THE HIGH COURT

[2016 No. 503 J.R.]

BETWEEN

MICAUD INVESTMENT MANAGEMENT LIMITED

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

CORK COUNTY COUNCIL, MICHAEL HOLLAND

AND CHRISTOPHER BUCKLEY

NOTICE PARTIES

JUDGMENT of Ms. Justice Faherty delivered on the 31st day of July, 2018

1. The within judicial review proceedings concern a net issue, namely, was it lawful for the respondent (hereinafter "the Board") to reject the applicant's (hereinafter "Micaud" or "the applicant") appeal on the basis that Micaud did not include with its appeal an acknowledgement as required by s. 127(1)(e) of the Planning and Development Act 2000 (as amended) ("the 2000 Act")?

Background

2. On 11th February, 2013, the second named notice party, Mr. Holland, submitted a planning application to the planning department of Cork County Council, the first named notice party, ("hereinafter the Council") for permission for the development of a two-story dwelling house, septic tank, percolation area and access road at Monalahy, Newcastle, Blarney, Co. Cork. The planning application was later supplemented by details of Mr. Holland's housing need.

3. On 4th April, 2013, the Council requested further information from Mr. Holland, in particular, in relation to his housing need. A response to the request for further information was submitted on 18th November, 2013. The Council made a further request for clarification as regards the housing need on 11th December, 2013 and this was responded to on 16th December, 2013. On 21st January, 2014, the Council decided to grant planning permission to Mr. Holland subject to a number of conditions.

4. In circumstances where there was no appeal in respect of the decision, a grant of permission issued on 26th February, 2014, subject to a number of conditions including that the proposed dwelling when completed would be occupied as a place of permanent residence by Mr. Holland or members of his family or their heirs, with the provision that the condition did not affect the sale of the dwelling by a mortgagee in possession or any person deriving title from such sale.

5. On 11th March, 2014, Mr. Holland entered into a loan agreement with Micaud whereby Micaud agreed to make available to Mr. Holland a loan of up to €300,000 to finance the construction of the dwelling in respect of which he had been granted planning permission. It was agreed that the loan would be secured by a mortgage over the said dwelling and that the loan would be repayable on demand by the lender at any time. Also on 11th March, 2014, Mr. Holland entered into a mortgage agreement with Micaud whereby a first fixed charged was created over the dwelling, the subject matter of the grant of planning permission, as security for the monies due and owning under the loan agreement.

6. By letter dated 20th March, 2015, Mr. Holland, in accordance with condition No. 2 of the planning permission, submitted to the Council a written statement of confirmation of the first occupation of the dwelling.

7. On 10th April, 2015, on behalf of Mr. Holland, O'Keefe O'Connell Architects (hereinafter O'Keefe O'Connell) lodged an application for retention planning permission in respect of the dwelling which was the subject of the planning permission previously obtained. The application was for the retention and completion of a two storey dwelling incorporating a basement and car port and amendments to the site layout including the septic tank and percolation area as previously permitted.

8. On 14th May, 2015, the Council received observations from the third named notice party herein, Mr. Buckley, in respect of the application for retention permission.

9. The Council wrote to Mr. Holland via O'Keefe O'Connell on 3rd June, 2015, requesting further information from him, and by letter dated 30th November, 2015, it extended the timeframe for reply to its request for further information to 11th March, 2016.

10. It appears that on or about 7th December, 2015, Mr. Holland informed Micaud that he could no longer make repayments on the mortgage and, thereafter, Micaud took steps to take over the constructed premises and secure same.

11. By letter dated 11th December, 2015, Micaud wrote to the Council to advise that it held a mortgage over the property in respect of which planning permission had been granted and advising that it had taken possession of the property as Mortgagee in Possession. It referred to the retention application that had been lodged in respect of the property and expressed its intention to engage the services of O'Keefe O'Connell to finalise the matter.

12. The applicant's letter was received by the Council on 22nd December, 2015. The Council deemed the correspondence "Unsolicited FI (22/12/2015)" (Unsolicited Further Information). It is common case that neither Micaud nor O'Keeffe O'Connell received an acknowledgement from the Council of receipt of the letter of 11th December, 2015.

13. On 10th March, 2016, O'Keeffe O'Connell submitted a response to the Council's previous request for further information which had issued to Mr. Holland. The response outlined that condition No. 2, as attached to the planning permission, was subject to the proviso that the condition shall not affect the sale of the dwelling by a mortgagee in possession or by any person deriving title from such a sale. The response also advised that as mortgagee in possession, Micaud wished to regularise the planning situation.

