PL1 included a proposal for a pedestrian bridge and footpaths running over the Notice Parties' land, the Notice Parties did not make any observations or submissions to the Council on the applicant's planning application.

16. The Planner's Report on the planning application highlights the issues for pedestrians with the existing Tower Bridge, noting: -

> "[L]ack of adequate footpath linkages to the village/community facilities and the nearest bus stop is a concern. Tower Bridge has no pedestrian use and is a bottleneck leading to all journeys to the village being by car."

and

> "[L]ack of pedestrian/cycling linkages to village/community facilities will result in an overreliance on the use of the private car for all trips which will only add to the existing pressure on local roads."

17. Further on the Planner elaborates on these concerns as follows: -

> "A narrow strip of land located to the north west of the site is denoted as a wayleave area which would allow pedestrian linkage to lands to the north on the opposite side of the Shournagh River. There is an existing pipeline that bridges the river at this location to the north of the west of the site. The Planning Authority considers that it is vital that as part of the proposed development non-vehicular links with the village and especially the village centre to the north are improved. There is a significant opportunity as part of this proposed development to open up and link existing residential areas to the north to this proposed development site and in so doing link areas to the south of this development also to the centre of the settlement.
>
> There are major concerns regarding existing poor pedestrian and cycling linkages to the town centre from this area within the settlement to the south of the River Shournagh. Tower Bridge at present does not have any footpath and so pedestrians are forced to walk along a very busily trafficked road in order to walk to the town centre. This is considered to be a very dangerous arrangement at the present and the Planning Authority would consider that significant proposals should be put forward by the developer to directly link the proposed residential estate to areas to the north which would improve permeability, and provide a safe pedestrian and cycle corridor for local residents in this area. The proposal would also reduce the reliance on the use of the private car for every journey/trip to and from the town centre it is considered and would also help reduce traffic.
>
> It is noted that as part of the first planning permission (06/4407) for the development of this site, the site boundary included a narrow strip of land to allow for the creation of a pedestrian/cycle link to areas on the opposite side of the river to the north. This permission was refused by CCC, appealed to ABP (04.221641) and granted. As this is considered to be the governing permission for the site and as the wording of the development description attached to the decision included: "an amenity walk to north of site and construction of footbridge" it is considered that the applicant should be

asked to put forward substantial proposals for the development of pedestrian links from the site to areas to the north of the river."

18. The Planner concludes this section by stating: -

> "Other than the wayleave shown in the submitted site layouts and the site layout denoting the possible location of a future pedestrian bridge adjacent to Tower Bridge no specific details have been submitted by the applicant in this regard and this is considered to be a significant shortcoming in the overall proposed design and layout of the estate."

19. This was the first reason given by the Planner for recommending deferral of a decision on the application. It led to the Council request for further information on 8th August, 2018 raising *inter alia* queries (1)(a) and (b): -

> "(1) (a) The governing permission for the site required that the proposed development be connected to the centre of Tower by a footpath. It is noted that this has not been carried out to date and that Tower Bridge is a bottleneck for pedestrian use as there is no footpath in place to serve pedestrians. Therefore, you shall submit revised details and proposals setting out how it is proposed to link the proposed development to the centre of the settlement as was required and set out as part of the governing permission for this site (pedestrian bridge etc. location and how it is to be constructed to the agreement and satisfaction of Cork County Council roads section/traffic and transportation).
>
> (b) A Proposed footpath location connected to amenity walk is identified, this seems to be on private land, clarification on footpath location and provision is required to be submitted.
>
> *It is recommended the application [sic.] meets with the Roads Section/Traffic and Transportation Section prior to responding to this item."*

20. It will be noted from this that the Council make reference to "private land". I am satisfied that this can only be interpreted as a reference to that section of the proposed footpath shown in large blue dots on the Notice Parties' land on the north side of the river as shown in PL1.

21. Queries (1)(a) and (b) were answered by the applicant's planning consultants McCutcheon Halley on 28th September, 2018 as follows: -

> "1(a) As requested, please refer to Dwg. No. 181013/C/008 'Proposed Pedestrian Connectivity' by Martin Peters Associates Consulting Engineers which demonstrates how a footpath connection can be achieved at Tower Bridge to the existing footpath network to the village centre further northwest. The drawing demonstrates that for the majority of the route, there is an already existing footpath network provided as a result of the previous decision on site (Cork County Council Ref. 06/4407 ABP Ref. PL04.221641), with the exception of a short section at Tower Bridge where the road is too narrow at certain pinch points to meet the footpath requirement on the bridge.
>
> A proposed bridge layout and site plan has been included as part of this response by Martin Peters Associates Consulting Engineers to address this issue. The plan and layout provide details and proposals setting out how it is proposed to link the proposed development to the centre of the settlement as was required and set out as part of the governing permission for this site. These proposals ensure pedestrian safety and demonstrate a full continuous pedestrian connection from Gleann Fia Estate to Tower Village. The enclosed proposals have been discussed with the Area Engineer, Andy O'Brien, prior to the submission of this RFI response. As discussed with the Area Engineer, the bridge can be delivered either by special development contribution as was the case in the previous 06/4407 permission or in collaboration with the Council.
>
> 1(b) The proposed footpath, bridge and connection to the amenity walk has also been identified in Dwg. No. 181013/C/008 in response to the objectives set out in the 2017 Blarney Macroom Municipal District Local Area Plan. As can be seen in Dwg. No. 181013/C/008 by Martin Peters Associates Consulting Engineers, the applicant has responded to the wider area and provided proposals to ensure pedestrian safety and demonstrate a full continuous pedestrian connection from Gleann Fia Estate to Tower Village. As shown in dark blue, the proposed footpath between the pedestrian bridge and the existing footpath will allow for the provision of the amenity walkway by the Council. The enclosed proposals have been discussed with the Area Engineer, Andy O'Brien, prior to the submission of this RFI response. The Area Engineer was happy with the details shown and also fully accepted that the amenity walk would need to be provided by the council which would, *inter alia*, deal with any third party ownership issues."

22. The enclosed Drawing No. 181013/C/008 ("PL2") is similar to PL1 but gives some more definite detail in delineating the "Proposed Pedestrian Connectivity" and the proposed pedestrian bridge. The arrow leading to the proposed pedestrian bridge, now shown with a solid red/pink line, carries the caption "proposed pedestrian bridge to link into existing footpath & connect to amenity walk". On the north side of the river the connection of the proposed bridge with the amenity walk is shown as a T-junction, just northwest of the old railway line. The "possible footpath link to amenity walk" is now shorter and appears to connect with the apex of the "Loop" walk on the Notice Parties' land. As with PL1, the footpath link with the "existing footpath" leading into Tower Village crosses the corner of the Notice Parties' land at the corner nearest the existing road bridge. There is also more clarity given on "proposed footpath linking proposed bridge and existing footpath" on the south side of the river.

23. Also enclosed with this response were bridge plans, drawings no. 181013-S-500 and 181013-S-501. The first of these is a more detailed plan showing the location of the proposed pedestrian bridge with approach footpaths on either side. It includes, with the dotted line, "site boundary of adjacent property as per planning ref. 15/5524". Although the incorrect number is given, this is a reference to a planning application lodged by the Notice Parties for the development of "proposed Domestic Dwelling and Garage". The correct planning reference is 18/4086, and there is a pending appeal before the Board reference PL04.302523.

24. A notable feature of the Notice Parties' planning application is the splayed entrance close to the existing Tower bridge. The applicant's proposed footpath link from the proposed foot bridge to the existing footpath to Tower Bridge would travel over the same land as this entrance. Another notable feature of the Notice Parties' planning application is that their development site is separated from the edge of the river by the land occupied by the old railway. Their proposal also allows scope for the connection of the "Loop" walk to the Kerry Pike Road, marked on their Proposed Site Layout map as "Potential future connection to golf club grounds."

