THE HIGH COURT
JUDICIAL REVIEW

2007 No. 1564 J.R.

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

BETWEEN

CICOL LIMITED

APPLICANT

AND
AN BORD PLEANÁLA

RESPONDENT

AND
DUN LAOGHAIRE-RATHDOWN COUNTY COUNCIL, ARDGLAS RESIDENTS ASSOCIATION, FRIENDS OF AIRFIELD, MAURICE W. TRYAN, BALALLY RESIDENTS ASSOCIATION, ROSE MARY LOGUE, TANEY SCHOOL BOARD OF MANAGEMENT, BARBARA CLEAR, ANTHONY AND GWENDOLYN DUDLEY

NOTICE PARTIES

Judgment delivered by Ms. Justice Irvine on the 8th day of May, 2008

1. The applicant is the owner of certain lands comprising a total site area of 13,600 sq.m.(1.36 hectares) adjoining Overend Way in Dundrum, Dublin, known locally and referred to in the planning file of the respondent as "Dudley's Field".

2. The within proceedings arise by reason of the refusal on the part of the respondent ("the Board") on 2nd October, 2007, to grant planning permission to the applicant for a proposed development on its lands which are within the functional area of the first named notice party ("the Planning Authority"). The Planning Authority, having considered some 29 objections, had originally granted planning permission for the proposed development, subject to twenty conditions, on 22nd March, 2007. An appeal against that decision was lodged by seven third parties including two residents associations and a local school.

3. The Board appointed Ms. Caryn Coogan to prepare a report and this was submitted on 28th August, 2007, following upon which the Board refused permission in accordance with her recommendation.

4. In making its decision, the Board advised that it had considered all of the matters to which it was obliged to have regard by virtue of the Planning and Development Acts 2000 to 2006, and the Regulations made thereunder, including the submissions and observations which it had received prior to its determination.

5. The reasons given by the Board for its refusal were as follows:-

> "Having regard to the nature and scale of the proposed development which consists of primarily residential and mixed commercial use, the proposed development would materially contravene Objective F – 'to preserve and provide for open space and recreational amenities' as set out in the current Dun Laoghaire-Rathdown County Development Plan. The proposed development would, therefore, be contrary to the proper planning and sustainable development of the area."

The Nature of these proceedings

6. The first application before the court is an application seeking leave to apply for judicial review of the Board's decision of 2nd October, 2007. By agreement between the parties and by virtue of the court's earlier directions, this Court has been charged with firstly determining the leave application and thereafter, in the event of it granting the applicant leave to apply for judicial review, to embark upon the substantive judicial review application. To this end, the respondent delivered a draft Statement of Opposition on 21st January, 2008.

7. In the substantive proceedings, the applicant seeks to quash the decision of the respondent on the grounds set out at para. (E) of its Statement of Grounds dated 26th November, 2007. These grounds may be conveniently summarised as follows:

> (a) That the Board failed to comply with its statutory obligations to "state the main reasons and considerations" on which its decision was based.
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> (b) That the Board failed to have regard to the manner in which the Planning Authority had interpreted its own Development Plan at the time of granting planning permission.
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> (c) That the Board failed to have regard to all relevant considerations when making its decision and in particular:
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> > (i) that it failed to consider adequately the specific local objective No. 5 in the Development Plan, namely "to encourage the retention and development of the Airfield estate for educational, recreational and cultural uses"; and,
> >
> > (ii) that it failed to have regard to the use of land which was "permitted in principle" and/or "open for consideration" in areas Zoned F in the Development Plan.
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> (d) That the Board misinterpreted the Dun Laoghaire-Rathdown County Development Plan ("the Development Plan") 2004-2010, in failing to assess the applicant's application by reference to the entirety of the lands Zoned F adjoining Overend Way which lands comprised approximately 37 acres (15 hectares) of which the applicant's site was, to quote the applicants submission, "*but a small part, i.e. less than ten per cent*".
>
> (e) That the Board failed to consider whether the proposed development ought to have been permitted, even if the Board considered that the proposed development would materially contravene the Development Plan.

8. Because the within proceedings constitute a challenge not only the correctness, as a matter of law, of the Board's decision to refuse planning permission but also to its interpretation of the relevant Development Plan, it is necessary to briefly refer a number of

well established legal principles against which the applicants claim must be considered.

Purpose of local authority development plans
9. At the heart of these proceedings is a local authority development, in this case the Dun-Laoghaire Rathdown Development Plan, a document which has been described in the following manner by McCarthy J. in *Attorney General (McGarry) v. Sligo County Council* [1991] 1 I.R. 99 at p. 113:-

> "The plan is a statement of objectives; it informs the community, in its draft form, of the intended objectives and affords the community the opportunity of inspection, criticism, and, if thought proper, objection. When adopted, it forms an environmental contract between the planning authority, the Council and the community, embodying a promise by the Council that it would regulate private development in a manner consistent with the objectives stated in the plan and, further, that the Council itself shall not effect any development which contravenes the plan materially. The private citizen, refused permission for development on such grounds based upon such objectives, may console himself that it will be the same for others during the currency of the plan, and that the Council will not shirk from enforcing these objectives on itself."

10. In *Tennyson v. Corporation of Dun Laoghaire* [1991] 2 I.R. 527 Barr J. at p. 535 gave further consideration to the nature and purpose of a Development Plan when he advised as follows;-

> "A development plan is a written statement prepared by a planning authority indicating the development objectives for its area – see s. 19 of the Act of 1963. An important purpose of the plan is to inform interested parties of what types of development may or may not be permitted in any given area or part thereof, and in the case of housing, the maximum number of units which may be permitted."

The construction and interpretation of development plans
11. In dealing with the principles to be adopted when construing planning documents, Barr J., in *Tennyson*, adopted the sentiments earlier expressed by McCarthy J. in *In re X.J.S. Investments Ltd*. [1986] I.R. 750. He reminded the parties that Development Plans, because they are not drawn up by skilled draftsmen, should not be subjected to the tenets of construction that would be applicable to legislation, but should be properly construed in their ordinary meaning as would be understood by members of the public. At pp. 535 and 536 he stated as follows:-

> "…a court, in interpreting a development plan, should ask itself what would a reasonably intelligent person, having no particular expertise in law or town planning, make of the relevant provision?. What would he or she learn from the 1984 development plan as to the types of development which the planning authority might allow at Silchester Road?"

12. Having construed the plan in accordance with the aforementioned principles, it is then for the court to decide whether a particular development constitutes a material contravention of the relevant Development Plan as was confirmed by McGuinness J. in *Wicklow Heritage Trust Ltd v. Wicklow County Council* (Unreported, High Court, McGuiness J., 5th February, 1998).

13. In the within proceedings, the parties are agreed that the court is not concerned with reviewing the reasonableness of the decision made by the Board but is engaged in satisfying itself firstly as to the appropriateness of the Board's approach to the performance of its function and thereafter a consideration of whether or not the Board's conclusion that the applicant's development constituted a material contravention of the Development Plan was correct as a matter of law.

The Dun Laoghaire-Rathdown Development Plan
14. The applicant's proposed development can be readily seen in the plans exhibited at exhibit "TP5" of the affidavit of Mr. Tom Phillips sworn on 26th November, 2007. The applicant's site is bounded to the east by lands known as the Airfield Estate, of which it was formerly part prior to its purchase in 2005. The Airfield Estate is zoned for use as open space and is an urban farm which has been singled out for special attention by the Planning Authority in the manner described later in this judgment. The layout, mass and scale of the proposed development relative to the balance of the Airfield Estate is best seen in the documents exhibited at "MD2" of the affidavit of Mr. Michael Donlon sworn on the 21st January, 2008.

15. For the purposes of deciding all of the issues in the within proceedings it is necessary to set out briefly some of the more relevant provisions of the Development Plan under scrutiny in these proceedings.

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

17. The full local authority Development Plan 2004 to 2010, which was handed into the court after the conclusion of the proceedings, clearly shows how all of the lands in that area are zoned. Of particular importance to the present case are those lands which are coloured in green which are designated to fall within the zoning objective "F" and those lands coloured pale yellow which are zoned "A".

18. Zoning objective F provides as follows:-

> "To preserve and provide for open space and recreational amenities."

19. Within areas zoned F, certain land uses are described as being "permitted in principle" and/or "open for consideration".