14. The Planner's Report, dated 4th April, 2016, recommended refusal of the retention application. It recited O'Keeffe O'Connell's response of 10th March, 2016, to the Council's request for further information and noted that unsolicited further information had been received on 22nd December, 2015. It goes on to state:-

> "This planning application was received by the Planning Authority on the 10.04. 2015 and the name of the applicant on the planning file, public notices, etc is Michael Holland.
>
> …
>
> It has not been set out when exactly the "mortgagee in possession" took possession of the property. The response is inconclusive and not satisfactory. There are no details as to who is residing in the property. The site is located in an area where the applicants have to demonstrate a genuine rural housing need.
>
> …
>
> This application site is located in a rural area, and it is within the rural area under strong urban influence as set out in the Cork County Development Plan 2014.
>
> Permission is being sought in the name of Michael Holland for retention and completion of two-storey dwelling house and basement, car port and amendments to site layout including sceptic tank previously permitted…
>
> There is a long planning history associated with the site, with refusal of planning permissions to applicants who did not comply with the rural housing policy at the time they were being assessed and also on visual amenity grounds.
>
> The Planning Authority granted permission to Michael Holland…who is a local farmer and farming the overall landholding, on his exceptional grounds outlined in his 13/4218 application.
>
> Further information was sought on the occupier of the dwelling. When the site was inspected in May 2015, it was substantially complete and signs that it was occupied…
>
> It is now claimed that Micaud Investments Management Limited have taken possession of the property. The exact date of when this took place has not been set out and what the intentions of this company are."

15. The Planner's draft refusal reasons were in the following terms:-

> "(1) The application site is located in a rural area under strong urban influence as identified in the current Cork County Development Plan wherein it is the policy of the Council to restrict rural housing development to certain limited categories of applicants. Based on the information submitted with the application, the Planning Authority is not satisfied that it has been demonstrated that the applicant/owner of the house comes within the scope of the housing need criteria for the dwelling at this location as set out in the Development Plan…The proposed development would, therefore, contravene materially this objective with regard to the provision of sustainable rural housing and would be contrary to the proper planning and sustainable development of the area.
>
> (2) The Planning Authority is not satisfied on the basis of the information provided that proposed development would comply with condition No. 2 attached to existing planning permission…which regulates the development of the overall lands of which the site forms part. The proposed development would, therefore, would be contrary to the proper planning and sustainable development of the area."

16. On 6th April, 2016, the Council received a submission from Mr. Buckley on in respect of the retention application which was duly returned to Mr. Buckley on the basis that it was not received within the requisite five week timeframe.

17. By way of notification dated 7th April, 2016, addressed to Mr. Holland at the address of O'Keeffe O'Connell, the Council refused the application for retention planning permission. The grounds of refusal were that the Council was not satisfied "that it has been demonstrated that the applicant/owner of the house comes within the the scope of the housing need criteria…" or that "the proposed development would comply with condition No. 2..."

18. On 3rd May, 2016, McCutcheon Halley Walsh, Planning Consultants, acting on behalf of Micaud, submitted an appeal to the Board under s. 37(1)(a) of the 2000 Act against the decision of the Council. They advised, *inter alia*, that Micaud was the mortgagee in possession of the subject dwelling and enclosed a cheque for €220 and a copy of the refusal decision. They went on to state:

> "On 22/12/2015 Cork County Council received a submission from our client which referred to both the extant permission … and to the retention planning application …which is the subject of this appeal.
>
> …
>
> The subsequent reports of the Area Planner…Senior Executive Planner… and Liasion Officer …treated our client's submission as information which was relevant to the decision to refuse. It also appears from the [planners'] reports that the reference in the planning authority's second refusal reason to "*the information provided*" is a specific reference to the submission received from [Micaud] on 22/12/2015."

19. After noting that the Council had deemed Mr. Buckley's submission of 6th April, 2016, as invalid for being out of time, the Planning Consultants cited s. 34(3) of the 2000 Act and went on to state:

> "The planning authority has therefore made an important distinction between:
>
> > (a) the submission made by [Mr. Buckley] on 06/04/2015 (sic) which was deemed to be outside the scope of Article 29 and therefore not in accordance with the permission regulations;
> >
> > (b) the submission made by [Micaud] on 22/12/2015 which was deemed to be unsolicited further information. Article 35 of the permission regulations refers to cases where the planning authority receives further information or evidence in response to a request under Articles 33 or 34 "*or otherwise receives further information or evidence in*

relation to the application". No fee is required for a valid submission of unsolicited further information to which Article 35 refers.

We submit that, as [Micaud] has made a valid submission in relation to the planning application in accordance with the permission regulations, it may now make a valid appeal under Section 37 (1) (a) of the planning act against the relevant decision of the planning authority."

20. By letter dated 18th May, 2016, the Board wrote to McCutcheon Halley Walsh in the following terms:

"An Bord Plenala has received your letter in which you intended to make an appeal under the Planning and Development Acts 2000 to 2015.