25. Returning to the applicant's further information documents, the applicant's Drawing 181013-S-500 also includes a small 3D mark up of what the proposed pedestrian bridge would look like, with the existing old arched road bridge in the background.

26. The applicant's Drawing 181013-S-501 is a Section drawing of the proposed foot bridge, again with a 3D view, this time from the downstream side of the road bridge.

27. The Planner's Further Information Assessment on these more detailed proposals for the pedestrian bridge and footpath link dated 24th October, 2018 (signed off on 25th October, 2018) was as follows: -

> "Response
>
> The applicant has submitted details and a site location map setting out the proposed location of a pedestrian bridge to be located adjacent to Tower Bridge that would cater for pedestrian access to and from the centre of the settlement to the north. The proposed pedestrian bridge would link existing footpaths on both sides of the river and would also link the proposed development to the proposed amenity walking routes that are set out in the LAP. The development site is located at a remote and peripheral location from the centre of the settlement and it is considered that any proposed pedestrian link that will allow the development to be connected to existing footpath to the north, and by extension to the centre of the settlement are to be welcomed.
>
> It is considered that the proposed pedestrian bridge should be fully constructed in advance of the dwelling units being occupied on site.
>
> It is noted that the proposed pedestrian bridge lies outside of the red line development boundary and so the applicant will have to agree to some form of special contribution covering the cost of the bridge's construction. S.E.P. to commend further in relation to this matter."

28. The Planner recommended that permission be granted subject to conditions, including Conditions nos. 1 and 35 which were ultimately imposed and will be recited shortly.

29. The Planner's Report includes the following: -

> "The Traffic and Transportation Section have reviewed the pedestrian connectivity proposals for the footpath and bridge (see email report of 24/10).
>
> *In order to give this area connectivity to the village and provide the necessary pedestrian and cycle linkage from this development to Tower village, a pedestrian and cycle bridge will be required which links up to where the existing footpath currently terminates.*
>
> *The new dwellings as part of this development and future development of zoned lands in this area will benefit from this and so should bear the costs associated with same.*
>
> *Unless a bridge can be provided these dwellings will not have a suitable level of connection to Tower village.*
>
> *Based on a cost estimate a new structure would cost in the region of €500,000.*
>
> *Examining the planning history of zoned lands in this area and the zoning densities it is likely that total of 150 units will be constructed to the full build of this local area plan.*
>
> *Therefore, a special contribution of €3,333 should be levied towards each unit."*

30. Regulation 35 of the Planning and Development Regulations 2001 empowers a planning authority, on receipt of further information or evidence which it considers contains "significant additional data", to require *inter alia* further newspaper notification and a further site notice. This entitles fresh submissions/observations to be made by any person or body to the planning authority within 2 weeks (or 5 weeks if Environmental Impact Assessment is required). The Planner did not recommend further notification, and the Council did not require it.

31. By its decision dated 25th October, 2018 and notified to the applicants on that date the Council decided to grant permission for the proposed development subject to conditions, two of which are relevant: -

> "1. The proposed development shall be carried out in accordance with plans and particulars lodged with the Planning Authority on 15/6/18, 04/07/18 and 28/09/18 save where amended by the Terms and Conditions herein.
>
> *Reason*:
>
> In the interests of clarity.
>
> […]
>
> 35. At least one month before commencing development or at the discretion of the Planning Authority within such further period or periods of time as it may nominate in writing, the developer shall pay a special contribution of €199980.00 to Cork County Council, updated monthly in accordance with the Consumer Price Index from the date of grant of permission to the date of payment, in respect of specific exceptional costs not covered in the Council's General Contributions Scheme, in respect of works proposed to be carried out, for the provision of pedestrian and cycle bridge which links up to where the existing footpaths currently terminate to ensure connectivity to the village and provide the necessary pedestrian and cycle linkage from this development to Tower village. The payment of the said contribution shall be subject to the following; - (a) where the works in question – (i) are not commenced within 5 years of the date of payment of the contribution (or final instalment if paid by phased payment), (ii) have commenced but have not been completed within 7 years of the date of payment of the contribution (or final instalment if paid by phased payment), or (iii) where the council has decided not to proceed with the proposed works or part thereof, the contribution shall, subject to paragraph (b) below, be refunded to the applicant together with any interest which may have accrued over the period while held by the Council. (b) Where under sub-paragraphs (ii) or (iii) of paragraph (a) above, any local authority has incurred expenditure within the required period in respect of a proportion of the works proposed to be carried out, any refund shall be in proportion to those proposed works which have not been carried out. (c) payment of interest at the prevailing interest rate payable by the Council's Treasurer on the Council's General Account on the contribution or any

instalments thereof that have been paid, so long and in so far as it is or they are retained unexpended by the Council.

Reason:

It is considered appropriate that the developer should contribute towards the specific exceptional costs, for works which will benefit the proposed development."

32. Section 48(1) of the Act empowers a planning authority to impose conditions requiring the payment of contributions in respect of public infrastructure and facilities benefitting development in the area of that planning authority. Subsection (2)(a) and (b) provide the basis for such contributions are to be set out in "a development contribution scheme made under this section", and that the scheme may provide for payment of different contributions for different classes or descriptions of development. Section 48(2)(c) then provides for "special contributions": -

> "(c) a planning authority may, in addition to the terms of a scheme, require the payment of a special contribution in respect of a particular development where specific exceptional costs not covered by a scheme are incurred by any local authority in respect of public infrastructure and facilities which benefit the proposed development."

33. Condition 35 was imposed in this instance pursuant to s.48(2)(c), presumably because the exceptional cost of providing a pedestrian and cycle bridge and footpath links was not covered by any existing development contribution scheme made under s.48. The applicant has not accepted the amount of the special contribution and on 19th November, 2018 McCutcheon Halley on its behalf lodged an appeal limited to that aspect to the Board, but that appeal has no relevance to these proceedings and does not in other respects prejudice the validity of the decision to grant the planning permission in question.

34. On 10th October, 2018, prior to the issue of the Council's decision to grant permission, RPS Engineers wrote on behalf of Ms. Ursula O'Sullivan, one of the Notice Parties, stating *inter alia*: -

> "Our client's property is affected by proposals presented in the further information response lodged, yet she has given no consent either for inclusion of proposals within an application or for the works which are suggested in the further information submission.
>
> We note that the application is currently at further information stage and that new statutory notices have not been requested by Cork County Council to date. Accordingly, we acknowledge that at present there is no formal procedure for third party submissions in respect of this application. We respectfully submit however that the information lodged as further information concerns significant additional information, including information which affects third party lands, and that further notice of the revised plans and information should be required by Cork County Council. We submit also that the information now presented in this submission is of direct relevance to the matters raised by the Planning Authority in its Further Information Request and accordingly should be reviewed and considered by the Planning Authority prior to its decisions."

35. RPS went on to make a submission in relation to the proposed pedestrian bridge location and footpath links, and stated: -

> "With respect, the suggestion that this bridge and pedestrian links identified can be delivered by the Applicant and/or the Council is incorrect. Simply presenting a possible route on a drawing does not mean that this is a viable proposal. DRWG. No.181013/C/008 shows a proposed pathway running through lands in our Client's ownership. The proposed bridge also crosses other third party lands between our Client's property and the river. These other third party lands are along the route of the former railway line which runs under the bridge and along which an overhead power line runs. We confirm that our Client does not agree to these proposals and we note that no evidence of any agreement of the other third party landowner is provided either."

RPS went on to suggest alternatives, and to emphasise that "the proposals cross our Client's land and have not been consented to by her, the Planning Authority should note that they do not correspond to the proposed route of the amenity walkway as shown on the Blarney Macroom Municipal District Local Area Plan."