20. The following uses of land are "permitted in principle" under zoning objective F namely:-

> "Community facility, cultural use, open space, recreational facilities/ sports clubs, traveller's accommodation."

21. Uses which are "open for consideration" under zoning objective F are stated to include:-

> "Agricultural buildings, bed and breakfast, boarding kennels, caravan, park-holiday, car park, cemetery, church, crèche/nursery school, education, garden centre, guesthouse, home based economic activities, hospital, hotel/motel, industry-extractive, public services, recreational buildings (commercial), refuse landfill/tip, residential, restaurant, shop-local."

22. In relation to the uses deemed to be "open for consideration" in Zone F, the plan did not, as adverted to by the applicant and noted by the inspector at p.19 of her report, seek to circumscribe such proposed uses by the imposition of any conditions thereon.

23. The Development Plan at table 15.1 advises the public that tables numbered 15.2 to 15.15 inclusive are intended only as guidelines in assessing development proposals. Further clarification is given by the Planning Authority at table 15.1 where it is clearly stated that the tables in the Development Plan are limited to the issue of the potential use of the lands and that there are a wide range of other issues which will also be considered by the planners and which may render a development whose potential use is deemed to be "permitted in principle" or "open for consideration" objectionable for other reasons. Table 15.1 cautions the public as follows:-

> "However, they (i.e. the tables setting out what is 'permitted in principle' and 'open for consideration') relate only to land use. Factors, such as making the most efficient use of land, density, height, massing, traffic generation, public health regulations, design criteria, visual amenity and potential nuisance by way of noise, odour or air pollution, are also of importance in establishing whether or not a development proposal conforms to the proper planning and sustainable development of an area. General guidelines are set out in subsequent paragraphs of this part of the written statement."

24. Under zoning objective F, the Planning Authority, at table 15.3, gives further guidance regarding land uses which are "permitted in principle" namely:-

> "Land uses designed under each zoning objective as 'permitted in principle' are generally acceptable, subject to compliance with the relevant policies, standards and requirements set out in this plan."

25. Similarly, land uses which are "open for consideration" are further described at table 15.4 as follows:-

> "Uses shown as 'open for consideration' are uses which may be permitted where the Planning Authority is satisfied that the proposed development would be compatible with the overall policies and objectives for the zone, would not have undesirable effects and would otherwise be consistent with the proper planning and sustainable development of the area. Uses which are temporary are open for consideration in all zones."

26. Given that zoning objective F is designed to "preserve and provide for open space and recreational amenities", it is relevant to note that open space in the Development Plan is defined at table 15.8 as follows:-

> "Any land, whether enclosed or not, on which there are no buildings or of which not more than 1/20th is covered with buildings and the whole of the remainder of which is laid out as a garden or is used for purposes of recreation or lies waste and unoccupied"

27. Finally, in relation to the Development Plan, it is appropriate to include a small amount of historical information regarding Dudley's field and the Airfield Estate as the same is relevant to various arguments made in support of the application for planning permission.

28. There is a slight lack of clarity as to the precise relationship between Dudley's field and the Airfield Estate. However, it was described in the following terms by Mr. Tom Philips in his Planning and Environmental Report exhibited at "2TP1" of his affidavit of the 4th February, 2008, where he stated as follows:-

> "Dudley's field is currently an inaccessible, under-utilised parcel of land wedged between the Airfield Estate and Overend Way that has never been open to the public and which forms no part of the Airfield Trust's Masterplan for the future of the Estate."

29. He later states:-

> "Dudley's field appears to have been a separate entity and was acquired by the Overend sisters in 1925, from whence it was to be held leasehold for 100 years. The freehold on Dudley's field and the remaining estate was acquired in 1997 by the Airfield Trust."

30. Mr. Phillips, in the same report, refers to the fact that the lands at Dudley's field, and also the lands comprised in the Airfield Estate, enjoyed the same zoning designation for many years. Both areas were previously zoned under Objective A for the purpose of "protection and/or improving residential amenity", following which the lands were later zoned under objective F "to preserve and provide for open space and recreational amenity". The purpose for the variation in the designation of these lands to Objective F, is stated in the second proposed variation to the Development Plan 2004 – 2010 of the 20th June, 2006, as being, "to protect amenity lands at Airfield as an urban farm". This variation is to be found at exhibit "MD1" of the affidavit of Michael Donlan sworn on the 21st January, 2008.

31. It appears to be common case from the planning file that the Airfield Estate and Dudley's field, prior to its sale to the applicant in late 2005, were originally the property of the Overend family and were both under control of the Airfield Trust at the time it sold Dudley's field to the applicant. Further, Mr. Phillips, in his affidavit of the 26th November, 2007, accepts that the applicant's site formed part of the Airfield Estate from about 1922 and that the applicant's lands are part of those lands to which Special Objective No. 5 of the Development Plan relates. The specific local objective provides as follows:-

> "The Council will also encourage the retention and development of the Airfield Estate for educational, recreational and cultural use."

32. It is the aforementioned provisions of the Development Plan which the court must now interpret in the manner advised by McCarthy J. in *Re X.J.S. Investments Ltd* [1986] I.R. 750.

The applicant's proposed scheme of development for Dudley's field

33. The applicant's proposal included the development of 62 residential units which were to be provided in five apartment blocks each being five storeys in height. The plans included a further two storey leisure building to house an indoor recreational centre, health spa

and crèche. The gross floor space to be covered by the proposed development was 12,878sq. m. allied to which there was to be, 4.400sq. m. of basement car parking. The buildings on the site were designed to cover slightly less than 25% of the site with the remaining 75% thereof being retained as open space either in the form of private, semi-private or public space. Having regard to table 15.10, the open spaces and recreational facilities fell to be considered as land uses which were "permitted in principle". However, the residential aspect of the proposal and the other commercial elements of the development, were uses to be considered as being "open for consideration" under the Development Plan. Having regard to the planning history, it is clear that Special Objective No. 5 in the Development Plan included the applicant's site at Dudley's field.

34. It is accepted by both parties in this litigation that the proposed development comprises:

(a) 62 residential apartments with a gross floor area of 6,842sq.m.

(b) Commercial mixed use and recreational space: 6,035sq.m.

(c) Car parking and ancillary facilities: 4,400sq.m.

The Facts

35. Because of the nature of the within proceedings which includes an assertion that the Board failed to have regard to a number of allegedly critical matters at the time of making its decision, and which it is asserted renders the decision of the Board flawed, it is necessary to briefly refer to the planning history referable to the applicant's application for planning permission which culminated in the decision of the Board on 2nd October, 2007.

36. The application for planning permission was submitted to the local authority on 26th January, 2007, following upon which a planning assessment of the proposed development was carried out. It is clear from exhibit "TP11" that the planning official who carried out the planning assessment considered, *inter alia*, the nature, scale and composition of the proposed development having regard to the zoning objectives and the specific objectives contained in the Development Plan.

37. Amongst the matters considered in the planning official's report were:

(a) The high quality of the proposed residential development; the fact that if the proposal had been received in respect of an area zoned for residential development that the density, plot ratio, scale and the open space available for its residents would have been acceptable.

(b) That the open areas and recreational or sports facilities fell within the categories of uses which were "permitted in principle" and that the proposed recreational or sports facilities, including a 24 hour bowling alley, would be well located.

(c) That whilst residential development was a use which was "open for consideration", the quantum, density and plot ratio of the proposed development on a site zoned for use as open space was incompatible with the policies and objectives of the zone and that the proposed development would thereby materially contravene the Development Plan.

38. Notwithstanding the aforementioned conclusions, the Director of Economic Development and Planning, Mr. Michael Gough, on 20th March, 2007, recommended that planning permission be granted and in the course of his lengthy report set out the manner in which he materially disagreed with the planning official's conclusions. The major reasons advanced in favour of the granting of the planning permission by Mr. Gough were as follows:

(a) That the open spaces and recreational facilities proposed were "permitted in principle" under the zoning objective. Further, insofar as the proposed bowling alley, crèche and spa were concerned, such facilities would be well located having regard to the growing local population.

