Neutral Citation Number: [2007] IEHC 478

**THE HIGH COURT**

**2006 No. 724 JR**

**BETWEEN**

**NOEL MULHAIRE**

**APPLICANT**

**AND**
**AN BORD PLEANÁLA AND THE ELECTRICITY SUPPLY BOARD**

**RESPONDENTS**

**AND**
**ENNIS TOWN COUNCIL**

**NOTICE PARTY**

**Judgment of Mr. Justice Birmingham delivered the 31st day of October, 2007.**

1. This is an application by Mr. Noel Mulhaire (the applicant) for leave to apply for judicial review in respect of a decision of An Bord Pleanála (the Board) of 26th April, 2006 granting permission to the Electricity Supply Board (ESB) for the erection of a 24 metre high free standing communication structure carrying antennae and communications dishes at the ESB substation at Cahircalla, Ennis, County Clare.

2. Section 50 of the Planning and Development Act 2000, as amended, provides that leave to apply for judicial review shall not be granted unless

> (a) The High Court is satisfied that there are substantial grounds for contending that the decision concerned is invalid or ought to be quashed and the applicant has a substantial interest in the matter which is the subject of the application.

3. The applicant lives in close proximity to the proposed structure and it is not in dispute that he has a substantial interest in the application, though it is contended by both respondents that he lacks an entitlement to advance certain arguments which he seeks to make.

4. In relation to what constitutes substantial grounds, the classic statement of what is required is to be found in the judgment of Carroll J. in *McNamara v. An Bord Pleanála (No. 1)* [1995] 2 I.L.R.M. 125 at 130, where she commented:

> "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."

5. This passage has been considered and approved in a large number of cases and received the endorsement of the Supreme Court In *Re Article 26 and the Illegal Immigrants (Trafficking) Bill, 1999* [2000] 2 I.R. 360. I accept that at this stage the court is not concerned with trying to ascertain what the eventual result would be, save to the extent that a ground which did not stand any chance of being sustained could not be said to be substantial. The authority for that is *Village Residents Association Ltd v. An Bord Pleanála* [2000] 1 I.R. 65.

**History of the permission**

6. In order to understand and put in context arguments advanced by the different parties and, in particular, to put in context certain arguments advanced by the applicant, it is appropriate to outline the history of the planning application.

7. An application was made to Ennis Town Council by the ESB for permission to erect a 24 metre high free standing communication structure to carry antennae and communication dishes within an existing ESB substation at Cahircalla, Ennis, County Clare. The application was received by Ennis Town Council on 3rd June, 2005 and after an initial request for further information, the application was refused on 30th November, 2005. The refusal referred to material contravention of the development plan for the area, serious injury to amenities, property in the vicinity of the proposed development and that accordingly the proposed development would be contrary to the proper planning and sustainable development of the area. It should be noted that in refusing permission the planning authority was following the recommendations of its planning officials.

8. The refusal of permission was appealed to the Board by the ESB, and the applicant, who had earlier made a submission to Ennis Town Council, made an observation which was received by the Board on 20th June, 2006. A number of other observations were submitted by third parties.

9. The Board Inspector's report recommended refusal, having regard to the guidelines for telecommunications antennae and support structures issued by the Department of the Environment in 1996, as well as the statutory plan for the area. He concluded that the proposed development by reason of its height and scale within a low rise environment, would by reason of the associated dishes and infrastructure and by reason of its location in proximity to residential properties, would be visually intrusive, would injure the amenities of the area and would diminish property values. He further concluded that the development would materially contravene policy objectives of the statutory plan, would set an unwelcome precedent and would accordingly be contrary to the proper planning and sustainable development of the area.

10. The Board received the Inspector's report on the 24th April, 2007 and on the 26th April, 2007 the Board granted permission subject to a number of conditions. In doing so it was of course declining to follow the recommendations of the Inspector. It is this decision which the applicant now seeks to challenge.

11. A very large number of grounds of challenge were put forward in the statement of grounds. However, there is a considerable overlap between them and some of the grounds are repetitive. It is possible to cluster the grounds so as to reflect the basic contentions of the applicant. In summary the challenge centres on

> (i) alleged irregularities in relation to the site notice;
>
> (ii) an alleged failure on the part of the Board to give any, or any adequate, reasons for its decision.
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> (iii) It is said that the Board's decision was unreasonable and or irrational and

(iv) it is alleged that the Board failed to give notice to the applicant of certain matters including the contents of the Inspector's report thereby denying the applicant of the opportunity of making relevant submissions.