Along with the request that the Council should consider the information in their letter they requested that the Planning Authority also do not make provision by condition for works which would ultimately be outside the power of the applicant or the Council to deliver, and they requested that the Council consider further notification in the first instance.

36. The Council replied to RPS/Ms. O'Sullivan on 18th October, 2018 acknowledging receipt of the submission/observation and stating: -

> "I regret your submission/observation cannot be considered a valid submission/observation as it was not received within the period of five weeks beginning on the date of registration of the application."

37. As previously noted that the Council did not see fit to require further public notification under regulation 35 following receipt of the further information from the applicant. Had they done so this would have given the Notice Parties an opportunity to make a submission/observation. The Notice Parties did not challenge this notwithstanding that their agents RPS did suggest that there should be a further round of notification.

2. The Leave to Appeal Application and Decision.

38. By letter dated 19th November, 2018 RPS on behalf of the Notice Parties applied to the Board for Leave to Appeal the Council's decision to grant permission dated 25th October, 2018. RPS identify the location of their client's site, and note: -

> "Our clients did not object to the application as originally submitted to the Planning Authority. Their site however is affected by proposals which were presented to Cork County Council at further information stage and now by a condition on the premises."

RPS explained that their clients had recently purchased the site and applied to the Council (Reg. Ref. 184/04/086) for a dwelling, which application was currently the subject of an appeal to the Board (ABP-302523-18), the Council having refused permission at first instance. They went on to indicate how the applicant's proposals for the footpath connection would run across the Notice Parties' site. Acknowledging that the applicant "does not have any rights to our client's lands and cannot implement these works" they referred nonetheless to condition no. 35, and the Planner's Report which included the sentence "it is considered that the proposed

pedestrian bridge should be fully constructed in advance of the dwelling units being occupied on site." RPS then stated: -

> "Condition No. 35 then suggests that the bridge and associated connections presented in the further information response will be implemented by Cork County Council. This is despite the fact that our clients have not given consent to the works which are proposed across their property. Our client's right to make a formal objection to this proposal was precluded by Cork County Council which did not acknowledge this information (and indeed other significant further information submitted) as containing significant additional information, including information which affects third party lands, and accordingly did not request further notice of the revised plans and information."

RPS then refer to s.37(6)(d) of the Act and the criteria which must be satisfied for the Board to grant leave to appeal. They state: -

> "By reason of the further information submitted along with condition No. 35 of the decision to grant permission however, the permission had direct consequences for works on our client's property. In this regard it is submitted that criteria s.37(6)(d)(i) clearly applies in this case.
>
> If Cork County Council pursues the bridge and pedestrian connections as provided under condition No. 35 and identified in drawings submitted with further information, this would directly conflict with our client's development proposals for their property. It could not be accommodated under the current proposals being considered by the Board under ABP-302523-18. They would also significantly diminish, if not eliminate entirely, the possibility for providing an alternative residential proposal at the site. At a minimum it would impact on the siting and scale of the house proposed and also would significantly reduce the open space/amenity provision potential at the site. This would significantly reduce our client's enjoyment of the land and reduce significantly its value. Furthermore, this is despite the fact that (as shown in our submission of 10th October, 2018 to Cork County Council), that there are a number of alternative options for the provision of a pedestrian connection from the Gleann Fia Development to Tower. We submit that criteria (ii) of s.37(6)(b) also applies."

39. It is notable that neither the letter of 10th October, 2018 to the Council nor the application for Leave to Appeal dated 19th November, 2018 explain why the Notice Parties did not make any submissions or observations to the Council following lodgement and publication of the applicant's planning application, notwithstanding that it included drawing PL1 which clearly shows a possible pedestrian bridge location, and proposed footpaths linking to the Loop and to the existing footpath leading to Tower village, and crossing the Notice Parties' land. Also of note is that, other than stating that the Notice Parties' land is "close to the application site", there is no other explanation or reasoning given as to how it could be said the Notice Parties' land was "adjoining" the applicant's development site for the purposes of s.37(6)(a) of the Act. The Notice Parties did not file any affidavit in these proceedings, and took no part at the hearing.

40. The Notice Parties' submissions seeking Leave to Appeal were considered by the Board at its meeting on 14th December, 2018, when it decided to grant leave to appeal, based on two reasons which are also set out in the resulting Board Order also dated 14th December, 2018. The Board Order recites the application for Leave to Appeal and the description of the Proposed Development and then states as follows: -

> "Decision
>
> Grant leave to appeal under section 37(6) of the Planning and Development Act, 2000, as amended, based on the reasons and considerations set out below.
>
> Matters Considered
>
> In making its decision, the Board had regard to those matters to which, by virtue of the Planning and Development Acts and Regulations made thereunder, it was required to have regard. Such matters included any submissions and observations received by it in accordance with statutory provisions.
>
> Reasons and Considerations
>
> Having regard to the submissions and documents received in connection with the application for leave to appeal and the conditions set out in the planning authority's decision, it is considered that it has been shown that: -
>
> (i) the development, in respect of which a decision to grant permission has been made, will differ materially from the development as set out in the application for permission by reason of conditions numbered 1 and 35 imposed by the planning authority to which the grant is subject, and
>
> (ii) the imposition of conditions numbered 1 and 35 will materially affect the applicant's enjoyment of the land adjoining the land in respect of which it has been decided to grant permission or reduce the value of the land.
>
> Dave Walsh
>
> Member of An Bord Pleanála
>
> Duly authorised to authenticate the seal of the Board.
>
> Dated this 18th day of December 2018."

This is the impugned decision.

41. It should be noted that, apart from the application itself and the planning file, the Board had in fact received no other 'submissions and observations'. This is not surprising as the Act does not make provision for notification or publication of an application for Leave to Appeal under s.37(6), nor is there provision for the applicant for planning permission or any other party to make submissions. Accordingly, no response submissions could have been received or considered. Further no Inspector was appointed to consider the application.

42. Pursuant to the impugned decision, RPS by submission dated 9th January, 2019 purported to lodge a "Third Party Appeal" with the Board in respect of the Council's grant of permission to the applicants.

3. First Issue – s.37(6)(a) – "interest in land adjoining land in respect of which a decision to grant permission has been made."

43. The applicant argues that this first criterion could not be met by the Notice Parties because their land is at some distance from the applicant's development site, that is to say the "red line" site, in respect of which the Council made its decision to grant permission for the development of housing with access onto the Kerry Pike Road. Counsel Mr. David Holland S.C. characterised this as "a jurisdictional pre-condition" to the Board granting leave to appeal. It was argued that as s.37(6) is an exception to the general rule under s.37(1)(a) viz. that no person other than an applicant for planning permission or a party who has made a submission/observation can appeal, the wording of subsection 6(a) should be given a literal meaning.

44. Counsel also argued that the Board had failed to give reasons for deciding, as it was required to have done, that the Notice Parties' land adjoined the land in respect of which a decision to grant permission had been made, and indeed did not even mention s.37(6)(a) or the word "adjoining". He argued that the Board could not in its Statement of Opposition, or in its written or oral submissions to the court, now seek to supply reasons or suggest possible reasons.

45. In response it was argued that s.37(6) should be given a broad interpretation in keeping with the overall framework and scheme of the Act, and that on this basis the decision to grant permission involves the proposed pedestrian bridge and amenity footpaths which "adjoin" the lands in which the Notice Parties have an interest.