(b) That the proposed residential development was "open for consideration" and under the provisions of table 15.4 was permissible as it did not offend any of the considerations therein set forth. The proposed development was considered by him to be compatible with the overall policies and objectives for the zone. In reaching this conclusion Mr. Gough determined that:

(I) the proposed development would provide for open space and a new access to the Airfield urban farm and also met with the local specific objective No. 5 in the Development Plan which was "to encourage the retention and development of the Airfield Estate for educational, recreational and cultural uses";

(II) there were no undesirable effects associated with the proposed development and that the residential element comprised high quality apartments which were local to public transport and the Dundrum Shopping Centre; and

(III) the proposal amounted to high quality sustainable development and was consistent with the proper planning of the area.

Appeal to An Bord Pleanála and the Inspector's Report

39. Seven third party appeals were made to the Board against the decision of the local authority granting planning permission to the applicant in respect of its proposed development. The Board, in accordance with its statutory powers under s. 146 of the Planning and Development Act 2000 ("the Act"), appointed Ms. Caryn Coogan to make a written report to them regarding the appeal and to include within the report her recommendation.

40. Ms. Coogan reported to the Board in a 21 page report which is exhibited at exhibit "TP8" of the affidavit of Mr. Phillips sworn on 26th November, 2007.

41. It is clear from the content of the Inspector's report that she considered in detail the planning history, as already set out in this judgment, the appeal submissions, the observations from the seven third parties and the response of the applicants and the local authority to the third party appeals. In addition, she discussed the conflicting opinions regarding the proposed development at the time when planning permission was originally sought.

42. The Inspector, in her report, referred at length to specific local objective No. 5 in the Development Plan whose stated objective was to encourage the retention and development of the Airfield Estate for educational, recreational and cultural uses prior to advising upon the unsustainability, in her opinion, of the applicant's submission which had previously been accepted by the Director of Economic Development and Planning, that the proposed development was necessary for the future preservation of the Airfield Estate as an urban farm. She also considered, inter alia, the applicant's submission that the development lands had been in limited agricultural use, were under-utilised and had never been open to the public prior to the application for planning permission and their further assertion that the proposed bowling alley would be a desirable recreational facility to replace the "Stillorgan Bowl" which had recently closed in the locality.

43. In her advice to the Board, the Inspector also set out the statutory framework against which the Planning Authority was charged with making its decision and later referred to the Development Plan and its zoning objectives prior to advising that:-

> "The crux of this appeal lies in whether the proposed development complies with or contravenes this zoning objective. [i.e. Zoning Objective F]. There are opposing views on this issue between the management and elected members of the planning authority, between planning officials within the Planning Department of Dun Laoghaire Rathdown, the applicant, the general public, different political parties and organisations."

44. The distilled reasoning of the Inspector is contained at the conclusion of her report where she states:-

> "The existing open space use of the site will be radically altered regardless of whether there is 75% of the site area devoted to open space areas. The overall transformation of an open field to a development including No. 5 high-rise blocks of development for residential use at ground level along the entire road frontage of Overend Way, and multilevel underground car-parking and services, is a radical deviation and material change from its current use as an open field. This, in my view, implies a material contravention of the development plan will have occurred. The existing open space use of the site will be lost and it will be replaced by a residential, multi-use commercial facility with token recreational facilities, which, due to the nature and scale of the proposal will seriously prejudice the zoning objective of the site.
>
> In this regard, I consider the proposed development is incompatible with the overall policies and objectives of the development plan and for this reason, is not 'open for consideration' under the provisions of the current zoning objective for the area.
>
> Having regard to the planning and zoning history of the site, the existing use of the site and its long term association with Airfield farm, I would consider the current zoning objective, 'to preserve and provide for open space and recreational facilities' to be reasonable."

Recommendation

> "Having inspected the site and considered the appeal file in full, based on my assessment I am recommending the proposal be refused for the following reasons and considerations."

Reasons and Considerations

> "Having regard to the nature and scale of the proposed development which consists of primarily residential and mixed commercial use, the proposed development would contravene materially an objective of the current Dun Laoghaire Rathdown Development Plan, namely 'F – to preserve and provide for open space and recreational amenities'. The proposed development would therefore be contrary to the proper planning and sustainable development of the area."

45. The Board duly considered the report of Ms. Coogan on 26th September, 2007, when it made the following Direction:-

> "The submissions on this file and the Inspector's report were considered at a Board meeting held on 26th September, 2007.
>
> The Board decided to refuse permission generally in accordance with the Inspector's recommendation, shown on the attached copy of the Inspector's draft, reasons and considerations."

46. Subsequently, the Board, by decision dated 2nd October, 2007, refused permission for the proposed development for the reasons and on foot of the considerations which were stated to be as follows:-

"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 nature and scale of the proposed development which consists of primarily residential and mixed commercial use, the proposed development would materially contravene objective F:- "To preserve and provide for open space and recreational amenities" as set out in the current Dun Laoghaire Rathdown County Development Plan. The proposed development would, therefore, be contrary to the proper planning and sustainable development of the area."

Judicial Review

47. In relation to the first application to which I must have regard, namely the application for leave to apply for judicial review, I have no difficulty in coming to the conclusion that the applicant has established in the affidavits filed on its behalf that it has the necessary "substantial interest" in the decision of the Board so as to provide it with the *locus standi* to maintain the within

proceedings. This is clearly so given that the applicant is the owner of the land which is the subject matter of the planning application under consideration and is adversely affected by the outcome of the Board's decision and thereby falls within the class of persons entitled to maintain an application under the provisions of s. 50(4)(c) of the Planning and Development Act 2000.

48. The respondent, whilst accepting the locus standi of the applicant to maintain those claims set out earlier in this judgment, save for a slightly different *locus standi* argument that is raised in relation to its final ground of complaint, nonetheless urges the court to refuse the leave sought on the basis that the applicant has not advanced "substantial grounds" for its assertion that the decision of the Board should be quashed as being invalid. In this respect, the applicant relies upon the provisions of s. 50(4)(b) which provides as follows:-

> "An application for leave to apply for judicial review shall be made by motion, on notice (grounded in the manner specified in the Order in respect of an ex parte motion for leave) –
>
> … … and leave shall not be granted unless the High Court is satisfied that there are substantial grounds for contending that the decision is invalid or ought to quashed, and that the applicant has a substantial interest in the matter which is the subject of the application."

49. The test that the court is therefore affixed with applying in such circumstances, is that of Carroll J. in *McNamara v. An Bord Pleanála* [1995] 2 I.L.R.M 125 at p. 130 where she stated:-

> "What I have to consider is whether any of the grounds advanced by the appellant are substantial grounds for contending that the Board's decision was invalid. In order for a ground to be substantial it must be reasonable, it must be arguable, it must be weighty. It must not be trivial or tenuous. However, I am not concerned with trying to ascertain what the eventual result would be. I believe I should go no further than to satisfy myself that the grounds are 'substantial'. A ground that does not stand any chance of being sustained (for example, where the point has already been decided in another case) could not be said to be substantial. I draw a distinction between the grounds and the various arguments put forward in support of those grounds. I do not think I should evaluate each argument and say whether I consider it is sound or not. If I consider a ground, as such, to be substantial, I do not also have to say that the applicant is confined in his arguments at the next stage to those which I believe may have some merit."

50. The parties in this case are agreed that the threshold to be met by the applicant is that stated by Carroll J. In these circumstances I have subjected each of the applicant's grounds for complaint to this test. Having done so, I have come to the conclusion that the applicant has demonstrated that it has a substantial argument to make in respect of each of its complaints and has accordingly met with the appropriate degree of proof required to obtain leave to apply for judicial review. In circumstances where the court heard all of the applicants submissions in respect of what the parties have described as a type of "hybrid" hearing at the one time, the reasons justifying the court's decision to grant leave to the applicant to apply for judicial review can hopefully be gleaned from the court's response to the same arguments which form the subject matter of the court's decision on the issues in the substantive proceedings. For this reason, I do not propose to engage in the artificial exercise of firstly testing the applicant's arguments on paper at a lower threshold for the purposes of the leave application and then to the theoretically higher standard required to maintain the validity of those arguments on the substantive hearing. Accordingly, on the basis of the substantial arguments raised by the applicants in respect of each of the complaints referred to at (a) to (e) earlier in this judgment, I have come to the conclusion that leave ought to be granted to the applicant in respect of each such complaint.

(A) Did the Board fail to comply with its statutory obligations to "state the main reasons and considerations" on which its decision was based?