Section 127(1)(e) of the 2000 Act provides that an appeal must be accompanied by the acknowledgement by the planning authority of receipt of submissions or observations on the application. As your appeal was not accompanied by the said acknowledgement, it is regretted that it must be regarded as invalid in accordance with s. 127(2)(a) of the Act. To lodge a valid appeal you must comply with ALL of the requirements of s. 127.

You are reminded that the final date for the lodgement of a valid appeal is 4 weeks beginning on the day of the decision by the planning authority. In this case, the time period to lodge a valid appeal has expired."

21. The said letter was received by McCutcheon Halley Walsh on 20th May, 2016.

22. It is the Board's decision to invalidate the applicant's appeal which is under challenge in the within proceedings. On 18th July, 2016, the High Court (Humphreys J.) granted leave to Micaud to seek, *inter alia*:

(i) An order of *certiorari*, by way of judicial review, *qua*shing the Board's decision;

(ii) A declaration, by way of judicial review, that the Board's decision was invalid and of no effect; and

(iii) An order remitting the matter to the Board and requiring the Board to validate the appeal.

23. In the course of oral submissions, counsel for the applicant distilled the applicant's grounds as set out in the statement of claim to the following:

• In making its decision to invalidate the applicant's appeal the Board erred in law and/or in fact in circumstances where the Council had had regard to Micaud's letter of 11th December, 2015.

• The letter dated 11th December, 2015 from the applicant to the Council fell within the scope of s. 34(3) (a) of the 2000 Act. In particular, the letter comprised "information relating to the application furnished to [the Council] by the applicant in accordance with the permission regulations" in circumstances where the proprietary interests of the original applicant for permission (Mr. Holland) in the dwelling the subject matter of the planning application had been transferred to the applicant and the Council had regard to such information in accordance with s. 34(3)(a) of the 2000 Act.

• In those circumstances, in reaching its decision on the validity of the appeal, the Board erred in law and in fact in finding that the appeal was an appeal to which the requirements of s. 127(1)(e) of the 2000 Act applied.

• Further and or in the alternative, in reaching its decision on the validity of the appeal, the Board failed to take into account relevant considerations.

• In particular, the Board failed to take into account the transfer of the proprietary interests of the original applicant for permission (Mr. Holland) in respect of the dwelling to the applicant as Mortgagee in Possession. This information was clear from the appeal itself and from the planning authorities' planning file, in particular the letter of 11th December, 2015, as received by the Council on 22nd December, 2015, the Planner's Further Information Assessment Report dated 4th April, 2016 and the Senior Executive Planner's Report dated 6th April, 2016. The Board failed to take material consideration of the transfer of proprietary interest from Mr. Holland to Micaud (as recognised by the planning authority) into account in the making of its decision.

• Further and/or in the alternative, the Board acted irrationally in deciding the appeal was invalid in circumstances where the evidence before the Board was that the proprietary interests of Mr. Holland had been transferred to the applicant. In making its decision, it was unreasonable for the Board not to accept such evidence of the transfer of interests.

• Further and/or in the alternative, the Board acted in breach of fair procedures and the rules of natural constitutional justice.

• In particular, the Board breached fair procedures and the rules of natural and constitutional justice in invalidating the appeal in circumstances where the applicant has effectively been denied the right to appeal against a decision of the Board regarding a dwelling in respect of which the proprietary interests have been transferred from the original planning applicant, Mr. Holland, to the applicant during the course of the planning application process.

Micaud's submissions

24. The applicant's principal contention is that albeit it was a third party for the purposes of the appeal to the Board the acknowledgement requirement under s. 127(1)(e) of the 2000 Act, which would normally apply to a third party appellant, did not apply in circumstances where Micaud had been permitted by the Council to make submissions through O'Keeffe O'Connell. At no point did the Council challenge Micaud's authority to do so.

25. While it is not Micaud's case (nor was it ever the Council's) that it replaced the first party applicant Mr. Holland, it remains the

case that Micaud's submissions were accepted by the Council. The Council did not issue an acknowledgement of submissions because it did not see Micaud as a third party. Whilst it is accepted that the refusal was issued in Mr. Holland's name, importantly, the Council had admitted Micaud's submissions which were the answers given by O'Keefe O'Connell (by that time retained by Micaud) to questions which the Council had posed to Mr. Holland. The Council thus gave Micaud standing. In such circumstances, it was not an oversight by Micaud not to include an acknowledgement with its appeal to the Board; there was no acknowledgement, nor could Micaud have obtained one. It is the applicant's contention that the Board was bound by the Council's admission of Micaud's submissions.

26. This is so in the following circumstances: the submissions to the Council were by letter of 11th December, 2015, which was received on 22nd December, 2015. These submissions clearly advised the Council that Micaud was now the mortgagee in the possession of property over which planning permission had been granted and that it was aware of Mr. Holland's application for retention permission. The Council were also advised that Micaud was going to retain the same architects that Mr. Holland had retained.