12. I propose to address each of these issues in turn.

**The site notice**
13. The evidence before the court indicated that on the 3rd June, 2005, a required site notice was erected by a planning consultant employed by the ESB who later on the same day lodged the original planning application with Ennis Town Council. It appears that it is the settled policy of the ESB when submitting a planning application that the site notice is erected on the same day as the planning application is submitted but before the actual submission.

14. It appears from the affidavit of the applicant that the applicant was initially of the view that the site notice had to be erected two weeks prior to the submission of the planning application and be in situ throughout that two week period. The applicant, however, was mistaken in that regard as what is required under Article 17(1) of the Planning and Development Regulations 2001, is that an applicant shall within the period of two weeks before the making of a planning application give notice of the intention to make the application by the erection or fixing of a site notice in accordance with Article 19.

15. Faced with this difficulty, the applicant has refined his arguments and contends that the erection of the notice, on the same day as the planning application was submitted, does not comply with the regulations. The argument made is that the day on which the application is submitted cannot be regarded as being within the two week period. It is said that this is so by an analogy with the Statute of Limitations. However, it seems to me that the Statute of Limitations jurisprudence does not assist the applicant. *In McGuinness v. Armstrong Patents Limited* [1980] I.R. 289, McMahon J. held that the day on which the cause of action accrues is included. It seems to me that where somebody erects a sign early in the day when they are subsequently going to lodge an application for planning permission that they have erected the sign within two weeks prior to the submission of the application.

16. Further, the applicant relies on the fact that the site notice was not in place for sometime running up to the 8th July, 2005, the last day of the statutory period of five weeks. By letter dated 4th July, 2005 the applicant informed Ennis Town Council that the ESB were not displaying the application at the site.

17. I am satisfied that the erection of the site notice on the 3rd June, 2005 complied with the requirements of the Planning and Development Regulations 2001. Furthermore, the ESB did not receive any information or notification that the site notice had been removed. I accept that the ESB would have arranged to have it renewed, or replaced as required, had information come to hand, that the site notice had been removed or been defaced or rendered illegible. On the basis, however, of the suggestion, and I do not think it is much more, that the notice was not in situ in the period running up to the 8th July, 2005 it is said that there has been a failure to comply with Article 20 of Planning and Development Regulations 2001. Article 20 requires that the site notice should be maintained in position for a period of five weeks from the date of receipt of the planning application and that it should be renewed if it is removed or become defaced or illegible within that period. The applicant relies on the decision of Peart J. in *Marshall v. Arklow Town Council* [2004] 4 I.R. 92. It seems to me, however, that there are a number of factors which distinguish that case from the present. First of all, what was in issue there was a decision of the planning authority to grant permission whereas here matters had moved on from the planning authority to An Bord Pleanála. Secondly, that was a case where the failure by the planning authority to inspect the site to see whether there was compliance with the requirements in regard to notice gave rise to significant prejudice in that a number of potential objectors lost out on their opportunity to object.

18. For the sake of completeness I should say that, in my view, the fact that the applicant did not raise an issue in relation to this site notice in his submission to the Board means that, in any event, he is not now entitled to raise this matter. In Har*rington v. An Bord Pleanála (No. 1)* [2006] 1 I.R. 388, Macken J. held that an applicant seeking to pursue judicial review proceedings is normally required to have personally raised an objection to the decision maker before proceeding to put forward a subsequent legal objection. However, while I do note that the issue was raised by another objector, in my view, this does not avail the applicant. Further, the applicant has not been prejudiced in any way even if it is accepted that the site notice was not present for some time. The fact of the matter is that the applicant for judicial review was fully aware of the permission being sought, made two submissions to the planning authority and then made observations to An Bord Pleanála. The inability of the applicant to establish prejudice precludes a successful reliance on the site notice. In *Dunne v. An Bord Pleanála* [2006] I.E.H.C. 400, McGovern J. deals with two issues raised with regard to the site notice. Then, it was alleged that the site notice was not erected in good time and also alleged that the site notice should have been on a yellow background. McGovern J. found it impossible to resolve a dispute as to when the notice went up. He said that he was in any event satisfied that there was no prejudice to the applicants because they knew in sufficient time of the developments and they were able to make objections before the planning authority and subsequently appeal the matter to An Bord Pleanála. The remedy of certiorari is a discretionary remedy, he accordingly exercised his discretion against making any order on that issue. A similar conclusion was reached, by Kelly J, in *Blessington District and Community Council Ltd v. Wicklow County Council* [1997] 1 I.R. 273 where the issue related to the terms of a newspaper notice. Kelly J. found that even if it was assumed that the premises in question were a habitable house, the issue in the case, it was difficult to see how anyone could have been misled by such an omission. In the absence of evidence that persons had been mislead, the point could not constitute substantial grounds warranting judicial review.