51. Section 34 (10) of the Planning and Development Act 2000 provides as follows:-

> "A decision given under this section or section 37 and the notification of the decision shall state the main reasons and considerations on which the decision is based, and where conditions are imposed in relation to the grant of any permission the decision shall state the main reasons for the imposition of any such conditions, provided that where a condition imposed is a condition described in *subsection (4)*, a reference to the paragraph of *subsection (4)* in which the condition is described shall be sufficient to meet the requirements of this subsection.
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> (b) Where a decision by a planning authority under this section or by the Board under section 37 to grant or refuse permission is different, in relation to the granting or refusal of permission, from the recommendation in-
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> (i) the reports on a planning application to the manager (or such other person delegated to make the decision) in the case of a planning authority, or
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> (ii) a report of a person assigned to report on an appeal on behalf of the Board.
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> a statement under *paragraph (a)* shall indicate the main reasons for not accepting the recommendation in the report or reports to grant or refuse permission."

52. Kelly J. in *Mulholland v. An Bord Pleanála (No. 2)* [2006] 1 I.R. 453 considered the provisions of s. 34(10) (a) which had brought about an expansion of the obligations placed on the Planning Authority in earlier legislation. Notwithstanding this apparent increased obligation, Kelly J. nonetheless went on to advise that in his view, the section did not alter the existing jurisprudence by which the adequacy of the "reasons" and "considerations" given by a Planning Authority or the Board should, in judicial review proceedings, be functionally tested. He advised that the "reasons" and "considerations" provided had to be such as to give the applicants such information as would be necessary and appropriate to permit them to consider whether they had a reasonable chance of succeeding in appealing or judicially reviewing the decision concerned and to know if the decision maker had directed its mind adequately to the issues which the applicant believed the decision maker was obliged to consider.

53. The decision of Kelly J. in *Mulholland* was approved by O'Neill J. in *Grealish v. An Bord Pleanála (No. 2)* [2006] I.E.H.C. 310, wherein he concluded that the Board had failed to satisfy the criteria identified in *Mulholland* and in the course of his judgment he described the obligation of the Board in the following manner:-

> "As set out above the legal obligation resting on the respondents to explain their decisions is a very light one, one could even say almost minimal. It is well settled that they do not have to give a discursive judgment. They do, however, as set

> out in the judgment of Kelly J., have to provide sufficient information to enable somebody in the position of the applicant in this case to consider whether he has a reasonable chance of succeeding in judicially reviewing the decision, can arm himself for such a review; can know if the respondent has directed its mind adequately to the issues it has to consider; and finally give sufficient information to enable the court to review the decision."

54. The first matter of significance in relation to the provisions of s. 34(10)(a) is that what is required of the Planning Authority or the Board is to state the "main" reasons and considerations upon which its decision is based. In my opinion, the use of the word "main" in the section means that the Planning Authority and/or the Board is not required to set out all of the reasons upon which their respective decisions are based or any of those reasons which are subsidiary to the main point upon which such decisions are made. Secondly, as s. 34(10)(b) obliges the Board, where its decision regarding the granting or refusal of planning permission is different from its Inspector's recommendation, to indicate the main reasons for not accepting such recommendation, it can be inferred in the present case that the Board accepted the report of Ms. Coogan to the extent that it did not report that it was departing from her recommendation.

55. I believe there is a distinction to be made between the words "reasons" and "considerations" which are referred to in s. 34(10)(a). I am of the view that the word "considerations" refers to all of the matters which are in being and are brought to the attention of the Planning Authority or the Board prior to the point at which they make their decision. By way of contrast, the word "reasons" must relate to the post-decision analysis of the basis for the decision and those "reasons" may or may not encompass all of the "considerations" which lead up to that decision. This being so, I conclude that the main "reason" for the refusal by the Board of planning permission is clearly stated in its decision of 2nd October, 2007, where it advised that the nature and scale of the proposed development comprising residential and mixed commercial usage would materially contravene objective F in the Development Plan and would therefore be contrary to the proper planning and sustainable development of the area.

56. What is less clear from the decision of the Board are the "considerations" that the Board had regard to in coming to its conclusion. However, in this respect the provisions of s. 146(2) of the Act of 2000 are relevant and they provide as follows:-

> "A person assigned in accordance with *subsection (1)* shall make a written report on the matter to the Board which shall include a recommendation, and the Board shall consider the report and recommendation before determining the matter."

57. From the aforementioned section it is clear that the Board, prior to making its decision, must consider the report and recommendation of its Inspector and the Direction of the Board dated 26th September, 2007, notes that it did indeed comply with its statutory obligations insofar as it recites:-

> "The submissions on this file and the Inspector's report were considered at a Board meeting held on the 26th September, 2007.
>
> The Board decided to refuse permission generally in accordance with the Inspector's recommendation shown on the attached copy of the Inspector's draft reasons and considerations."

58. Further, the Board in its decision, stated under the heading "matters considered" that it had had regard to those matters which, by virtue of the Planning and Development Acts 2000 to 2006, it was required to have regard prior to making its decision.

59. Having regard to this statement in the Board's decision, I believe that the Board has cross referenced its decision to the Inspector's report in terms of the matters which it considered prior to reaching its decision and that it thereby complied with its statutory obligations under s. 34(10)(a) of the Act of 2000.

60. Whilst there certainly is some doubt as to the entitlement of the Board to set out its "reasons" and "considerations" in this cross referencing fashion, it should be noted that the applicants have, for the purposes of these proceedings, proceeded on the assumption that the "main reasons and considerations" underlying the Board's decision are one and the same as those of its Inspector. It is difficult therefore, to view sympathetically any assertion that the Board's decision should be quashed because it does not in greater detail elaborate the "main reasons and considerations" underlying its decision. The nature and complexity of the within proceedings would seem to make it difficult for the applicant to sustain an argument that it has been prejudiced in the manner described by Kelly J. in *Mulholland*.

61. If the applicant had truly been prejudiced in the manner described by Kelly J., one might have expected this issue to have been dealt with as a preliminary issue with the court being asked to direct the Board to deliver the "main reasons and considerations" underlying its decision. Thereafter, the applicant might have been expected to consider the main reasons and considerations furnished by the Board and then decide upon whether or not it had grounds to challenge the decision. This, the applicant has not done and it appears to me that in making the wide ranging attack upon the decision of the Board in this case in reliance upon the Inspector's report, the applicant is effectively estopped from contending that the Board has defaulted in its obligations in relation to s. 34(10)(a). In these circumstances, whilst the considerations are not extensively elaborated upon in the Board's decision, I reject the applicant's claim that the Board failed to comply with the provisions of s. 34(10)(a).

(B) Did the Board consider and/or attach appropriate weight to the manner in which the Planning Authority had interpreted its own Development Plan at the time of granting planning permission?

62. For the purposes of reaching its decision, the Board, exercising its statutory powers under section s. 146(1) of the Act of 2000, duly appointed Ms. Coogan as the relevant Inspector to report and make recommendations regarding whether or not planning permission should be granted for the applicant's proposed development. As already advised, Ms. Coogan prepared an extensive report dated 28th August, 2007, and this report not only discussed her own interpretation of the Development Plan but set out in detail the interpretation by the local authority and its various officials of the Plan.

63. The Inspector, in no uncertain terms, advised the Board that there had been opposing views as to the proper construction of the Development Plan at the time of the initial application for planning permission and that those wholly divergent positions were maintained by the protagonists throughout the appeal process. The Inspector set out fully, not only the advice of the planning official but also the contrary discursive and analytical interpretation of the Development Plan by the Director of Economic Development and Planning, Mr. Michael Gough, whose conclusions were grossly critical of the planning official's advice and whose interpretation of the Development Plan led to the grant of planning permission.

64. The Inspector's report to the Board dealt with the interpretation by the local authority of its own Development Plan both in respect of the overall zoning issues and also the specific local objective regarding the future of the Airfield Estate. The Board's direction dated 26th September, 2007, states that it considered the Inspector's report prior to coming to its conclusion to refuse

planning permission and in these circumstances it is simply untenable for the applicant to suggest that the Board failed to have regard to the manner in which the Planning Authority had interpreted its own Development Plan at the time of granting planning permission.