27. Furthermore, the Council's treatment of the letter of 11th December, 2015, as "Unsolicited FI" is testament to the Council not having viewed Micaud as a third party. It is submitted that "Unsolicited FI" is an appellation that can only apply to information received from a first party/primary applicant for planning permission, as is clear from Article 35 of the Planning and Development Regulations 2001-2013 ("the Regulations"). Article 35 provides, in relevant part :

> "Where a planning authority receives further information or evidence following a request under article 33, or revised plans, drawings or particulars following a request under article 34, or otherwise receives further information, evidence, revised plans, drawings or particulars in relation to the application, and it considers that the revised plans, drawings or particulars received, as appropriate, contain significant additional data, in relation to effects on the environment, the authority shall-
>
> (a) require the applicant…"

28. Thus, as only an applicant for permission is permitted under Article 35 of the Regulations to submit "further information", it follows that the Council allowed Micaud to act *qua* Mr. Holland. This opened the door for Micaud to be treated *qua* Mr. Holland, albeit Micaud was a third party.

29. Furthermore, Micaud's second representation to the Council via O'Keeffe O'Connell's letter of 10th March, 2016, comprised the response to queries which the Council had previously raised with Mr. Holland. As, under Article 33(3) of the Regulations, such queries are only ever made of an applicant for permission, as they were in this case, the acceptance by the Council of the responses submitted by O'Keeffe O'Connell (at this time retained by Micaud) again indicates that the Council perceived Micaud as acting *qua* Mr. Holland.

30. Consequently, as a matter of fact, the submissions made on behalf of Micaud were considered in the context of the Council's refusal of the retention permission application. In other words, the Council took the submissions at face value. The Council did not see fit to raise a time issue regarding the submissions, which could have occurred if Micaud was in fact being treated by the Council as a third party. Nor did the Council raise with Micaud the issue of a third party fee. Counsel submits that it is those factors which distinguishes Micaud's circumstances from the requirements of s. 127(1)(e) of the 2000 Act.

31. It is not Micaud's case that the proprietary interests in the retention planning application had transferred to it: rather, the Council treated Micaud as if the proprietary interests in the application had been transferred.

32. It is acknowledged that, pursuant to s. 127(1)(e) of the 2000 Act, it is mandatory for a third party who has made submissions in a planning application to enclose, when appealing to the Board, the acknowledgement furnished by the planning authority of the third party's status. It is also accepted that this acknowledgement forms the basis of a third party's *locus standi* to appeal to the Board. It is submitted however that there was no requirement for an acknowledgement in the present case given the applicant's history of dealings with the Council.

33. Whilst Micaud appealed to the Board as a third party and paid the appropriate fee, because of its unusual position in the planning application it was not a third party to which the requirement to provide an acknowledgement could apply, as had been clearly outlined in its appeal to the Board.

34. It is submitted that the question for determination by the Court is whether the Board can categorise the applicant as a third party to which the s. 127(1)(e) requirement applied? The applicant contends that this question must be answered in the negative. This is so in circumstances where the Board was bound by the Council's determination of the applicant's status. It is submitted that the respondent cannot enter into *qua*si-judicial decision making process (as referred to in *McMahon v. An Bord Pleanála* [2010] IEHC 431), and effectively repackage the applicant. The Board cannot determine that Micaud is a third party to which the acknowledgement criteria apply when the Council did not do so. Micaud cannot be held by the Board to have had its status changed by virtue of it having appealed to the Board; nor did the Board have the authority to change Micaud's status.

35. Essentially, the Board cannot look behind the Council's categorisation of the applicant and the manner in which the Council has determined the issue. As an appellant to the Board, Micaud carried the status conferred on it by the Council. Moreover, as a public body the Board was obliged to take these relevant matters into account. In this regard, counsel cites *O'Reilly Brothers (Wicklow) Ltd v. An Bord Pleanála* [2008] 1 I.R. 187 and *O'Connor v. An Bord Pleanála* [2008] IEHC 13.

The Board's submissions

36. Counsel for the Board submits that Micaud, having abandoned its argument (as set out in the statement of grounds) that it was a first party applicant/appellant, now seeks to argue that notwithstanding that it was a third party appellant, the provisions of s. 137(1)(e) of the 2000 Act did not apply to its appeal. It is submitted that that argument is misconceived.