19. In summary, it is my view that the procedures followed in this case did in fact comply with the statutory instrument, even if the situation were otherwise. I am quite satisfied that there has been no prejudice whatever experienced by the applicant and I accordingly refuse leave to seek judicial review on this ground.

**Failure to give reasons**
20. The applicant complains that in breach of natural and constitutional justice, the Board failed to give any, or any adequate, reasons for its decision to grant planning permission to the ESB.

21. It is appropriate to set out the reasons actually given in some detail. The reasons and considerations were stated as follows:

"Having regard to

(a) The National Strategy regarding the improvement of mobile communications services.

(b) The Guidelines relating to telecommunications antennae and support structures which were issued by the Department of the Environment and Local Government to Planning Authorities in July, 1996.

(c) The commercial zoning of the site.

(d) Its existing use as a utility site and

(e) The location of the cathedral spire to the north east of the site.

It is considered that, subject to compliance with the conditions set out below, the proposed development would not seriously injure the amenities of the area or of property in the vicinity, would not be prejudicial to public health, and would, therefore, be in accordance with the proper planning and sustainable development of the area. The Board noted that the planning authority had decided to refuse permission because it was considered that the proposed development would constitute a material contravention of the development plan. Having regard, however, to the guidelines relating to telecommunications antennae and support structures, which were issued by the Department of the Environment and Local Government to planning authorities in July of 1996, the Board considered that by virtue of s. 37(2)(b)(iii) of the Planning and Development Act 2000, it was not constrained in granting permission for the proposed development."

22. The Board, in deciding not to accept the Inspector's recommendation to refuse permission, had regard to national policy, the commercial zoning of the site, and the fact that the site consisted of an existing electricity supply Board sub-station.

Conditions

1. This permission is for a period of 5 years from the date of this order. The telecommunications structure and related ancillary structures shall then be removed unless, prior to the end of the period, planning permission shall have been granted for their retention for a further period.

Reason: to enable the impact of the development to be reassessed, having regard to changes in technology and design during the period of five years.

2. The site shall be reinstated on removal of the communications structure and ancillary structures. Details relating to the removal and reinstatement shall be submitted to, and agreed with, the planning authority as soon as practicable.

Reason: In the interest of orderly development.

3. Part commencement of development, the developer shall lodge with the planning authority a cash deposit, a bond of an insurance company, or other security to secure the satisfactory reinstatement of the site, coupled with an agreement empowering the planning authority to apply such security, or part thereof, to the satisfactory completion of the reinstatement, including all necessary demolition and removal. The form and amount of the security shall be agreed between the planning authority and developer or, in default of agreement, should be referred to the Board for determination.

Reason: To ensure the satisfactory reinstatement of the site.

4. The site shall be landscaped in accordance with a scheme of landscaping, details of which should be submitted to the planning authority for agreement before development commences. The Scheme shall include a time scale for its implementation.

Reason: In the interest of visual amenity.

5. Surface water drainage arrangements for the proposed development shall comply with the requirements of the planning authority.

Reason: In the interest of orderly development.

6. Details of the proposed colour scheme for the telecommunications structure, ancillary structures and palisade fencing should be submitted to, and agreed in writing with, the planning authority prior to the commencement of development.

Reason: In the interest of the visual amenity of the area.

7. The transmitter power output, antennae type and mounting configuration shall be in accordance with the details submitted with this application, and shall not be altered without a prior grant of planning permission.

Reason: To clarify the nature of the development to which this permission relates and to facilitate a full assessment of any future alterations to the network.