65. As to the applicant's submission that the Board, in exercising its jurisdiction, ought to have afforded some special primacy to the Planning Authority's interpretation of its own Development Plan, I cannot accept this submission. Simply put, if, as accepted by the parties in the course of the hearing, it is for the court on a hearing such as this to decide whether or not a proposed development contravened a particular Development Plan and in so doing is charged with interpreting the Development Plan through the prism of a reasonably intelligent person having no particular expertise in law or town planning, it cannot be the case that the Board, on hearing an appeal, should attach any special weight to the Planning Authority's own interpretation of its plan.

66. It is also the case that under the provisions of s. 37(1)(b) of the Act of 2000, the Board must determine the appeal as if the application for planning permission had been made to it in the first instance. Once again, this provision does not appear to be consistent with the applicant's assertion that the Board should pay particular regard to the interpretation by the local authority of its own Development Plan.

67. Neither do I believe that there is any validity in the applicant's argument that the provisions of s. 37(2)(b) of the Act of 2000 lend any further legitimacy to this assertion on the part of the applicant. Whilst that section places certain restrictions on the Board where a Planning Authority has decided to refuse planning permission on grounds that a proposed development materially contravenes the Development Plan, it does not follow that when the Planning Authority grants planning permission and the Board is minded to annul that decision that it is circumscribed in the manner contended for in reaching that decision. There is no statutory provision in support of such an assertion and there is nothing in the legislation from which such curtailment is to be inferred.

68. The applicant's assertion that primacy should be given to the interpretation by a local authority of its own Development Plan does not withstand practical testing and this can be done in the following manner. Section 178 of the Planning and Development Act 2000, precludes a local authority from carrying out any development which materially contravenes its Development Plan. If special primacy was to be afforded to the local authority's interpretation of its own Development Plan, it is difficult to see how any party could mount a challenge to a decision made by the local authority and successfully claim that a proposed development was in contravention of the Development Plan. The right of a local authority to have its interpretation of its own Development Plan accorded some special weight would substantially dilute the clear intention of the legislature to restrict the powers of the local authority from developing in contravention of a Development Plan.

69. Similarly, s. 34(6)(a) of the Act of 2000 requires a Planning Authority, where it decides to grant permission for a development notwithstanding the fact that the same would contravene materially the Development Plan, to go through a rigorous procedural process to safeguard the Development Plan. These safeguards are set out at ss. 34(6)(a) to (d) inclusive. This procedure requires notice to the public, the consideration of relevant submissions from interested parties and to be a resolution passed by three quarters of the total members of the Planning Authority. If the applicant's submission was correct and the Board was required to attach some special primacy to the Planning Authority's interpretation of its Development Plan, it would be difficult to successfully challenge the decision of a Planning Authority that any proposed development did not contravene the Development Plan. If the Board was to be restricted in this way it would be difficult for it to correct any error made by the local Planning Authority which could then proceed to permit a development in contravention of a Development Plan absent the democratic process and legislative safeguards provided for in ss. 34(6)(a) to (d) inclusive.

70. For the aforementioned reasons, I cannot accept the applicant's submission that any special primacy must be afforded by the Board to the interpretation which a Planning Authority places on its own Development Plan.

(C) Did the Board fail to have regard to, either adequately or at all, the following considerations:-

> (i) Specific local objective No. 5 of the Council "to encourage the retention and development of the Airfield Estate for educational, recreational and cultural uses".
>
> (ii) Uses of land which were "permitted in principle" and/or "open for consideration" under the Development Plan.

(I) Specific Objective No. 5

71. The applicant asserts that the Board, in considering its application for planning permission, did not have regard to the overall impact of the proposed development on the adjoining lands which development it contended was designed to enhance and to be consistent with, the Airfield Trust lands. It was asserted, as a matter of fact, that the applicant's proposed development was designed to preserve the adjacent lands in accordance with specific local objective No. 5 and that the Board erred in law in failing to take into account a number of matters that would have led it to a different conclusion namely:

> (a) That the purchase monies paid by the applicant for Dudley's field would permit the balance of the Airfield lands to be preserved and developed in the manner provided for in the specific objective No. 5.
>
> (b) That at the time of its purchase of the lands, the Airfield Trust was in financial difficulties and that the recreational amenity then in existence was likely to be severely compromised absent the applicant's purchase of the lands.
>
> (c) That under the applicant's proposed development, the development lands would become open to the public as never before and that the development would enable a new entrance to be created to the Airfield Estate at a later time.
>
> (d) That the recreational facilities to be incorporated in the development accorded with the said specific objective.

72. Insofar as the applicant asserts that these matters and other less significant submissions in relation to specific objective No. 5 were not considered by the Board, the report of Mr. Phillips dated the 15th May, 2007, which is exhibited at "MD2" to the affidavit of Michael Donlon is of significance. In that report, Mr. Phillips sets out how, in his opinion, the proposed development does not offend specific local objective No. 5.

73. The applicant's submission in respect of specific local objective No. 5 was, as can be seen from the report of the Director of Economic Development and Planning, Mr. Michael Gough, critical to his recommendation that the local authority would grant planning permission for the applicant's development. His report, to which the Board also had regard and which is further summarised in the Inspector's report stated as follows:-

"The Dudley's field development copper fastens the future for Airfield. Without this development there is no long term future for Airfield as an urban farm. The development of Dudley's field is the price that has to be paid for safeguarding Airfield's future."

74. The matters which the applicant alleges were not taken into account by the Board in relation to specific objective No. 5 were also dealt with comprehensively by the Inspector in her report of the 28th August, 2007. In that report, the Inspector summarised, in relation to this particular issue, the original opinion of the planning official and the contrary opinion of Mr. Gough. The Inspector also recorded fully the applicant's submission and also the response of the Planning Authority to the third party submissions in relation to this specific local objective. Thereafter, the Inspector in the "assessment" section of her report, and in particular at pp. 17 and 18, dealt extensively with the facts surrounding the purchase of Dudley's field from the trustees of the Airfield Estate prior to reaching her conclusions. I therefore reject the applicant's assertion that the Board failed to take into account matters which were material to its consideration as to whether or not the applicant's proposal complied with the specific local objective in the Development Plan.

75. The alternative submission made by the applicant, namely, that the Board erred in law in concluding that the facts relevant to the purchase of Dudley's field from the Airfield Trust, and/or the potential effect of that purchase on on the finances of the Trust, were irrelevant to its consideration is, in my opinion, unsustainable.

76. As a matter of fact, no evidence was put before the Board or its Inspector regarding the financial status of the Airfield Trust at the time of its sale of Dudley's field to the applicant. Further, there was no assertion by the applicant that the sale of Dudley's field was subject to planning permission being obtained for the development. This being so, even if it were the case that the Airfield Trust was in financial difficulty at the time of the sale of Dudley's field to the applicant in November, 2005, the purchase monies had already been transferred to the trustees at the time of the application for planning permission and hence the financial viability of the Airfield urban farm was not dependant upon a grant of planning permission. The applicant, in my opinion, has no legitimate basis for its criticism that the Board incorrectly excluded from its considerations as extraneous, the financial circumstances relevant to its purchase of Dudley's field from the Airfield Trust. The Board was not in error in concluding that such circumstances were not proper matters for inclusion in its considerations when deciding upon whether the proposed development was consistent with the proper planning and sustainable development of the area and/or was compatible with specific local objective No. 5.

(C)(II) Did the Board fail to have regard to the matters which were "permitted in principle" and/or "open for consideration" for development in the areas zoned F in the development plan?

77. The applicant asserts that the Board could not have adequately or properly considered its proposed development in terms of the uses of land that were "permitted in principle" and/or "open for consideration" as if it had done, the Board would have to have concluded, on a proper construction of the Development Plan, that the proposed development was not in material contravention of the Development Plan and thus would accord with the proper planning and sustainable development of the area.

78. The extent of the Board's consideration of how the applicant's proposed development was to be viewed in terms of the uses of land which were "permitted in principles" or "open for consideration" under the Development Plan is clear from the report of the Inspector which sets out the relevant extracts from the Development Plan including all relevant definitions such as those which relate to "open space", "recreational building (commercial)", "recreational facilities/sports club" and "residential development".