37. The position is clear: Mr. Holland initially applied for planning permission to the Council, citing a local need. The planning application was opposed by the third named notice party, Mr. Buckley. That objection notwithstanding, Mr. Holland obtained planning permission for a residence on 20th February, 2013. As the history discloses, he subsequently applied for retention planning permission. In so doing, he was obliged to make the case for his personal need for retention planning permission. He was required by the Council to explain how the local, personal need criteria applied to his application to retain the residence he built, which was not in accordance with the original planning permission. Accordingly, the focus of the Council as the planning authority was on Mr. Holland. It is submitted that a third party could not take the place of Mr. Holland and obtain the benefit of a planning permission which enured to a local need, as Micaud suggests in its pleadings. It is submitted that what Micaud attempted to do was to bring to the Board the

appeal which Mr. Holland himself could and should have brought.

38. As pleaded in the statement of claim, the applicant's letter of 11th December, 2015, together with its March 2016 letter, constituted submissions/observations by it to the Council. That being the case, pursuant to s. 127(1)(e) of the 2000 Act, it was an absolute requirement that Micaud furnish the Board with the acknowledgement it received from the Council of the latter's receipt of the submissions/observations which Micaud made.

39. Counsel submits that on the basis of the Planner's report there is no factual or legal basis for the suggestion that the Council had somehow clothed Micaud with a formal standing as the first party applicant. In all those circumstances, given with what the applicant contends for (a hybrid status) is legally impermissible, and given the absence of any legal or factual basis to the assertion that the Council had afforded Micaud with a particular status, there is no basis for any legitimate expectation on its part that the appeal would be accepted by the Board.

40. What the Board was required to do upon receipt of the appeal was to ascertain whether it was in compliance with the legislation. Micaud had prefaced its appeal as that of a third party and it paid the requisite fee. However, there was no compliance with s. 127(1)(e) and, therefore, the appeal was properly invalid pursuant to section 127(2) of the 2000 Act.

41. It is also submitted that Micaud had options which were not availed of. Either it could have requested Mr. Holland to lodge an appeal to the Board, or Micaud itself could have challenged what is said by Mr. Mahon to have been the Council's refusal and/or failure to provide an acknowledgement.

Considerations

42. Micaud contends that its status to appeal to the Board was under s. 37(1)(a) of the 2000 Act as it had made a submission to the Council which had been accepted. While in fact a third party, the Council never treated Micaud as a third party to which an acknowledgement should issue. Effectively, Micaud does not claim to have made the usual third party appeal to the Board in respect of which the validity of the appeal derives from the submission to the Board of the acknowledgement ordinarily issued by the planning authority to a third party who makes submissions or observations in a planning application. Rather, it is argued that, as a third party, Micaud was allowed to make submissions to the Council *qua* the first party applicant and hence its *locus standi* to appeal derived from the acceptance of and dependence on its submissions as such by the Council.

43. The appeal structure is clearly set out in the 2000 Act. Section 37(1)(a) permits the following persons, within the appropriate period and on payment of the appropriate fee, to appeal the decision of a planning authority on a planning application:-

> (i) the applicant for planning permission; and
>
> (ii) those who have made submissions/observations in writing in relation to the planning application.

44. Prescribed bodies entitled to be given notice in respect of any planning application and adjoining landowners are also permitted to appeal, as provided for in s. 37(4) and s. 37(6) of the 2006 Act. Neither of these categories is in issue in the within case.

45. For an appeal to the Board to be lawful and valid, it must comply with s. 127 of the 2000 Act which provides, in relevant part, as follows:-

> "(1) An appeal or referral shall—
>
> (a) be made in writing,
>
> (b) state the name and address of the appellant or person making the referral and of the person, if any, acting on his or her behalf,
>
> (c) state the subject matter of the appeal or referral,
>
> (d) state in full the grounds of appeal or referral and the reasons, considerations and arguments on which they are based,
>
> (e) in the case of an appeal under section 37 by a person who made submissions or observations in accordance with the permission regulations, be accompanied by the acknowledgement by the planning authority of receipt of the submissions or observations,
>
> (f) be accompanied by such fee (if any) as may be payable in respect of such appeal or referral in accordance with section 144, and
>
> (g) be made within the period specified for making the appeal or referral.
>
> (2) (a) An appeal or referral which does not comply with the requirements of subsection (1) shall be invalid.
>
> (b) The requirement of subsection (1)(d) shall apply whether or not the appellant or person making the referral requests, or proposes to request, in accordance with section 134, an oral hearing of the appeal or referral.