8. No material change of use of the mast shall be made without a prior grant of planning permission.

Reason: To safeguard the amenities of the area.

9. The developer shall pay to the planning authority a financial contribution in respect of public infrastructures and facilities benefiting development in the area of the planning authority that is provided, or intended to be provided, by, or on behalf, of the authority in accordance with the terms of the development contribution scheme made under section 48 of the Planning and Development Act 2000. The contribution shall be paid prior to the commencement of development, or in such phased payments as the planning authority may facilitate, and shall be subject to any applicable indexation provisions of the Scheme at the time of payment. Details of the application of the terms of the Scheme shall be agreed between the planning authority and the developer or, in default of such agreement, the matter shall be referred to the Board to determine the proper application of the terms of the Scheme.

Reason: It is a requirement of the Planning and Development Act 2000, that a condition requiring a contribution in accordance with the development contribution Scheme, made under s. 48 of the Act, be applied to the permission.

23. The requirements in relation to the giving of reasons received detailed considerations from Kelly J. in *Mulholland v. An Bord Pleanála (No.2)* [2006] 1 I.R. 453. The case is of particular interest in that, as here, this was a case where the Board did not follow the recommendations of its Inspector recommending rejection of a planning permission but rather granted the permission. Kelly J. pointed out that the Planning and Development Act 2000, brought about an expansion of the obligations imposed on the Board and indeed on planning authorities. Under s. 34(10)(a), there is now an obligation to state the main reasons and considerations on which a decision was based. There is also a requirement now under s. 34(10)(b) to indicate the main reasons for not accepting the recommendation of the Board's Inspector.

24. It is important to bear in mind why the giving of reasons is regarded as fundamental. In *O'Donoghue v. An Bord Pleanála* [1991] I.L.R.M. 750, Murphy J. said that:

> "It is clear that the reasons furnished by the Board (or by any other Tribunal) must be sufficient first to enable the courts to review it and secondly to satisfy the persons having recourse to the Tribunal that it directed its mind adequately to the issues before it. It has never been suggested that an administrative body is bound to provide a discursive judgment as a result of its deliberations."

25. In *State (Sweeney) v. Minister of the Environment* [1979] I.L.R.M. 35, Finlay P. stated that the purpose for the requirements for reasons was:

> "To give to the applicant such information as may be necessary and appropriate for him, firstly, to consider whether he has got a reasonable chance of succeeding in appealing against the decision of the planning authority and, secondly, to enable him to arm himself for the hearing of such an appeal."

26. In dealing with the new obligation to state the consideration on which a decision is based, Kelly J. was of the view that in order for the statement of considerations to be acceptable under law it must satisfy a similar test to that applicable to the giving of reasons. The statement of considerations must, therefore, be sufficient to; give to an applicant such information as may be necessary and appropriate for him to consider whether he has a reasonable chance of succeeding in appealing, or judicially reviewing, the decision, or arm himself for such hearing or review, know if the decision maker has directed its mind adequately to the issues which it has considered or is obliged to consider and enable the court to review the decision. Thus, he concluded the criteria which must be met for the statement of considerations are precisely the same as those which apply in respect of the statement of the main reason. In *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 at 76 Finlay C.J. said:

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

27. Here, if one has regard to the decision and the conditions and reasons, it is clear, therefore, that the Board has applied its mind to the issues before it. Indeed, the reasoning of the Board clearly emerges from the decision with the attached conditions. Mr. Mulhaire may, understandably, be very aggrieved at the outcome, particularly, as his arguments had carried the day before the planning authority, and with the Inspector, but he cannot be left in any doubt as to why the decision went against him. In my view, it is noteworthy that the reasons and considerations are set out here much more fully than was the case in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39, a case with some striking similarities as it, too, involved an application for permission to erect a radio mast where An Bord Pleanála departed from its Inspector's report it decided to grant permission. As was the case in *O'Keeffe v. An Bord Pleanála*, I am satisfied that the entirety of the documents clearly, and sufficiently, identify the reasons by which the Board reached its decision to grant this particular planning permission subject to these particular conditions. The applicant has placed particular emphasis on the fact that this was a case where An Bord Pleanála had decided not to follow the Inspector's recommendation to refuse planning permission. However, as is clear from *Mulholland v. An Bord Pleanála*, even here there is no obligation to provide a discursive judgment. In the present case, An Bord Pleanála expressly stated that in deciding not to follow the Inspector's recommendation it had regard to national policy, the commercial zoning of the site, and the fact that the site consisted of an existing ESB sub-station. Again, while Mr. Mulhaire may not like the conclusions reached by An Bord Pleanála, he cannot be left in any doubt as to how and why they came to their decision to depart from the Inspector's recommendation.