46. In support of this contention counsel for the Board Ms. Nuala Butler S.C. relied primarily on the decision of the Supreme Court in *Michael Cronin (Readymix) Limited v. An Bord Pleanála* [2017] 2 I.R.658. That case concerned the interpretation of a category of exempted development provided for in s.4(1)(h) of the Act where Kerry County Council had taken the view that an extension by the applicant of a yard on a quarry site to facilitate the manufacturing of cement blocks was an unauthorised development. O'Malley J. for the court did not consider that the provisions of s.4 related to "the imposition of a penal or other sanction", and also did not consider that s.5 of the Interpretation Act 2005 had any application to the matter as s.4(1)(h) was not obscure or ambiguous and did not lead to an absurd result. She proceeded: -

> "47. The issue, then, is whether the plain intention of the Oireachtas can be ascertained. In my view it can. I agree with the argument of counsel for the Board, summarised in paras. 30 to 32 above, that the effect of the High Court judgment would be to render exempt a range of developments far in excess of the intention of the Oireachtas. *One must bear in mind the overall framework and scheme of the 2000 Act, with the many considerations that come into play in the planning process, and look at the context of the provision in question within that framework.* I think it is manifestly unlikely that the intention was to render exempt all works carried out on any existing structure, including unlimited extensions and size, subject only to considerations of visual appearance (and subsequent considerations arising from any intensification of use). Nor do I consider that the words used in the section compel the court to the conclusion that this is the meaning of the section." [Emphasis added]

In para. 50 of her decision O'Malley J. again refers to "the context of the overall framework, policies and purposes of the 2000 Act" in considering the wording of the section.

47. Counsel argued that this approach was endorsed and applied again by the Supreme Court in its subsequent decision in *An Taisce v. McTigue Quarries Limited* [2018] I.E.S.C. 54, where MacMenamin J. stated: -

> "In interpreting s.177O, and the [Planning and Development (Amendment) Act 2010] as a whole, a court should have regard to the overall framework and scheme of the Act. (C.F.) the recent judgment of O'Malley J. for this Court in *Cronin* […] What does the framework and scheme tell the reader?"

48. Counsel therefore argued that the general rule contained in s.37(1), which permits those who made submissions or observations on a planning application to appeal a decision to the Board, and s.37(6), should be viewed as an exception –

> "[…] intended to protect the property rights and associated fair procedures rights of persons whose lands/interests in lands may be adversely affected by the relevant decision of the planning authority, but who did not make a submission or observation because that aspect of the decision that is liable to affect his or her lands/interests was not apparent in the application as originally made; rather, it results from a condition attached to the grant of planning permission by the planning authority." (Written submissions, para. 9).

49. Counsel submitted that the Oireachtas would not have intended the s.37(6) exception to be applied with rigidity: -

> "The 2000 Act aims to achieve quality decision making in a number of key ways, not least through hierarchical land-use planning, the primacy of proper planning and sustainable development, and extensive provision for public participation in the planning application procedure. […] Within this framework, s.37(6) is clearly intended to plug a potential gap, namely that when amendments to developments during the decision-making process mean that a decision to grant permission is likely to affect someone adversely and/or to a greater extent than was apparent at the beginning, when public notice was given, that person should be afforded the opportunity to be heard." (Para. 10 of written submissions).

50. In developing the contention for a broader, purposive of construction of s.37(6), counsel's written submission suggested two possible ways in which this could be done to support the impugned decision: -

> "43. First, the Oireachtas could have provided that an applicant for leave must have an interest in land "*adjoining the site of the permitted development*" but instead provided that he or she must have an interest in "*land adjoining land in respect of which a decision to grant permission has been made*." Indeed, s.37(6) of the PDA as originally enacted in 2000 used the phrase "*adjoining land in respect of which permission has been granted".* The formulation which currently appears was inserted by amendment in 2002. The phrase "*in respect of which a decision to grant permission has been made"* arguably encompasses, or has the potential to encompass a broader class of lands than just the development site or the lands in respect of which permission has been granted. On this approach, the land where it has been proposed to build the pedestrian bridge and walkways is land to which the permission granted to Cork County Council relates, in particular because Condition No. 35 relates to the building of the said bridge and walkways.
>
> 44. Second, the term "adjoining" can be given a broad interpretation so as to encompass any lands that are adjacent to,

> near or in the vicinity of lands in respect of which a decision to grant permission has been made and that are likely to be affected by that permission. On this analysis, even if one confines the term "*land in respect of which a decision to grant permission has been made*" to the site of the proposed development as defined by the red line boundary, the Notice Parties' lands can nevertheless qualify: although not contiguous with the development site, their lands are in the immediate vicinity of it and likely to be affected by the permission granted in respect of it."

Counsel contended that "the narrower, formulistic construction contended for by the Applicant can result in unfair and potentially unconstitutional consequences and would do so in this case." *East Donegal Co-operative v. Attorney General* [1970] I.R. 317 was then cited for the proposition that when faced with two available constructions of a statutory provision in circumstances where there is doubt as to the compatibility of one of these with the Constitution the court should adopt the construction that is plainly consistent with the Constitution.

4. *Discussion*.

51. The parties did not dispute that the decision which the Board must take under s.37(6) is not a discretionary decision. If the parties seeking leave to appeal hold an interest in "adjoining" lands, and if the criteria in s.37(6)(d)(i) and (ii) are met, then they are entitled to pursue an appeal; if they are not met, the Board has no discretion.

52. The applicant advocates a literal approach to the interpretation of s.37(6)(a). Dodd D., *Statutory Interpretation in Ireland* (Tottel Publishing – Dublin 2008) gives the rationale for this approach: -

> "5.07 The literal approach arises from an oft-repeated logic: The fundamental object of all interpretation is to give effect to the intention of the legislature. The preeminent indicator of the legislator's intention is the text actually chosen by the legislator itself to indicate its intention. In construing the text chosen by the legislator, the first consideration is to give the words used their literal meaning. If that meaning is plain and ambiguous, the interpreter's task is at an end. The important constitutional principles, as well as matters of legal policy underpin this logic. Whatever the legislator meant to say or wanted to say is not relevant when compared with what it did say. Perceived intention plays little or no role in the literal approach."

53. Many judicial pronouncements support this approach. Blaney J. in *Howard v. Commissioners of Public Works* [1994] 1 I.R. 101 (Supreme Court) quoted Lord Blackburn in *Direct United States Cable Co. v. Anglo – American Telegraph & Co*. [1877] 2 A.P.P. C.A.S. 394: -

> "The cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention expressed in the Acts themselves. If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expand those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the law giver."

54. McCarthy J. in *Texaco (Ireland) Limited v. Murphy (Inspector of Taxes)* [1991] 2 I.R. 449 and 456 said, "the first rule of statutory construction remains that the words be given their ordinary literal meaning".

55. In seeking to ascertain the plain intention of the Oireachtas in s.37(6)(a) I accept that the court should "bear in mind the overall framework and scheme of the 2000 Act", and the "context of the provision in question within that framework". However, the broader purposive approach advocated by counsel for the Board in my view only becomes relevant if the provision is capable of more than one meaning, or the literal interpretation would clearly frustrate the purpose of the legislation. As Dodd observes, op. cit. at para. 6.38: -

> "It is important not to overstate the role of purpose in interpretation. The Irish Supreme Court places a high value on the literal approach, as detailed in Ch.5. One approach for a court is to describe a provision as being entirely plain and unambiguous and state that no consideration of purpose, object or aim or other interpretative criteria can permit deviation from that plain meaning. A court may view a submitted meaning, which is supported by the purposive approach, as being a meaning that the words in the provision are not capable of bearing. A court may describe an interpretation as a strained one and reject it. When a court rejects a submission as being strained, it means that the meaning deforms the provision and places too much demand on the language used. Straining asks the court to misconstrue, rewrite, supplement or extend the natural meaning or accept artificial meaning of words. Where the courts are satisfied that this is the correct approach, then the literal meaning prevails, notwithstanding any conflict with the legislator's purpose. If the remedy be required, the task lies with the Oireachtas. This approach allows a court to emphasise its constitutional role and the separation of legislative and judicial power."

I adopt this passage as a helpful guide in approaching the interpretation of s.37(6)(a).