…"

46. The mandatory nature of s. 127(1) of the 2000 Act is clear from the wording of the provision. As an authority as to how mandatory provisions should be read, the Court was referred to the decision of Kelly J. in *McAnenley v. An Bord Pleanála* [2002] 2 I.R. 763, where, at pp. 765 – 766, he considered the provisions of s. 6 of the Local Government (Planning and Development) Act 1992 which made it mandatory on the planning authority, upon receipt of a copy of an appeal lodged to the Board, to furnish the Board with the Council's planning file. Kelly J. opined as follows:-

> *"It is suggested that this statutory provision is to be interpreted as not creating a mandatory obligation on a planning authority. Rather it is said to be permissive.*
>
> *I cannot agree with this proposition. In The State (Elm Developments Ltd.) v. An Bord Pleanála [1981] I.L.R.M. 108 at p.*

110, Henchy J. said:-

> *'Whether a provision in a statute or a statutory instrument, which on the face of it is obligatory (for example, by the use of the word 'shall'), shall be treated by the courts as truly mandatory or merely directory depends on the statutory scheme as a whole and the part played in that scheme by the provision in question. If the requirement which has not been observed may fairly be said to be an integral and indispensable part of the statutory intendment, the courts will hold it to be truly mandatory, and will not excuse a departure from it. But if, on the other hand, what is apparently a requirement is in essence merely a direction which is not of the substance of the aim and scheme of the statute, non-compliance may be excused.'*

I am of the view that the legislature is setting up the statutory scheme of appeals to the respondent had in mind that certain documents would be placed before it when it is called upon to exercise its de novo jurisdiction involving an appeal to it from a decision of a planning authority.

The obligation to submit these documents is placed on the planning authority. The section uses the word 'shall'. The intent of the legislature is that there should be placed before the respondent the documentary material as specified which was on the planning authority file and was before it when it made its decision together with the documents which are set forth at subs. (c) which relate to the decision itself.

The documents in question in this application are as follows:-

> *(I) It is common case that the decision of the notice party was not forwarded to the respondent. The respondent did not therefore have the decision of the notice party before it when it made its decision on the appeal. It did have a copy of the notification to grant permission. It is said that this document contained all of the material which was contained in the decision itself. In this case the decision was constituted by an order of the county manager. It is argued that this failure to comply with the provisions of s. 6(c) of the Act should be treated and excused on a de minimis basis.*

It is difficult to treat non-compliance with an express statutory requirement on a de minimis basis. The notification of a decision of a planning authority will in all cases contain the essence of the decision itself. Notwithstanding that, parliament has ordained that both should be provided to the respondent. I cannot disregard this statutory requirement."

47. In an earlier decision, *Graves v. An Bord Pleanála* [1997] 2 I.R. 205, Kelly J. considered the provisions of s. 4(5) of the Local Government Planning and Development Act 1992, which provided, *inter alia*, that an appeal to the Board had to be made by sending the appeal by prepaid post or by leaving the appeal with an employee of the Board at the offices of the Board during office hours. In Graves, the appeal had been left with a security guard (not an employee of the Board) at the offices of the Board on 18th January, 1997, the date of expiry of the appeal period. On 20th January, 1997, before the offices opened, a Board employee found the envelope containing the appeal and left it at the Board's reception desk where it was accepted by the Board and a different employee took possession of the envelope and applied the date stamp to the contents at the offices of the Board during office hours on 20th January, 1997.

48. Kelly J. considered that the mere fact that an employee of the Board fortuitously came into possession of the appeal documents did not discharge the onus placed upon the appellant to comply with the provisions of the Act where the appellant had chosen to appeal by leaving the appeal with an employee of the Board at the offices of the board during office hours. He stated, at p. 215:-

> *"To permit of a departure from that procedure would not merely run counter to the statutory provisions but would, in my view, introduce an element of uncertainty into a procedure which must be construed strictly and rigidly so as to ensure certainty and the protection of third party rights."*

49. With regard to the present case, it is submitted on behalf of the Board that Micaud has not put before the Court any statutory provision which gives it the right or standing to appeal to the Board in the absence of an acknowledgement from the Council. At its height, Micaud's case is that albeit a third party, it made submissions as a first party and thus was not a third party to which an acknowledgement must be given by the Council. The Board's position, however, is that there is no basis upon which it was obliged to investigate the circumstances surrounding the appeal. In this regard, counsel for the Board cites *O'Connor v. An Bord Pleanála* [2008] IEHC 13. In that case Finlay Geoghegan J. considered s. 127 of the 2000 Act in the context of the requirement for an appeal (per s. 127(1)(b)) to state the address of the applicant. The learned judge held the requirement to be "*truly mandatory*" in nature. She stated:-

> *"It also follows from this conclusion that the court has no discretion to excuse non-compliance with the requirement to state the address in s. 127(1)(b) of the Act of 2000 on the basis of an alleged absence of prejudice to the applicant or any other person".*

50. On the facts of that particular case, Finlay Geoghegan J. found that the address had actually been stated in the acknowledgement which the appellant had received from the planning authority. What is significant, however, in *O'Connor* is the recognition given by Finlay Geoghegan J. to the mandatory nature of s. 127 of the 2000 Act.