28. This was a case where Ennis Town Council had refused the application in part on the grounds that it materially contravened Policy ENV 5 of the Ennis and Environs Development Plan 2003. As far as material, s. 37 of the Planning and Development Act 2000, provides as follows:

> (2) (a) 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.
>
> (b) Where a planning authority has decided to refuse permission on the grounds that a proposed development materially contravenes the development plan, the Board may only grant permission in accordance with paragraph (a) where it considers that
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> (i) the proposed development is of strategic or national importance,
>
> (ii) there are conflicting objectives in the development plan or the objectives are not clearly stated, insofar as the proposed development is concerned, or
>
> (iii) permission for the proposed development should be granted having regard to regional planning guidelines for the area, guidelines under section 28, policy directives under section 29, the statutory obligations of any local authority in the area, and any relevant policy of the Government, the Minister or any Minister of the Government, or
>
> (iv) permission for the proposed development should be granted having regard to the pattern of development, and permission granted, in the area since the making of the development plan.
>
> (c) Where the Board grants a permission in accordance with paragraph (b), the Board shall, in addition to the requirements of section 34 (10), indicate in its decision the main reasons and considerations for contravening materially the development plan.

29. In the decision the Board states specifically that, having regard to the guidelines relating to telecommunications antennae and support structures which were issued by the Department of the Environment and Local Government to planning authorities, in July, 1996 and by virtue of s. 37(2)(b)(iii) of the Planning and Development Act 2000, it was not constrained in granting permission for the proposed development.

30. During the course of the hearing a disagreement emerged between counsel for the applicant and counsel for the respondents on how s. 37(2)(b) was to be interpreted. On behalf of the applicant, it was argued that the Board may only grant planning permission which contravenes a development plan when it considers that the proposed development is of strategic or national importance and that, in addition, there is present one of the factors listed at (ii), (iii), and (iv). On behalf of the respondents, it is argued that if any one of the conditions, set out at (i), (ii), (iii) and (iv), is satisfied that the Board is free to grant permission. In my view, the submissions made on behalf of the respondents are correct. There is no logical connection between a development being of strategic, or national, importance and the fact that there are conflicting objectives in a development plan or that the objectives are not clearly stated. Likewise, there is no logical connection between a development of strategic, or national, importance and the pattern of development in the area since the making of the development plan. I am, therefore, of the view if only one of the conditions specified at (i) – (iv) is present that the Board is free to grant permission, if it wishes to do so. However, even if I am wrong about that it would seem to me that in this case the Board were, in any event, having regard to the national importance of the communications sector a decision, which was not unreasonable or irrational.

**Unreasonable or Irrational**

31. It is alleged that the Board failed to have regard to

(i) the prejudice,

(ii) the availability of alternative sites,

(iii) the international radiation protection association guidelines and

(iv) its own precedents.

32. On behalf of the applicant, it has been argued that the well known test, as stated in *O'Keeffe v. An Bord Pleanála*, does not apply to the present application because Mr. Mulhaire's constitutional rights are an issue and that, accordingly, requires a different and more extracting standard to be applied. In that regard, reliance is placed on the judgment of Clarke J. in *Gashi v. Minister for Justice*, (Unreported, High Court, 3rd December, 2004).

33. These cases are not at all comparable. *Gashi* was decided in an asylum context where applicants would frequently contend that if returned to their home country they would face execution or torture. If the anxious scrutiny test has a place in Irish law, and that remains to be determined, it is in the context of a very limited type of case and such cases do not have any relevance to the planning area. I think it is significant that the *O'Keeffe* test was actually formulated in the context of a planning case and, indeed, a planning case which raised issues very similar to those that arise in the context of this case.

34. While couched in the language of judicial review, the applicant is effectively inviting the court to substitute its own views for the views of An Bord Pleanála. Substituting the views of the court for the views of the decision maker is not, however, the purpose of judicial review.