56. I also accept that the 2000 Act is legislation which in certain respects gives effect to EU legislation, particularly where it is concerned with public participation in the planning processes, and to that extent it should be given a purposive interpretation. However, Counsel for the Board does not point to any particular EU legislation, the purpose of which it is said would be frustrated in the event that the court adopted a "narrow" interpretation of s.37(6)(a) or (d). It is not said that the objective of any identified treaty, regulation, directive, council decision, or any interpretation thereof by the European Court of Justice, will be frustrated by a "narrow" or literal interpretation.

57. Applying these principles, in my view the plain and ordinary meaning of the words, "a person who has an interest in land adjoining land in respect of which a decision to grant permission has been made" can only be that they refer to an interest in land that is contiguous or directly adjoining the land in respect of which the development works to which the grant of permission has been made are to be carried out i.e. the "red line" development lands. There are a number of reasons for so finding.

58. It is well established that the court can, with due caution, have regard to dictionary meanings and etymology to ascertain the ordinary and plain meaning of a word. The Concise Oxford Dictionary (10th Edition Revised) defines "*adjoin*" thus: -

> "v. [often as adj. *adjoining*] be next to and joined with.
>
> - Origin C19: from O[ld] Fr[ench] *ajoindre*, from Latin *adjungere*, from *ad*—'to' + *jungere* 'to join'."

A similar definition appears in The Chambers Dictionary (13th Edition 2014): "to join on: to lie next to, to be in contact".

59. It is beyond dispute, and the Board have conceded, that the Notice Parties' land cannot be said to be next to or adjoined with or

in contact with the applicant's "red line" development lands, being separated from them by at least some 238 metres as the crow flies, and 311 metres along the Kerry Pike Road.

60. In my view, the Oireachtas has advisedly used only one word, namely "adjoining", in s.37(6)(a) in reference to the development land and the land of the 'would-be' appellant. It could have, but did not, use words such as "near to", "in the vicinity of", or "land affected by" the lands in respect of which a decision to grant permission has been made. To give a broad or purposive interpretation to the word "adjoining" of this nature would be to strain the language actually used by the Oireachtas, and effectively to rewrite or supplement the natural and ordinary meaning. Such a strained meaning is not warranted or justified. It would also create uncertainty where none presently exists. As was argued by Mr. Holland, it could open the door for a large number of appeals in respect of decisions to grant permission where there is a s.48(2)(c) special contribution condition which by its nature relates to an infrastructural project that is not part of a local authority adopted scheme. Would all property owners "near to" or "in the vicinity of" or "affected by" a proposed development and such an infrastructural project be entitled to leave to appeal every planning permission granted in that area? And how would phrases such as "in the vicinity" be interpreted? The scope for different interpretation would be very wide and would give rise to uncertainty that in my view cannot have been intended by the Oireachtas.

61. The Board asks the court to interpret the phrase "in respect of which a decision to grant permission has been made" broadly and purposively as having the "potential to encompass a broader class of lands than just the development site or the lands in respect of which permission has been granted", on which basis it would include the land on which it is proposed to build a pedestrian bridge and walkways which is on/adjoins the notice parties' lands.

62. This also fails to have regard to the plain and ordinary meaning of the words "in respect of which a decision to grant permission has been made." Section 3(1) of the Act defines "development" to mean "except where the context otherwise requires, the carrying out of any works on, in, over or on the land or the making of any material change in the use of any structures or other land." In the present context the "development" therefore relates to the "works" that are permitted by the decision to grant permission. There was no need for the legislature to spell this out by referring to the applicant for leave having an interest in land "adjoining the site of the permitted development" – its choice of words already did this.

63. The applicants did not seek planning permission in respect of the pedestrian bridge or the related footpaths linking to the amenity walks and Tower village. Nor by its decision did the Council grant permission to the applicant to carry out any such development works. While Condition 1 does require that the development works be carried out in accordance with the plans and particulars lodged, those plans, and in particular PL1 and PL2, do not require or permit that the applicant carry out the proposed pedestrian bridge or footpath works. Likewise, Condition 35 does not require or permit the applicant to carry out any such works – it is merely required to pay a "special contribution" in respect of "works proposed to be carried out, for the provision of pedestrian and cycle bridge which links up to where the existing footpaths currently terminate to ensure connectivity to the village […]". If such works are not carried out – and they may never be carried out – there is provision for refund to the applicant; however, one thing is clear which is that Condition no.35 does not constitute permission for the carrying out of any development work.

64. The "special contribution" payment of which is required by Condition no. 35 is imposed by virtue of s.48(2)(c), and by definition is "in respect of public infrastructure and facilities". It is inevitable that such infrastructures will be built on someone's lands, but it will not necessarily be built in the location or in the manner contemplated in the revised drawings and narrative submitted by McCutcheon Halley. Moreover, while those drawings give more specific detail in relation to the applicant's "proposal", the provisional nature of the proposal is emphasised by the use of the words "proposed" and "possible footpath…" in several places.

65. It is also of note that although the Planner suggested that the proposed pedestrian bridge "should be fully constructed in advance of the dwelling units being occupied on site", this requirement was not ultimately transposed into a condition of the planning permission. Whether this was a deliberate omission – the Council's policy in light of current housing shortage might be to get as many houses constructed and occupied as possible, on the basis that infrastructure will follow – or unintentional, is not relevant. What is relevant is that the applicant on foot of this decision is entitled to develop the housing estate and ancillary works, and is not required or permitted to build the pedestrian bridge or associated footpaths. Based on the requirement of a special financial contribution, it may be assumed that that is work that is now likely to be undertaken by the Council, but even that is not determined by this decision.

66. Further if the local authority seeks to develop a pedestrian bridge and associated footpaths it must comply with the statutory process provided for in Part 8 of the Planning and Development Regulations, 2001-2019 (as amended). This involves public participation and the Notice Parties would have an opportunity to make submissions/observations or object to any particular proposal. If the local authority proceeded with a proposal that involved works on the Notice Parties' lands, in the absence of agreement the local authority would have to acquire such lands by compulsory purchase order (C.P.O.), and that process would also afford the Notice Parties an opportunity to make submissions or object, and in the event that a compulsory purchase proceeded they would be entitled to appropriate compensation for the loss of their land and injurious affection in respect of retained land.

67. It therefore cannot be suggested that if the Notice Parties are precluded by this Court's interpretation of s.37(6)(a) from pursuing an appeal of the permission to the Board that they are deprived of fair process or an opportunity to be heard; they will be afforded this in the future in the event that the local authority proceeds with proposals such as those set out by the applicants in response to the request for further information.

68. I do not consider that the process by which s.37(6)(a) of the Act was amended in 2002 assists the Board's arguments. It will be recalled that the original phrase "adjoining land in respect of which permission has been granted" was replaced by the words "land adjoining land in respect of which a decision to grant permission has been made" by s.10 of the Planning and Development (Amendment) Act 2002. The reason for the amendment was plainly that the phrase "land in respect of which permission has been granted" presupposed that the permission is final whereas the whole point of s.37(6)(a) is that a person with adjoining land may be granted leave to appeal "a decision to grant permission" which may be overturned or modified if an appeal is successful. The amendment does not support the proposition that the Oireachtas intended to thereby broaden the class of lands that might be said to be "adjoining".

69. I am also not satisfied that the Board has presented a stateable argument that a narrow interpretation of s.37(6)(a) could deprive an owner of lands in the vicinity of the lands in respect of which the decision to grant permission has been made of their constitutional rights. In the present case, in addition to the due process to which the Notice Parties would be entitled under Part 8 of the 2001 Regulations, and under a CPO process, the Notice Parties also had the opportunity to make submissions or observations in respect of the applicant's planning application following erection of the Notice and advertisement and the making available of the applicant's planning application online and at the Council's offices in accordance with the Act and Planning Regulations 2001 (as amended).