79. The Inspector went on in her report to consider the various elements of the applicant's proposed development and accurately advised the Board as to the uses which fell to be considered under the "permitted in principle" and "open for consideration" categories. She advised the Board that a number of the applicant's proposed uses for their site would be considered acceptable as being "permitted in principle" and that these included all of the open space areas and recreational/sports facilities. The Inspector then went on to advise the Board that the balance of the development which included the proposed residential apartments, childcare facilities and a health spa and restaurant, were to be considered as uses "open for consideration". Further, the Inspector fully advised the Board that the extent of open space which would be provided within the development would be as much as 75% and recorded the applicant's assertion that its proposal was in accordance with the zoning objective.

80. Insofar as it is contended that the Board misinterpreted the Development Plan, having regard to the uses which were "permitted in principle" and/or "open for consideration" for the proposed development, this is a submission which I reject.

81. Notwithstanding the fact that 70% of the proposed usage of the applicant's lands fell within the "permitted in principle" usage and the remaining 30% in the "open for consideration" category, the Board was, in my opinion, correct in the conclusion it reached to the effect that the proposed development was incompatible with the overall policies and objectives of the Development Plan and would therefore be contrary to the proper planning and sustainable development of the area. In coming to this conclusion, I have sought to interpret the Development Plan in a manner which would be consistent, I hope, with the approach taken by a reasonably intelligent person having no particular expertise in law or town planning. In this respect, there are a number of matters in the Development Plan which I believe would be considered to be material by any such individual trying to gain insight into whether the proposed development would or would not be likely to obtain planning approval, namely:

(a) That the Development Plan specifically identifies areas of land to be used solely or primarily for either residential or commercial uses. I believe that an intelligent person who had considered the entire Development Plan would have expected the applicant's development to have been proposed for an area zoned primarily for residential development. The applicant's site is of course zoned for preservation and the provision for open space and recreational amenities.

(b) That at table 15.1 it is provided that the uses of land described as being "permitted in principle" or "open for consideration" are merely guidelines in relation to the use of land and that there are a multitude of other factors including density, height, massing etc. to be considered by the Planning Authority when deciding whether or not any proposed development, whether "permitted in principle" or "open for consideration" is to be deemed to be one which does not materially contravene the Development Plan for the area.

(c) That special objective No. 5 applied to Dudley's field and that any proposed development on that site would have to be viewed against the specific local objective that the whole of the Airfield Estate should be retained for educational, recreational and cultural purposes.

(d) That whilst residential development was a use advised by the local authority as being "open for consideration", this guideline gave no assurance other than that the proposal would be examined on its merits which would include but would not be confined to the considerations set out at tables 15.1 and 15.4.

(e) That the "preservation" of "open space" was key to zoning objective F and that any development which would reduce

such open space in favour of significant residential development and mixed commercial development other than for recreational use would be likely to be viewed as incompatible with the zoning objective and hence inconsistent with the Development Plan.

(f) That the local authority might consider favourably some scheme which included residential development or commercial development but, by reason of table 15.1 and the relevant zoning F objectives, the chances of approval would likely depend upon the proposed size, density and mass of the intended development with the smallest and least intrusive proposals probably more likely than their larger, denser and taller counterparts to receive favourable attention.

82. If I am correct that the Development Plan would have been interpreted in the manner just described by the intelligent member of the public, then I believe that the Board cannot be considered to have been in error when it concluded that the proposed development was in material contravention of the Development Plan. Regardless of whether or not 75% of the site was to remain as open space and that the totality of the proposed development was either for a use "permitted in principle" or "open for consideration" the fact of the matter is that the total proposed development for the site was 17,318sq. m. of which 11,283sq. m. was for the use of land designated merely as "open for consideration", (principally comprising 62 apartments and car parking) with the remaining 6,035sq. m. for mixed commercial use and recreational space of which only the later use was to be considered as "permitted in principle". It was these factors which drove the Board to conclude that the proposed development consisted primarily of residential and mixed commercial use and that the nature and scale of the proposed development was such that it would contravene in a material way the zoning F objective in the Development Plan. In this regard, it was clearly open to the Board to examine the development, particularly the proposed use of the site for residential development and subject it to the considerations set out in particular in table 15.1 when deciding whether the development as a whole would be considered to be in material contravention of the Development Plan

83. At para. 25 of its written submissions, the applicant criticises the Board for misdescribing and mischaracterising the proposed development as one which was "primarily for residential and mixed commercial use". The applicant submits that this mischaracterisation was critical and that it led the Board to make a fundamental error in its interpretation as to what type of development would comply with the zoning objective. The basis for the applicant's objection is the fact that 70% of the proposed development could be ascribed to open space and recreational amenity; such uses both being "permitted in principle".

84. I have to say that I do not accept that an intelligent person viewing the applicant's proposed development would characterise the applicant's proposed development as being anything other than one which was primarily for residential and mixed commercial use and they certainly would not view it as being one which was principally devoted to the provision of open space and recreational amenity. Any intelligent person would consider how the land would be used following the completion of the development and having done so would be driven to agree with the Board's conclusion in this respect.

85. I believe that I am fortified in my view on this issue by a number of documents which have emanated from the applicant and its advisers. In this regard, exhibit "TP2" to the affidavit of Mr. Phillips sworn on the 26th November, 2007, describes the development as a "proposed mixed use commercial recreational/residential/childcare/retail and ancillary development at Dudley's field, Overend Way, Dundrum, Dublin 14". In the same affidavit at para. 6, Mr. Philips refers to the applicant's proposal in the following manner:-

> "I say that the development proposed for the site consists of a mixed use residential/recreational development and consists of a leisure building consisting of an indoor recreation centre, health spa and crèche, a shop/delicatessen and five residential blocks consisting of 62 residential units."

86. At para. 2.1 of Mr. Phillip's submission to the Board on the third party appeals, he describes the proposed development in the following fashion; "the appeal proposal seeks to provide a mixed use scheme of commercial recreational/residential/ childcare and ancillary development uses".

87. Assuming that Mr. Phillips has correctly described the various types of development proposed for the applicant's site, it is clearly correct for the Board to have concluded that the residential development was the most significant part of the development on the site, not only in terms of allocated area, but also because of the fact that some of the mixed commercial use proposed was clearly designed to be ancillary to the residential development.

88. For all of the aforementioned reasons, I conclude that the Board did consider adequately all of the uses of land which were "permitted in principles" and/or "open for consideration" under the Development Plan and that in so doing, it did not fall into error in reaching the conclusion that the proposed development nonetheless materially contravened objective F of the Development Plan such that the proposed development was contrary to the proper planning and sustainable development of the area.

(D) Did the Board fail to consider the applicant's proposal by reference to the entirety of the lands adjoining their site? Was such consideration mandated? If it was so mandated does it follow that the decision of the Board to the effect that the proposed development constituted a material contravention of the Development Plan was incorrect as a matter of law?

89. I find the applicant's submission in this respect to be somewhat opportunistic. At the time of the application for planning permission, the submission made on the applicant's behalf was that Dudley's field should be viewed as a separate entity from the Airfield Estate and this is clearly stated in the Planning and Environmental Report prepared by Mr. Phillips which is exhibited at "2TP1" in his affidavit of the 4th February, 2008. Further, whilst the Board is now criticised for considering the proposed development within the confines of its own site, the submission made to the Planning Authority on the applicant's behalf, and also to the Board, was destined to establish that, having regard to the fact that all of the uses proposed for the applicant's site where either "open for consideration" or "permitted in principle" that the proposed development was not in material contravention of the Development Plan. Thus, the nature of the adjacent site was not relied upon as being of any significance in terms of whether or not the proposed development was consistent with the Development Plan. The applicant now contends that it was wholly inappropriate for the Board to have considered the proposed development in the context of its own site alone, notwithstanding that this was the plinth upon which its submission to the Planning Authority and the Board was based, rather than as part of the total land zoned F of which its site was merely a small part. The applicant asserts that if its application for planning permission had been approached in this way, the Board would not have concluded that the proposed development constituted a material contravention of the plan.