35. The applicant is concerned about the manner in which public health issues were dealt with. Issues in relation to public health were to the fore of the decisions made by the planning authority and An Bord Pleanála. An Bord Pleanála concluded that the proposal would not be prejudicial to public health. There was material before it on which it could so conclude. As Lord Brightman stated *in R. v. Chief Constable of North Wales Police, ex parte Evans* [1982] 1 W.L.R. 1155 at 1173 (as quoted by Kelly J. in *Flood v. Garda Síochána Complaints Board* [1997] 3 I.R. 321 at 345): "Judicial review is concerned, not with the decision, but with the decision-making process."

36. The applicant has criticised the Board for its regard to the national strategy regarding the improvement of mobile communication services. However, s. 143(1) of the Planning and Development Act 2000, specifically requires the Board, in performing its functions, to have regard to the policies and objectives of the Government, State Authority, Minister, Planning Authorities and other bodies.

37. The applicant has also challenged the view of the Board that there will be no serious injury to the amenities of the area. In seeking to challenge this view, particular emphasis is being laid by the applicant on issues relating to visual amenity.

38. It seems to me, however, that the judgments that must be made in that regard are pre-eminently a matter for An Bord Pleanála. In *Evans v. An Bord Pleanála*, (7th November 2003) Kearns J. in the context of views at Vico Road, Dalkey observed:

> "The extent to which the amenity of a view may be said to be impaired seems to me, in this case at least, to be highly subjective. That being so, there was considerable scope for the respondent to reach a different conclusion than did the Inspector on looking at the same material. In an application of this nature, the Court is not concerned, nor is it permitted to substitute itself for An Bord Pleanála, and to ask if it would have reached the same decision on the identical material. The Court is only concerned with the decision making process itself. That being so, the Court may only ask: was there material upon which the decision maker could make the decision which it did make? If so was the decision taken one which flew or which flies in the face of fundamental reason?"

39. In this case, as in *Evans*, I am of the view that the answer to the first question as posed by Kearns J., whether there was material upon which the decision maker could make the decision, is yes; there was material and the answer to the second question, was the decision one that flies in the face of fundamental reason, must be no.

40. The applicant has advanced a number of arguments relating to the manner in which the Board treated the 1996 guidelines. In particular, he complains that the Board failed to comply with the guidelines: (a) failing to consider whether the site chosen was the site of last resort, (b) permitting a mast in a site that was zoned commercial rather than industrial. It is not in dispute that the guidelines in question fall within the provisions of s. 28 of the Planning and Development Act 2000, and that, accordingly, the Board must have regard to the guidelines in the performance of its functions. As it happens, all sides in the present case have referred to the guidelines and found therein materials which they say support their basic contention. It is important to consider the extent of the obligation imposed on the Board. The obligation upon the Board is to have regard to the guidelines and this is not, at all, the same as a requirement to follow, or to implement. The Board has stated that it had regard to the guidelines and it would require clear evidence

to displace this assertion. In *G.K. v. Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 418 Hardiman J. stated that:-

> "A person claiming that a decision making authority had, contrary to its express statement, ignored representations which it has received must produce some evidence, either direct or inferential, of that proposition before he can be said to have an arguable case."

41. In my view, the observations of Hardiman J., in regard to representations, apply with equal force to the guidelines. The evidence to support the proposition that the Board did not have regard to the guidelines is wholly lacking. I am reinforced in this view by the fact that the guidelines were in fact central to the appeal process, having being considered by the Planning Authority, referred to by the parties to the appeal and considered by the Inspector. This drives me to the conclusion that the guidelines must have been considered and that the objection is really to the view found arising from that consideration.

42. The applicant relies heavily on the following paragraph in the guidelines "only as a last resort and if the alternative suggested in the previous paragraph are either unavailable or unsuitable should free standing masts be located in a residential area or beside schools. Should such location become necessary, sites already developed for utilities should be considered and mast antennae should be designed and adopted for this specific purpose. The support structure should be kept to the minimum height consistent with effective operation and should be a monopole rather than a latticed tripod or a square structure." The applicant contends that permission should be granted only if the proposed site was a site of last resort. To this, the respondents replied by saying -

> "Read the previous paragraph". It reads "in the vicinity of larger towns and in city suburbs operators should endeavour to locate in industrial estates or in industrially zoned land. The possibility offered by some commercial or retail areas should be explored whether as roof top locations or by way of locating "disguised" masts. It should also be noted that sub-stations operated by the ESB may be suitable for the location of antennae support structures. This possibility should also be investigated."