70. In this particular case I am also satisfied that the opportunity to make submissions and observations or object at first instance was a real one because the Notice Parties and their planning consultants – and it must be borne in mind that the Notice Parties own application for planning permission had been lodged in January 2018 – could see from drawing PL1 that the applicants were proposing a pedestrian bridge and walkways that would, if developed, be on their land. It is notable that the Notice Parties and their agents did not in their letter of 10th October, 2018 to the Council, or in their Application for Leave to Appeal, at any stage attempt to explain why they did not avail of their right and opportunity to make submissions/observations at first instance.

71. The Board also pursued an argument that s.37(1)(a), which limits the making of appeals to the Board to applicants for planning permission or persons who made observations or submissions in writing, should be regarded as the "exception" to the general rule that there should be public participation in the planning process at all levels, and that therefore s.37(6) should be viewed as an "exception to the exception" and receive a broad interpretation in keeping with the scheme of the Act, and in the context of the desirability of public participation and proper planning and development.

72. No authority was cited in support of this other than the general authority of Cronin which requires that the overall framework and scheme of the Act be borne in mind. This submission would require an overly complex and prescriptive approach to interpretation of the Act, that would require the court to analyse what provision or wider principle might be regarded as the general rule, what provision should be treated as an exception, and what sub-provision should be treated as an exception to the exception. Such an approach cannot be justified where the plain and ordinary meaning of the words is apparent from the text used both in s.37(1)(a) and in s.37(6)(a) and (d). I find support for this view in *K.S.K. Enterprises Ltd v. An Bord Pleanála* [1994] I.R. 128. There the Supreme Court had to decide whether the filing in the Central Office together with its service on the respondent, of an application for judicial review of a Board decision stopped the two month time limit pursuant to s.82(3A) and (3B) of the Local Government (Planning and Development) Act, 1963 (as amended) for "making an application" under the Rules of the Superior Courts from running, or whether the application had to be moved in court to stop time running. Finlay C.J. stated, at p.136:

> "I am satisfied that as a matter of general construction, where a restriction is being imposed upon the exercise of a right in a statute such as this sub-section involves, that it is desirable to the extent of being almost imperative that it should be capable of being construed and should be construed in a clear and definite fashion."

Both s.37(1)(a) and s.37(6)(a) are capable of and should be construed in a clear and definite fashion.

73. The Board's own submission in this regard pre-supposes a policy or wider principle that dictates that s.37(1)(a) should be narrowly viewed as limiting the right of appeal to the Board and that therefore s.37(6) should receive a generous and broad interpretation. This fails to have regard to other possible policy objectives, and in particular fails to view the legislative intention in light of the pre-existing law under the Local Government (Planning and Development) Act 1963, which did not place any fetter on who could appeal the decision of a local planning authority. Why, it should have asked, did the Oireachtas introduce a *locus standi* requirement in s.37(1)(a) for bringing an appeal, confining it to the applicant for permission or any person who made submissions or observations, save with leave of the Board under the limited conditions set by s.37(6)? The answer may, as Mr. Holland suggested, lie in the number of appeals made by persons who did not have interests in land adjoining the lands in respect of which a decision to grant permission had been made. It may lie in the desire to bring more efficiency into the planning process. The Board's submission refers to the quality of planning decisions by ensuring that all affected parties' views are taken into account, as being part of the scheme of the Act; it may equally be suggested that the legislature's policy was that such views should be taken into account at the first instance decision making stage. Mr. Holland also suggested that the legislative policy behind s.37(1)(a) may have been to avoid objectors tactically biding their time until a decision at first instance has been made, and then appealing. He also suggested that the Oireachtas may have been desirous of minimising the number of appeals, and thereby reducing delays and costs in the planning process.

74. Where there is more than one, or there are several, possibilities in respect of the legislative policy or intention underpinning a provision, or exceptions, it is not the task of the court to look beyond the wording of the relevant statutory provisions. This reinforces my view that s.37(6) should be given a literal interpretation, and should not be broadly construed in a manner that *might* undermine the policy or legislative intent behind either s.37(6) or s.37(1)(a), whatever that may be.

5. *Decision*.
75. The Board has not provided a narrative or reasons that explain why it treated the Notice Parties' land as "adjoining" for the purpose of its decision to grant leave to appeal under s.37(6)(a). However, for the purposes of deciding this first issue I must assume that they did make a finding that it was "adjoining" for the purposes of exercising its s.37(6) jurisdiction.

76. In my judgment there was no basis in fact or in law upon which the Board could have treated the Notice Parties' lands as "adjoining". The Notice Parties simply could not satisfy the first criterion, and therefore the Board's decision is based on errors of law and fact.

77. In *Henry Denny & Sons (Ireland) v. Minister for Social Welfare* [1998] 1 I.R. 34, Hamilton C.J. stated, at p. 45: -

> "It would be desirable to take this opportunity of expressing the view that the courts should be slow to interfere with the decisions of expert administrative tribunals. Where conclusions are based upon an identifiable error of law or an unsustainable finding of fact by a tribunal such conclusions must be corrected. Otherwise it should be recognised that tribunals that have been given statutory tasks to perform and exercise their functions, as is now usually the case, with a high degree of expertise and provide coherent and balanced judgments on the evidence and argument heard by them it should not be necessary for the courts to review their decisions by way of appeal or judicial review."

In *N.M.(D.R.C.) v. The Minister for Justice Equality and Law Reform* [2018] 2 I.R. 591 the Court of Appeal recently confirmed the principle that the errors of fact are justiciable.

78. Accordingly on this ground alone Board's decision to grant Leave to Appeal must be quashed.

6. *Second Issue – s.37(6)(d)(i) – Material Changes Imposed by Conditions*.
79. This concerns whether the Board erred under s.37(6)(d)(i) in finding that the applicant has shown that "the development in respect of which a decision to grant permission has been made will differ materially from the development as set out in the application for permission by reason of conditions imposed by the planning authority to which the grant is subject".

80. As the Board accepted, this Court can grant *certiorari* if it finds that the Board made an error of law, or if its decision was not factually substantiated. The court must therefore have regard to all the facts, circumstances and documents that were before the Board at the time it made the impugned decision. In coming to a decision as to whether or not the criterion under s.37(6)(d)(i) was

met the Board, and the court in this judicial review, must therefore engage with the original planning application, and compare it with the development in respect of which the Council made a decision to grant permission, and that comparison must focus on differences arising from the conditions imposed by the Council's decision.

81. This requires the court to construe the decision to grant permission, the conditions attached, and the plans and particulars lodged with the Council and referenced in the decision. The correct approach to the construction of such planning documents were summarised by McCarthy J. in *Re XJS Investments Limited* [1986] I.R. 750, at p. 756: -

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

82. In approaching this task it might be expected that the impugned decision would give some insight into the Board's decision. The Board Order recites the Council's decision and simply states: -

> "Reasons and Considerations
>
> Having regard to the submissions and documents received in connection with the application for leave to appeal and the condition set out in the planning authority's decision, it has considered that it has been shown that –
>
> (i) the development, in respect of which a decision to grant permission has been made, will differ materially from the development as set out in the application for permission by reason of conditions numbered 1 & 35 imposed by the planning authority to which the grant is subject […]."

83. Thus, apart from specifying Conditions nos. 1 and 35 (and only this latter condition is specifically referenced in the RPS appeal application), the Board does not describe the material differences that gave rise to its decision. Whether this absence of reasoning is in itself grounds for granting a *certiorari* is a matter also raised by the applicants. Had there been more detailed reasoning it would perhaps have made the court's task of review more limited and focussed. Consequently, all the court can do in the present case is undertake a wider review to ascertain whether there was any evidential and legal basis upon which the Board could have come to the conclusion that it did.