90. Dealing with this complaint on its merits, it must be accepted that the Board, through its Inspector, considered the proposed application for planning permission having regard to the adjacent lands zoned F, in a number respects, namely:

> (a) It considered the applicant's assertion that Dudley's field did not form part of the original Airfield Estate, was not part of the urban hobby farm and was not open or accessible to the public from the Airfield Estate but would be so accessible if planning permission was granted;

(b) It considered the applicant's assertion that the proposed residential development which was "open for consideration" was compatible with the overall policies and objectives for the zone given that it allegedly fulfilled the local specific objective No. 5 "to encourage the retention and development of the Airfield Estate for education, recreational and cultural uses";

(c) It considered the applicant's assertion and that of the local authority that the proposed development had financially secured the future of the Airfield Estate and that the development was necessary to copperfasten its future;

(d) It considered the potential benefit of a new entrance being provided at a future date from the applicant's development into the urban farm on the Airfield Estate; and,

(e) It considered the height and density of the proposed structures on the surrounding landscape and whether or not a development of nearly 7,000sq.m. of commercial housing units as part of a 13,000sq.m. development complex could contribute in any way to Airfield's development as a model farm and a facility for the people of Dundrum and the wider area.

91. It is clear from the Inspector's report that the proposed development was considered generally in the context of all of the adjacent lands zoned F and the following is but one of the many references in her report as to how, in her opinion, the proposed development was in breach of the spirit of the zoning for the entire area, namely:-

> "The proposed development is entirely contrary to the zoning objective, and the proper planning and development of the area wherein a green lung should be retained in an area where an excessive amount of development has occurred over the past five years. The Objective F is 'to preserve and provide for open space and recreational amenity". The proposal neither preserves nor provides for open space and its contribution to its recreational amenity is entirely commercial and enclosed. The proposal is entirely inconsistent with the spirit and thrust of the zoning objective.
>
> The proposal is contrary to specific local objective and the development plan, *'to encourage the retention and development of the Airfield Estate for educational, recreational and cultural purposes.'*"[Emphasis added.]

92. I do not accept as a fact, that the Board viewed the applicant's proposed development in isolation. The Board considered the development both in the context of the overall lands zoned F and also the special objective in the Development Plan referable to the Airfield Estate. However, if I am wrong in this respect, I do not accept that any intelligent person interpreting this Development Plan would believe that a proposed development, if considered offensive to the relevant zoning objectives by reason of the nature and scale of that proposed development within its own site, would nonetheless be likely to receive planning approval based solely on the good fortune that the adjacent lands were not subject to a like application for development at that time. An intelligent person reading the Development Plan would be unlikely to believe that a local authority, when viewing plans for a development in an area zoned for open space and recreational activity would, when evaluating the open space element of the proposed development, permit the applicant to improve its position by including within its calculations the open space element of any adjacent property.

93. The applicant now seeks to argue for the first time that the Board made a fundamental error in how it interpreted the Development Plan. The applicant alleges that the Board was obliged to consider whether the proposed development amounted to a material contravention of the Development Plan taking into account the open space not only within its own site but also including the substantial adjacent Airfield Estate lands. The applicant asserts that had the Development Plan been interpreted in this way, the Board would not have fallen into error and would have been driven to the conclusion that the proposed development did not constitute a material contravention of the plan.

94. Whilst the applicant now relies upon what is described in the affidavits as this allegedly fundamental and serious mistake on part of the Board, I note with some surprise, therefore, that there is nothing in the planning file or in Mr. Philips' report to suggest that this submission was made either at the time of the application for planning permission or in the context of the appeal to the Board. Perhaps, this is not surprising given that the applicant's contention that the proposed development should have been evaluated in the context of the total lands zoned F seems to be only consistent with an acceptance that the proposed development, when considered on its own merits and confined to its own site, falls foul of the zoning objective for the area in which it is located.

95. The argument that the applicant now appears to be making is that if the footprint of its development was offensive in terms of reducing open space or if the mass of its intended development was such as to be deemed to be offensive to the area's zoning objectives, the applicant was entitled to have those offensive features ameliorated by the happenchance that the lands adjacent to it development had not been developed. I cannot accept that an intelligent member of the public would interpret the Development Plan in this way.

96. In rejecting the applicant's submission in this regard, I am mindful of the manner in which McCarthy J. described the nature of a *Development Plan in Attorney General (McGarry) v. Sligo County Council* [1991] 1 I.R. 99 where he described the Development Plan as being a contract between the Planning Authority and the community which sets out what is likely to be permitted in terms of development during the currency of any Development Plan. If the submission on the applicant's behalf is correct, it appears to me that the applicant's contract with the Planning Authority would be different from the contract between the Planning Authority and its next door neighbour owning land within the same zone. It must be the case that both landowners should enjoy the same opportunity to obtain planning permission during the currency of the Development Plan for similar types of development. However, if the Development Plan is to be interpreted in the manner suggested by the applicant, this cannot occur. The applicant wishes to obtain planning permission in reliance upon the open space owned by its next door neighbour, the Airfield Estate. The next door neighbour, the Airfield Estate, however, will not be in a position to seek planning permission for a similar development on its lands in reliance upon the applicant's present open space as if planning permission is granted such open space will be substantially reduced and the whole profile of the lands irreparably altered. If the Board interpreted the Development Plan in the manner suggested by the applicant, the result would favour the applicant substantially and simultaneously disadvantage the adjacent landowner as the planning permission granted would have the effect of freezing any potential development on the adjacent lands. One party would be permitted to develop its site for significant financial reward based on the non-development of the adjacent lands whilst the adjacent landowner is denied the same right with the obvious consequences. This seems to me to be entirely contrary to the sentiments expressed by McCarthy J. in *Attorney General (McGarry)* where he stated at p.113 that:-

> "The private citizen, refused permission for development on such grounds based upon such objectives, may console himself that it will be same for others during the currency of the plan, and that the Council will not shirk from enforcing these objectives on itself".

97. If the Board was correct in concluding that the proposed development, when considered within its own site, was in material contravention of the Development Plan by reason of the zoning objectives of the area, I believe that the Board would have been in error to have reached a contrary conclusion by considering the proposed development in context of the immediately adjacent open space within the Airfield estate.

98. In the aforementioned respect, I believe the respondent's reliance upon the decision of O'Hanlon J. in *O'Leary v. Dublin County Council* [1988] I.R. 150 is apposite. In that case, O'Hanlon J. considered the plaintiff's objection to the location by the local authority of a halting site in an area which was zoned for high amenity. The respondent asserted that it was legitimate, in the context of the proposed location of this small halting site, to rely upon the fact that it was to be situated in a very large area of high amenity and that this being so, its impact upon the surrounding area would be minimal. In relation to this submission, O'Hanlon J. stated as follows at p.153 that:-

> "Having considered all the evidence put before the Court and the legal submissions made on behalf of the applicants and the respondent, I have come to the conclusion that the creation of a halting site of the kind contemplated and its use for the purpose envisaged, while locating it in a high amenity area, would amount to a material contravention of the County Development Plan and the County Council would be acting *ultra vires* in proceeding with the project at this particular time in the location specified."

99. He continued on p.154:-

> "If an application were made by a private developer for permission to develop part of the lands in an area zoned as a high amenity area, by the erection of prived dwellings for private residential accommodation, I have no doubt that it would be resisted strenuously by the planning authority on the basis that it would amount to a material contravention of the County Development Plan. I do not think a private developer would be allowed to argue that the area involved in his project was small in relation to the area comprised in a higher amenity area, and that therefore the contravention, if any, was not 'material'."

100. Even if I am in error as to the Board's obligations in terms of the extent to which it ought, in determining whether the applicant's proposed development was in material contravention of the Development Plan, to have taken into account the existing open space within the Airfield Estate, I nonetheless consider that any default on the part of the Board in this respect does not undermine its ultimate decision to the effect that the proposed development was in material contravention of the Development Plan. To regard the proposed development otherwise is to fail to assess the reality of the proposed development against the crystal clear guidance of the Development Plan that the applicant's site and the other lands zoned F adjacent thereto were to be preserved as open space and/or to be used for recreational activity rather than for a use or combination of uses including significant residential and commercial development. I do not believe that any intelligent person seeking to interpret the relevant Development Plan would fail to conclude that the proposed development significantly reduced the open space which the areas zoning objectives sought to promote and maintain. Further, a like individual would hardly consider that an area formerly used as a field for grazing which was to be developed into five apartment blocks with 62 apartments and mixed commercial leisure facilities would be compatible with the open space zoning, regardless of the fact that 75% of the site was to comprise open space and the balance of the development being either "permitted in principle" and/or "open for consideration" under the Plan. This is particularly so having regard to the availability of other land in the locality zoned for land use which was primarily residential.