43. The respondents point to the reference in the guidelines to the use of ESB sub-stations and say that the present applications are, therefore, supported by the guidelines. As I have already indicated the extent of the obligation on the Board is to have regard to the guidelines and there is nothing to suggest that has not happened.

44. The applicant further complains that the Board has not followed its own precedents or, indeed, referred to the relevant precedents. Clearly, consistency is a desirable objective but almost all planning decisions involve the task of balancing competing factors in a specific context. This may well mean that when these factors are applied to a specific context more than one conclusion may be open, so that neither of the conclusions can be said to be irrational or unreasonable. Indeed, that is very much the view that I have formed in this case. It would have been open to the Board to refuse permission and had there been a refusal it would have been difficult for the ESB to categorise the decision as irrational and unreasonable. At the risk, however, of stating the obvious, it does not at all follow that because a refusal of planning permission would not have been unreasonable or irrational, that it follows that a decision to grant will be unreasonable or irrational.

45. It has been argued that uncertainty surrounds the scale of the development as a doubt surrounds the number of antennae which will be erected. I cannot agree. The Board, in deciding to grant permission, was authorising the ESB to proceed with a development defined and limited by the capacity of the mast. The fact that the permission is time limited is an indication that the Board was keenly aware of developing technology and seeking an opportunity to reassess the situation after a period.

**Failure on the part of the Board to give notice.**

46. The applicant criticises the Board for not providing him with a copy of the Inspector's report which it considered in reaching its decision and says that this denied the applicant the opportunity of considering it and making relevant submissions. It is contended that in failing to provide the Inspector's report the Board failed to comply with s. 137 of the Planning and Development Act 2000, which states that it must give notice to the parties, and any person, who has made submissions where it purports to take matters into account other than those raised by the parties, or persons, making submissions. The applicant placed reliance on *McGoldrick and An Bord Pleanála* [1997] 1 I.R. 497, *Stack v. An Bord Pleanála* (Unreported, High Court, O'Neill J., July 11th, 2000).

47. In *McGoldrick*, the issue turned on whether a particular annex had been constructed to its present dimensions prior to refurbishment works being carried out. The applicant furnished an amount of evidence in that regard and stated a willingness to furnish additional evidence if required. The applicant was not told about, nor invited to comment on, an objection that had been made by a local residents group to the effect that the annex had been newly built by him from smaller and unconnected outhouses.

48. In *Stack v. An Bord Pleanála*, O'Neill J. granted leave in a situation where when considering an application the Board had regard to a decision reached in respect of a neighbouring site and a conclusion that there was little difference between the two applications. In addition, that applicant was not informed of the fact that regard was being had to the earlier decision and that a view was being formed that there was little difference between them.

49. In this case the situation is entirely different. This was not a question of the Board having regard to some extraneous document, rather the complaint centres on a report created by the Board's own Inspector. The arguments on behalf of the applicant ignored the fact that the Inspector's report was entirely favourable to the applicant and that there could be no question of the applicant needing an opportunity to deal with the report. In fact, the sequence of events in respect of the appeal as set out in the affidavit establishes that third parties including the applicant had the last word on the appeal.

**The Board reached its conclusion with undue expedition**

50. One additional argument shall be referred to.

51. The applicant points to the fact that the Inspector's report was received only on 24th April and that, accordingly, the Board had, effectively, only 24 hours to consider the report. It was contended that there could have been no proper or substantive analysis, or investigation, arising from the report which was conducted within the 24 hours. In my view, there is no substance in this complaint. The Board has stated that it considered the Inspector's report and, indeed, has stated with some particularity why it differed from the approach recommended by the Inspector. To suggest that inadequate time was taken over the decision is comparable to suggesting that in a criminal case a conviction could be set-aside because the jury did not stay out long enough. It may be added that this complaint about undue expedition does not sit easily with the fact that the applicant had earlier sought to make a point in relation to s. 126 of the Planning and Development Act 2000, when contending that there had been undue delay in determining the appeal.

**Conclusion**

52. I am not of the view that any of the arguments advanced individually, or collectively, amount to substantial grounds and, accordingly, I propose to refuse the application for leave to seek judicial review.