51. In *Murphy v. Cobh Town Council & Ors* [2006] IEHC 324, an appeal was submitted by the "Holy Ground and Environs Action Group", or more accurately by its committee on behalf of its members, to the Board in respect of the grant of a planning permission. A submission to the planning authority by the Action Group had been acknowledged by letter of 30th November, 2014. However, what was submitted on appeal by the Action Group to the Board was a later letter of 11th January, 2015. In the High Court, it was argued that the Board was wrong to determine that the appeal was invalid because the appellant had not supplied an acknowledgement with its appeal. In *Murphy*, it was not the case that the third party had not been provided with an acknowledgement by the planning authority-it had; the acknowledgement however had not been submitted to the Board and something else had been submitted in its place. In the course of his judgment, MacMenamin J. cited *McAnenley* and went on to state:-

> *"Section 127(1)(e) of the Act of 2000 can only be read in the light of the accepted principles of statutory interpretation, one of the basic premises of which is that, prima facie, the meaning of an enactment which was intended by the legislature should be taken to be that which corresponds to its literal meaning…"*

52. He further opined:-

> *"What is the position here? I consider the very provision of the Section, its relationship to the Statutory Instrument of 2000, the interpretation of analogous statutory provisions in the McAnenley and Graves, and the principles of statutory provision all lead ineluctably to the conclusion that s. 127(1) of the Act of 2000 is mandatory in effect and that, absent the de minimis rule, non-compliance with its provisions render an appeal invalid. Furthermore, I accept that the statutory reference to 'the acknowledgement' in subsection (e) must necessarily refer only to the acknowledgement to the applicant's letter of 29th November 2004, that is the acknowledgement issued by the Town Council on 30th November, 2004. To permit or allow the interpretation urged on behalf of the applicant would of necessity render uncertain that which must be certain, and create doubt as to compliance when the objective of the section is to remove such doubt. This particularly in the light of the stark terms of s. 127(2) of the Act recited above.*
>
> *The de minimis Rule*
>
> *In order for the Board properly to conduct its affairs there must be strict compliance with statutory procedure provisions. The Board is not entitled, as a creature of statue, to operate outside the four corners of the legislation which governs its powers."*

53. As far as the present case is concerned, it is not disputed that Micaud appealed to the Board as a third party and that it paid the requisite third party fee. That being the case, having regard to the mandatory nature of s. 127 of the 2000 Act, as a third party appellant Micaud was obliged to comply with all of the requirements of s. 127, which included, when lodging its appeal, the provision of the planning authority's acknowledgement of its status. Having regard to the manner in which s. 127 has been interpreted in the jurisprudence, it is not, to my mind, open to the Court to condemn the Board for the regard which the Board has paid to its statutory mandate. I do not accept the argument that the Board engaged in "repackaging" the applicant: in deeming the appeal invalid, the Board was, in the words of MacMenamin J. in Murphy, operating within *"the four corners of the legislation which governs its powers".*

54. I find that there is no lawful or legitimate basis for the hybrid status which is effectively now being contended for on behalf of Micaud, a status which is not recognised in the planning code.

55. A further issue in this case was whether notwithstanding the mandatory nature of s. 127 of the 2000 Act, it was incumbent on the Board to evaluate the particular circumstances by which Micaud came to lodge its appeal of the refusal decision. Counsel for the applicant contends that the Board should have had regard to the history and relevant circumstances surrounding the applicant's appeal. She argues that, in particular, the Board was bound by the Council's characterisation of the applicant as an effective first party planning applicant such that the acknowledgement requirement could not be deemed to apply. It is contended that in all of those circumstances, the Board's refusal to accept the appeal was unlawful and irrational and in breach of fair procedures. In support of her argument that the Board was obliged to take all relevant matters into account, counsel for Micaud relies on *O'Reilly Brothers (Wicklow) Ltd v. An Bord Pleanála*, in particular the finding of Quirke J. that whether there was compliance with the mandatory provisions of s. 127(1) of the 2000 Act was a question of fact for the Court and not for the Board.

56. I am not persuaded that counsel's reliance on *O'Reilly Brothers (Wicklow) Ltd v. An Bord Pleanála* is dispositive of Micaud's argument. Whilst Quirke J. was satisfied as a matter of fact that the requirements of s. 127(1)(d) of the 2000 Act (which provides that the grounds of appeal or referral must be stated in full) were met in that case on the basis that the reasons for the referral by the planning authority to the Board for a determination could be discerned from the bundle of documents which had been submitted with the referral, he did not demur from the mandatory nature of s. 127, stating, at p. 196:-

> *"It is important to stress that the provisions of subs. (1) of s. 127 of the Act of 2000 are mandatory in nature and may not be waived by the Board. Subsection (2)(a) of s. 127 clearly and unambiguously provides that "an appeal or referral which does not comply with the requirements of subsection (1) shall be invalid"."*

In the present case, whatever way one looks at it, as a matter of fact, the Board correctly determined that no acknowledgement was submitted by Micaud, a third party appellant, in circumstances where s. 127(1)(e) expressly mandates that an acknowledgement be submitted.