101. In the foregoing circumstances even if the applicant is correct in its contention that the Board did not, in the limited sense alleged, consider the proposed development in the context of the size of the remaining green area in the lands zoned F attached to its site, I conclude that this failure did not lead the Board to an erroneous conclusion the applicant's proposed development was in material contravention of the Development Plan.

(E) Was the Board obliged to consider whether the proposed development ought to have been permitted, even if it considered that the proposed development materially contravened the Development Plan?

102. Section 37 (1) (b) provides that the Board, when dealing with an appeal, shall determine the same as if the application for planning permission had been made to it in the first instance and requires the Board to determine the application having regard to the matters set out at s.34 subss. (1), (2), (3) and (4). Section 34 (3) deals with the obligation on the part of the Planning Authority and/ Board to consider all information and submissions furnished to it and there is no complaint made by the applicant in this respect. Further, s.34 (4) deals with the entitlement of the planning authority and/or Board to attach conditions to any grant of planning permission and once again no complaint is made by the applicant in this respect.

103. The applicant asserts that the Board, having concluded that the proposed development was in material contravention of the Development Plan as provided for in s. 34(2)(a)(i), erred in law in failing to have regard to all of the matters set forth in ss. 34(2)(a) to (c) inclusive. By way of example, the applicant, in its written submissions, referred to the fact that there was no evidence that the Board had examined whether or not the proposed application for planning permission was in accordance with any relevant Government policies or was in accordance with any relevant Environmental Impact Statement. The applicant therefore submits that as the court cannot be satisfied that the Board had regard to all of its statutory obligations such as those just mentioned that the court should quash the decision of the Board.

104. The court finds the applicant's assertion in this respect to be without merit. Firstly, the Board in its decision specifically advised that it had had regard to those matters to which, by virtue of the Planning and Development Acts 2000 to 2006, and the Regulations made thereunder, it was required to have regarded. Further, the applicant has not established to the court that there were in existence matters, for example, such as those referred to in ss. 34(2) (a)(iv) and (vi) to which the Board did not have regard. Were there any Government or Ministerial policies of relevance to the application? Was there an Environmental Impact Statement submitted which was ignored by the Board? Further, it seems to me that the provisions of ss. 34(2) (a), (b) and (c) are all destined to restrict the circumstances in which planning permission will be granted. None of these sub-sections appear to me to be likely to augment an application for planning permission which has already been deemed to be in material contravention of a Development Plan. However, if I am incorrect in this respect, not only has the applicant failed to establish the existence of matters to which it contends the Board did not have regard, but it has failed to demonstrate in any way how a consideration of those matters set out in ss. 34(2)(a),(b) and (c) might have altered its decision to refuse planning permission. Hence, the applicant's submission that the decision of the Board should be quashed appears to me to be without foundation.

105. The applicant further contends that the provisions of ss. 34 and 37 of the Act of 2000 are such that the Board was mandated, notwithstanding having concluded that the proposed development was in material contravention of the Development Plan, to proceed nonetheless to decide whether or not it should grant planning permission for the proposed development or some portion thereof.

106. I am afraid that I must reject the applicant's submission in this respect for a number of reasons. Firstly, the whole basis upon which the applicant sought planning permission and contested the appeal before the Board was grounded in a submission that its proposed development was consistent with the Development Plan. In this respect, Mr. Phillips, in his Planning and Environmental Report exhibited at "2TP1" of his affidavit dated the 4th February, 2008, submitted "that the zoning facilitates the proposed development without the need to involve the material contravention procedure". The applicant did not request the Board to consider granting planning permission even if it came to the conclusion that the proposed development constituted a material contravention of the Development Plan. Neither did it place any material information before the Board which might have justified the Board in proceeding to consider making such a decision. For this reason, I believe the applicant is estopped from now complaining that the Board did not consider granting full planning permission or some limited planning permission, having concluded that the development as proposed by the applicant was in material contravention of the Development Plan. I also accept the respondent's submission that the applicant has no locus standi to raise this complaint having regard to the basis upon which it approached the appeal before the Board. It is clear to me that the Board complied with its statutory obligations to the applicant in considering its written submissions in accordance with the provisions of s. 34(3)(b) of the Act of 2000.

107. I further reject the applicant's submission on the basis of the provisions of s. 37(2)(a) of the Act of 2000 which provides as follows:-

> "Subject to *paragraph (b)* the Board *may*, in determining an appeal under this section, decide to grant a permission even if the proposed development contravenes materially the development plan relating to the area of the planning authority to whose decision the appeal relates." (Emphasis added.)

108. The use of the word "may" in the aforementioned provision lends little support to the applicant's assertion that the Board, having considered the proposed development in material contravention of the Development Plan, was obliged to proceed to consider whether there were any reasons upon which it might seek to grant planning permission for the development either in whole or in part. Further, I am driven to the conclusion that the applicant's submission is entirely at odds with the tenor of the Act of 2000, wherein the legislature has sought to circumscribe, in so many ways, the development of land in circumstances where such development would be in contravention of the relevant Development Plan. This curtailment is seen in s. 178 of the Act where the Planning Authority itself is curtailed from carrying out development in its functional area in contravention of its Development Plan. Further evidence of such curtailment is to be found in s. 34(6)(a) which requires a Planning Authority, before it can grant planning permission for a development which it has deemed to be in material contravention of any relevant Development Plan, to engage in a consultative process and thereafter obtain agreement from three quarters of the members of the Planning Authority for the proposed development. Similarly, the Board, on appeal from a refusal of the Planning Authority to grant planning permission because of a material contravention to the Development Plan, can only grant permission in the very limited circumstances set in s. 37(2) of the Act of 2000.

109. I do not accept the applicant's submission that I can infer from the provisions of ss. 34 and 37 of the Act of 2000, that the Board was mandated, having rejected the applicant's contention that its development was not in contravention of the Development Plan, to go on to consider of its own motion whether it should grant planning permission on the basis of other considerations which were not ventilated by the applicant in the course of the appeal. I believe that to conclude that the Board should have done so would be to fly in the face of the legislature's obvious desire to curtail development in contravention of a Development Plan absent the type of safeguards and consultative process provided for in s. 34(6)(a) of the Act of 2000.

110. Finally in relation to this issue, I conclude that the Board, having decided that the proposed development was in contravention of the Development Plan, would have to have had very significant reasons to justify proceeding to grant planning permission of any sort to the applicant and all interested parties would have been entitled to be on notice of the Board's considerations in this regard. In this case, given that the applicant's submission to the Board was entirely based upon its assertion that the proposed development did not contravene the Development Plan, the Board did not have to hand any significant facts which might have permitted it to consider proceeding to grant any form of planning permission to the applicant. This being so, the Board would not have been in a position to notify the relevant third parties and/or Planning Authority of any such significant facts. Hence, I am driven to the conclusion that if the Board had proceeded to grant any form of planning permission to the applicant, such decision would have been made in circumstances where that decision would have been open to challenge by third party objectors and/or the local authority as having been made without due regard to fair procedures.

111. For all of the aforementioned reasons, I cannot accept the applicant's submission that the Board was mandated, having concluded that the proposed development was in contravention of the Development Plan, to proceed to consider granting any form of planning permission to the applicant in respect of its proposed development.

Conclusion

112. The court is satisfied that the Board fully complied with its statutory obligations in the manner in which it approached the decision which is the subject matter of the within proceedings and that the Board had regard to all relevant facts and circumstances in reaching its determination. Further, the Board did not, in the opinion of the court, have regard to any irrelevant considerations in reaching its determination.

113. Having carefully considered all of the arguments made by counsel for both parties, including their written submissions, I am satisfied that the Board's decision, as a matter of law, was one which was correct and that the applicant's proposed development was indeed, applying the appropriate method of interpretation, in material contravention of the Development Plan and was correctly advised by the Board as being one which was contrary to the proper planning and development of the area. Further, the Board was under no obligation, having determined that the proposed development was in material contravention of the Development Plan, to proceed to consider whether or not it should nonetheless grant planning permission to the applicant in respect of its proposed development or any part thereof.

114. Finally, I am satisfied that the Board complied with its statutory obligations to set out the main reasons and considerations underlying its determination. In these circumstances the applicant is not entitled to the relief claimed.