84. After conducting such a review I have come to the conclusion that the Board's decision on this criterion was not factually substantiated, and was wrong in law.

85. Fundamentally this was because the nature and extent of the works comprised in "the development" as originally applied for do not differ materially from the works in respect of which the decision to grant permission was made. In particular, objective comparison by an intelligent and informed layperson or a developer of the plans and particulars originally lodged with the application with the revised plans and particulars accompanying the further information (which are listed in Condition 1), would not perceive any material difference in the development works permitted in the "red line" site.

86. Insofar as drawing PL1 differs from drawing PL2, there is no difference whatsoever in relation to the development within the "red line" site.

87. Furthermore, when these two drawings are compared the key feature of both, from the Notice Parties' perspective, is that *both* show the line of the pedestrian bridge and footpath link crossing their land. The main differences in PL2 are firstly that the pedestrian bridge and footpath link are shown with more definite red and blue lines respectively, secondly that the southwestern apex of the Loop Walk is shown somewhat further southwest in PL1, and thirdly the word "proposed" replaces "possible" in respect of location of the pedestrian bridge (it should be noted that the words "possible footpath linked to amenity walk" are used in both plans). I am of the view that these are minor differences between plans, and are insignificant and immaterial; this is certainly the case when compared to the importance and materiality of the feature common to both, namely the pedestrian bridge and amenity walk links shown in both drawings crossing the Notice Parties' lands.

88. It bears repeating that the mere inclusion of reference to the plans in Condition 1 does not mean that the applicants, or the local authority, must carry out the pedestrian bridge and footpath link proposals, or indeed that these will ever be implemented. These were not developments in respect of which the applicants ever applied for planning permission, they fall outside the "red line" site, and plainly concern the possible development of third party lands.

89. As to Condition 35, again it cannot be said on any interpretation that this affects the development in respect of which the decision to grant permission was made. It does not touch on or affect any of the "red line" works. It requires the payment of a contribution of €199,980 to the Council, which may be refunded in whole or in part if the proposed pedestrian bridge and amenity walk links are never proceeded with, or only a proportion of the works are carried out.

90. While it was suggested that PL2 and the further detail provided in response to the request for further information, and in particular the approval of the more specific proposals by the Council's Traffic and Transportation Section, make the realisation of the proposals more imminent, what does this really mean? In my view, it has no effect on the legal status of the proposals, which remain only that – mere proposals which are more at concept than at design stage. It is also notable in this regard that the earlier or "governing" planning permission for the site (ref. 06/4407) as it is described by the Planner, included a condition requiring payment of a financial contribution towards a new pedestrian bridge and linking footpath. The applicant's planning application included a document prepared by MPA Consulting Engineers, and, having referred to the earlier governing permission and the special contribution condition stated: -

> "3.4.4 It is proposed that a similar arrangement be made in respect of this application and a provision of a pedestrian bridge adjacent to the vehicular bridge".

Accordingly, a condition in line with Condition 35 could "objectively" have been anticipated by an intelligent and informed layperson or a developer or their agent on reading the planning application. Condition 35, save as regards the quantum of the contribution, is not materially different to any Condition that could reasonably have been anticipated.

91. At para. 26 of their written legal submissions counsel for the Board refers to the fact that the "Planner's Report – further information assessment" stated: -

> "It is considered that the proposed pedestrian bridge should be fully constructed in advance of the dwelling units being occupied on site".

Somewhat surprisingly the Planner did not recommend an occupancy condition. The Planner's Report was signed off by a senior planner and ultimately the decision to grant permission did not include any occupancy condition. The Board's submission accepts that legally the applicant is not the developer in respect of the bridge and footpath proposals, and accepts that these proposals are located outside the development site and, by reference to the decision of the High Court in *Alen-Buckley v. An Bord Plenála* [2017] I.E.H.C. 541, that the Council's decision cannot be regarded as having granted planning permission in respect of them. It is nonetheless submitted that: -

> "28. However, given its view, expressed multiple times in the two Planner's Reports, that the proposed development would be permitted if it were to be served by improved pedestrian connectivity with Tower village centre given its decision to calculate the costs of the pedestrian bridge and calculate and levy the Applicant's appropriate contribution to same, the planning authority has clearly made a decision in principle to construct the bridge as proposed in the Applicant's response to the further information request."

92. While this may be so it does not alter the legal status of the proposals, which cannot be implemented by the local authority without undergoing the Part 8 process, and if necessary, a C.P.O. process.

93. If it was the absence of an occupancy condition that gave rise to the Board's concern and was a factor in its decision to grant leave to appeal, then that would be an improper consideration. It would be an irrelevant consideration, because it would not relate to any of the "conditions imposed by the planning authority", but rather to a condition not imposed.

94. While Ms. Butler in her oral submissions emphasised the differences between planning drawings PL1 and PL2, for the reasons which I have given earlier the intelligent well informed layperson or developer would not consider these differences to be material. Counsel also emphasised the detail in the "proposed pedestrian bridge layout" in sheets 1 and 2 which accompanied the further information. While these do provide some more detail in relation to the proposals they are not design or construction drawings as such, and they do not materially differ from the location proposals in PL1.

95. It was also submitted that, viewed from the Notice Parties' perspective, they found themselves in a "particular conundrum", in that the original planning application indicated a potential location for the pedestrian bridge in general terms but "there was no suggestion of a final design or location being proposed, less still fixed or decided upon", and that "the Notice Parties did not object", and only subsequently learned of the "precise detail in respect of the bridge and pedestrian linkages" once the decision to grant permission had been made. They were not made aware of these details because there was no public advertisement or notice of the submission by the applicant of further information, and they had no notice of the Council's acceptance of the applicant's more detailed proposals. Counsel referred the court to *White v. Dublin City Council* [2004] 1 I.R. 545, the facts of which were summarised by Fennelly J. at para. 32: -

> "*The Appeal*
>
> 32. The central point made on behalf of the applicants may be made quite simply. The development envisaged in the original application would have contained no windows overlooking their property. The first respondent required that the application be modified so as to orientate windows in an easterly direction which would, indeed, overlook their property, i.e. their rear garden. They were aware of the application as lodged. They had been given the plans of the first application and had caused it to be inspected by an expert planner. They had – correctly – been informed that the second application was closely similar. Therefore, they had not objected. They were unaware of the modifications which had the effect of re-orientating the windows so as to overlook their property, as they had never been advertised."

In affirming the decision of the High Court to quash the decision of Dublin County Council to grant permission, the Supreme Court held that the Council's failure to require the Notice Party to advertise the modified plans was irrational and unreasonable in that it did not take account of the likelihood that members of the public might wish to object.

96. Counsel suggested that the present case is comparable in that the bridge/footpath proposals only "crystallised in a material way" when the further information was supplied. It was submitted that, while the Council would indeed have to go through the Part 8 procedure, and if necessary rely on its powers of compulsory purchase, those were "more restricted processes", and that the Notice Parties' position was weakened and they would be forced into fighting a "rear guard action".

97. I do not agree with these submissions, or that the decision in *White* assists the Board. The evidence does not support the suggestion that the Notice Parties were faced by a conundrum, because both the original application and the change suggested by the further information demonstrated similar proposals for the pedestrian bridge and amenity walk links crossing the Notice Parties' lands. It therefore behoved the Notice Parties to make their views known by submissions/observations made to the original application. By comparison, the facts in *White* were that the overlooking windows were a material new feature, added at the Further Information stage, and directly contrary to the original application in which no overlooking windows featured. The decision of the High Court and Supreme Court in that case was entirely consistent with the policy of objection at the earliest point in the process. A further obvious difference is that in *White* the permission granted by Dublin County Council mandated inclusion of the overlooking windows – such additional development was not a mere "possibility" or "proposal" as in the present case. It should also be noted that in *White* the application for leave to seek judicial review was late in time, being made beyond the two-month period then provided for by virtue of s.82(3B)(a)(i) of the Local Government Planning and Development Act 1963, as amended, which was not capable of extension. Accordingly, the applicants in that case sought judicial review but also sought a declaration that that statutory provision was unconstitutional. O'Caoimh J. in the High Court found the section to be unconstitutional and also granted *certiorari* in respect of the decision to grant permission on the basis that there was a "very fundamental change effected between the planning permission

sought and the ultimate decision to grant planning permission with the 'modification'". The Supreme Court agreed and dismissed the appeal.