57. . Guidance as to whether the Board was obliged to have regard to what Micaud argues was the Council's characterisation of its status is found in the decision of Charlton J. in *McMahon v. An Bord Pleanála* [2010] IEHC 431. In McMahon, the position was that a third party submission to the planning authority had been made outside of the statutory time limit. Nevertheless, the planning authority had provided an acknowledgement of same. That acknowledgement was submitted in compliance with s. 127 in relation to an appeal to the Board. The applicant seeking judicial review argued, however, that the Board should have looked behind the acknowledgement because the submissions had come to the planning authority too late and thus should not have been acknowledged in the first instance.

58. In considering the scope of the Board's functions under s. 127, Charleton J. stated, at para.11:-

> *"The Board is obliged to consider each of these conditions for an appeal. It does so, I understand, by checking each appeal against the statutory conditions establishing validity. That is all that is required under the Act. Further, in analysing those requirements, the Board is confined by the structure set out in section 127(2). Any appeal or referral which does not comply with the requirements just quoted is deemed to be invalid. Even absent any taxation-akin principle of confining the Board to its function as set out in statute, this latter provision makes it clear that there is to be no inquiry beyond administering the validity of an appeal against the requirements set out in section 127(1)."*

59. As to whether the Board was obliged to consider whether the planning authority ought to have given the acknowledgement in the first place, Charleton J. stated, at para.15:-

> *"The Board, being a creature of statute, is confined in its analysis by the Act of 2000, as amended, to such issues as to planning which arise on the appeal. The Board has not been granted authority to make any legal analysis of steps conducted in pursuit of a planning application by the planning authority."*

60. Counsel for the Board submits with regard to the present case that if the Board had done what Micaud now urges it should have, namely have evaluated if Micaud had standing to appeal notwithstanding the failure or omission of the Council to provide an acknowledgement, then the Board would have engaged in the type of evaluative process which Charleton J., in *McMahon*, said was not permissible. I agree with this submission.

61. I accept the Board's submission that it is not for the Board to look to whether an acknowledgement should have issued from the Council. It is clear that the position now being adopted by Micaud is that an acknowledgement should have issued. At paras. 5-6 of his replying affidavit, Mr. Stephen Mahon, on behalf of Micaud, avers as follows:-

> "I say and believe that the requirement of Section 127, subsection 1(e) of the Planning and Development Act 2000 requires, *inter alia*, that the Submission or Observation must be 'receipted' by the Local Authority. I say and believe there is clearly an omission by the Local Authority to formally receipting the letter of 11th December, 2015. However, what was clear is that the said letter is acknowledged and forms part of the planning considerations as same appeared on the Local Authority's website as part of that planning file…
>
> I say and believe that this specific issue was brought to the attention of the Respondent in the context of the appeal which was submitted to the Respondent on 3rd May, 2016."

62. To my mind, the non-furnishing of an acknowledgement by the Council was a matter for Micaud to take up with the Council; it is not a matter for the Board. Furthermore, given the clear terms of s. 37 of the 2000 Act, it is not for Micaud to thus request the Court to create a new class of appellant to the Board, which is effectively what is being pursued in the within application. It is not sufficient for Micaud to argue that it gained a status upon which to appeal to the Board from what is alleged by it to have been the evaluative process engaged on by the Council with regard to the submissions which Micaud furnished by in December, 2015 and March, 2016. As I have stated, the status contended for by the applicant is not recognised in the legislation. Nor is there any legislative basis for the argument that the Board should accept an appeal from an entity that can make a case as to why they have standing.

63. I am also persuaded by the Board's argument that Micaud's contention that the Council had determined its status is not correct as a matter of fact. The applicant's argument in this regard is not supported by the correspondence which passed between it and the Council. The letters of 3rd June, 2015, from the Council to Mr. Holland requested further information after the receipt of the application for planning retention. The correspondence clearly demonstrates that the Council's concerns were directed to Mr. Holland. Moreover, there is no factual basis for Micaud's contention that the Council treated Micaud as the first party applicant in circumstances where it is evident from the Planner's Report that the retention planning application was considered at all relevant times to be that of Mr. Holland and was dealt with on that basis.

64. In all of the circumstances of this case, the grounds of challenge have not been made out.

65. In the course of the within hearing, it was argued on behalf of the Board that the case made by Micaud in its written and oral submissions fell outside the four walls on which leave was granted. While it is certainly the case that the arguments canvassed by counsel for Micaud were considerably more nuanced than those set out in the statement of grounds, the Court did not consider that the applicant's written and oral submissions fell outside of the pleadings.

Summary

66. For the reasons set out herein, the relief sought in the notice of motion is thus denied.