98. But the point must be made in the present case that at least by 10th October, 2018 the Notice Parties were aware of the further information submitted on behalf of the applicants to the Council, and on that date, RPS on their behalf wrote to the Council protesting at the effect of the proposals on the Notice Parties' property and requesting "further notification". Notwithstanding that that letter was returned by the Council on 18th October, 2018 as being an invalid observation/submission made out of time, and further notwithstanding that the decision to grant permission was then made on 25th October, 2018, the Notice Parties did not, as they could have done, seek judicial review of the decision or failure, by the Council to require further notification/advertisement and a further site notice, in accordance with Regulation 35 of the Planning and Development Regulations 2001 (as amended). That provision applies where the further information, evidence, revised plans, drawings or particulars "contain significant additional data". RPS characterised the further information as containing "significant additional information including information which affects third party lands" (letter of 10th October, 2018), and on the basis of that statement and advice (if correct) it would have been open to the Notice Parties, after the return of the RPS submission as invalid, to have sought judicial review of the decision not to require further notification or a further site notice, yet they did not do so. One immediate consequence of the Notice Parties' failure to seek judicial review at that stage was that the Council proceeded to take a decision to grant permission on 25th October, 2018.

99. In conclusion on the evidence before the Board there was no factual basis upon which it could have concluded that Condition 1 and/or Condition 35 caused the permission granted by the Council to differ materially from that for which the applicants applied initially. As a matter of law neither condition made any difference at all to the development "works" within the "red line" site. Further no intelligent well informed layperson or developer would objectively consider that there was any material difference between the initial application and that in respect of which a decision to grant permission was made, by reason of either of these conditions. On this ground also the Board's decision to grant leave to appeal should be quashed.

7. Third Issue – s.37(6)(d)(ii) – Effect on the Enjoyment or Value of the Land.

100. This concerns the third criterion under s.37(6)(d)(ii) "that the imposition of such conditions will materially affect the applicant's enjoyment of the land or reduce the value of the land".

101. This criterion does not refer to the "development", but rather focuses on the "conditions". It affords the party seeking leave to appeal the opportunity to satisfy the Board of one or both of two alternatives: firstly, that conditions will "materially affect the applicant's enjoyment of the land", or alternatively that such conditions will "reduce the value of the land".

102. Once again in respect of this criterion under the heading "Reasons and Considerations", the impugned decision is short on detail. It is merely states that: -

> "(i) the imposition of conditions numbered 1 and 35 will materially affect the applicant's enjoyment of the land adjoining the land in respect of which it has been decided to grant permission or reduce the value of the land."

103. Beyond identifying Conditions nos. 1 and 35, this does not elucidate how the Board considered that the Notice Parties' enjoyment of their land would be materially affected by either of these conditions, or how it considered that such conditions individually or together would "reduce the value of the land". Accordingly, the court can only consider whether there was any substantiated factual basis upon which the Board *could* have come to this decision.

104. Although the word "development" is not deployed in (d)(ii), the conditions identified by the Board as the basis for its decision must be considered in the context of the development works. It is common case that the development within the "red line" site does not affect the Notice Parties, and *a fortiori* it cannot be said that conditions in relation to that "red line" development work will "materially" affect the Notice Parties' enjoyment of their land. Conditions 1 and 35 do not involve the carrying out of works and therefore will not of themselves materially affect the Notice Parties' enjoyment of their land. Moreover, with regard to Condition 35 this is complied with by the payment of the special contribution monies by the developer to the Council, in respect of which there may or may not ultimately be a refund or partial refund, and it cannot be said to affect the Notice Parties or their lands.

105. However, it must be accepted that the effect of such conditions *may* be to "reduce the value of" the Notice Parties' lands. It will be recalled that in their submission on the Application for Leave to Appeal, RPS stated: -

> "If Cork County Council pursues the bridge and pedestrian connections as provided under Condition No. 35 and identified in drawings submitted with further information, this would directly conflict with our client's development proposals for their property. It could not be accommodated under the current proposals being considered by the Board under ABP-302523-18. They would also significantly diminish, if not eliminate entirely, the possibility of providing and alternative residential proposal at the site. At a minimum it would impact on the siting and scale of the house proposed and would also significantly reduce the open space/amenity provision potential at the site. This would significantly reduce our client's enjoyment of the land and reduce significantly its value. Furthermore, this is despite the fact that (as shown in our submission of 10th October, 2018 to Cork County Council), that there are a number of alternative solutions for the provision of a pedestrian connection from the Gleann Fia Development to Tower. We submit that criteria (ii) of s.37(6)(b) [sic] also applies."

The last sentence reference only makes sense if it is treated as referring to s.37(6)(d)(ii).

106. Although no valuation evidence was presented to back up the contention that this "would … reduce significantly its value", there is nothing in s.37(6)(d)(ii) that mandates the submission of valuation evidence. While the court should not speculate as to the Board's thinking or reasoning, it would not be irrational or unreasonable for it to have treated the views expressed by RPS in this passage as plausible and common sense if it also accepted that the greater detail provided in the further information, and the review/approval of the Traffic and Transportation Section of the Council on 24th October, 2018 rendered the development of the pedestrian bridge and walkways more imminent, and more likely that it would be carried out by the Council.

107. Accordingly, I am of the view that there was some evidence before the Board from which it could objectively have come to the view that Condition 1, including the plans and particulars lodged with the further information, and/or Condition 35 could of themselves have led to a reduction in value of the Notice Parties' lands. The weight to be attached to this evidence was entirely a matter for the Board. For this reason, if this were the only criterion in respect of which the applicants made complaint, and was the only ground for seeking judicial review, I would not grant *certiorari*.

8. *Fourth Issue – Lack of Reasons*.

108. There was considerable argument and counterargument in relation to the claim that the Board's decision to grant leave to appeal should be struck down for failing to give any adequate reasons. I have made some observations in relation to this aspect of the claims earlier in this decision in the context of the Board's conclusions on the criteria that need to be met to grant leave to appeal. However, in light of the court's decision that there is no basis in fact or in law upon which the first and second criteria could be met, it is not necessary for the court to further consider whether the decision should be quashed for failure to give reasons. Nevertheless, the court's observations may be of assistance in the Board's approach to future applications for leave to appeal under s.37(6)(a).

9. *Orders*.

109. Accordingly, there will be an Order of *Certiorari* in the terms of relief no. 1 in the Statement of Grounds, quashing the decision of the Board dated 18th December, 2018 granting the Notice Parties' leave to appeal under s.37(6) of the Act from the decision from the Council to grant the applicant planning permission under Reg. Ref. 18/05562.

110. Further, as the Notice Parties purported to submit an appeal to the Board on 10th January, 2019 in respect of the Council's decision, it is also appropriate to grant the order sought at no. 2 in the Statement of Grounds quashing the decision of the Board to accept as valid that appeal.

111. As this judgment finds that the Notice Parties could not satisfy the first two jurisdictional requirements, namely that under s.37(6)(a) that they are persons who have "an interest in land adjoining land in respect of which a decision to grant permission has been made" and the criterion specified in s.37(6)(d)(i), there is no point to the court remitting the matter to the Board for any further consideration.