Neutral Citation Number: [2011] IEHC 400

THE HIGH COURT

JUDICIAL REVIEW

2011 248 JR

IN THE MATTER OF THE PLANNING AND DEVELOPMENT ACTS

2000 – 2010 AND IN THE MATTER OF SECTIONS 50 AND 50A OF THE PLANNING AND DEVELOPMENT ACT 2000, AS AMENDED,

AND IN THE MATTER OF AN APPLICATION

BETWEEN

URRINBRIDGE LIMITED

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

WEXFORD COUNTY COUNCIL AND AOIBHINN O'CONNOR

NOTICE PARTIES

JUDGMENT of Mr. Justice John MacMenamin delivered on the 28th day of October, 2011

1. The applicant ("Urrinbridge") seeks judicial review of a decision made by the respondent ("the Board") under An Bord Pleanála Ref. No. PL26.237722 ("the appeal"). That decision, now impugned, was to refuse permission for a proposed development at Bloody Bridge, Lyre, Enniscorthy, Co. Wexford. The essential points which arise for consideration in this judgment relate to the interpretation of ss. 37 and 140 of the Planning and Development Act 2000 ("PDA 2000"). The substantive issues may be briefly summarised. They are as follows:-

> (i) In general, does a letter seeking to withdraw an appeal received by the Board after its deliberation, but before it had issued its decision, have the effect of depriving the Board of jurisdiction to issue its determination in all cases?;
>
> (ii) Specifically, whether, on the facts of this case a letter, from the only objector withdrawing an appeal received by the Board on 28th January, 2011, after a meeting on 25th January, 2011, had the effect of depriving the Board of jurisdiction to determine the appeal when there was no other party to the appeal?;
>
> (iii) On what date may it be said that the Board "determined" this appeal within the meaning of s. 37(1)(b) of the PDA 2000 and s. 140(1)(a) of the PDA 2000?;
>
> (iv) Whether the Board, having considered the matter at a meeting on 25th January, 2011, was entitled to proceed to issue an order whereby it upheld the appeal, thereby refusing the planning permission which had been granted by the first named notice party?

As will be seen, this case arises from a set of rather unusual facts where the chronology is of some importance. A brief preliminary description of the circumstances will illustrate how the issues arise.

2. Urrinbridge received permission for a development, described in detail later, from the first named notice party ("the County Council"). It had no difficulty with the permission granted, and was not the appellant before the Board. The second named notice party, Ms. O'Connor, objected to the planning permission which Urrinbridge had obtained from the County Council. She appealed to the Board. Prior to the Board deliberating on the matter, Urrinbridge settled its differences with Ms. O'Connor. This agreement was arrived at on or before 21st January, 2011. Despite what one might think as the degree of urgency which might attach to an appeal which had been pending before the Board for some months, Ms. O'Connor's letter was not delivered to the Board until 28th January, 2011 – seven days after it was written; and after the Board members had met on the matter and decided to refuse permission. The matter had by then been with the Board for more than three months. The sequence of events is odd, but I am entirely satisfied that nothing untoward occurred, and that what happened was mere chance. There has been no suggestion by the Board that there was any mala fides conduct, or any breach of the law. No notice to cross-examine was served. An affidavit has been filed which fully explains the sequence of events.

Chronology of Events

3. On 26th March, 2010, Urrinbridge applied to the County Council for permission to develop the site in question. The County Council issued a notice of a decision to grant planning permission subject to a range of conditions. On 7th October, 2010, Ms. O'Connor, as objector, appealed the County Council's decision to grant permission to the Board. This appeal was considered by a Board inspector, Ms. Brid Maxwell, on 14th January, 2011, who prepared a report for consideration by the Board members assigned.

The Nature of the Proposal

4. It might well be thought the project is the product of another, past, era. The intended site is 2.5 km north-west of Enniscorthy town centre. It has limited road frontage. The inspector described the area as being "urban/rural fringe" in character. There is significant ribbon development in the vicinity. There are a number of inactive, unfinished, housing estates nearby. The site lies to the west of the Slaney River Valley, a Special Area of Conservation, and the Wexford Harbour and Slobs Special Protection Area lies a little more 2.6 km south-east of the site.

5. The development is intended to be a mixed use residential one, comprising 60 serviced sites for two-storey dwellings to be developed in three phases: 39 two-storey dwelling houses; a building, 'A', consisting of four single retail units, storage areas and toilets; a double-storey building, 'B', for leisure/mixed use, including three retail units, children's indoor facilities; and a gymnasium. Urrinbridge sought permission to install a bowling alley at ground level in building B. This was the reason for Ms. O'Connor's objection as she herself operates another such facility in the county. The development is to also consist of a building, 'C', comprising a two and three-storey building with a pharmacy and crèche at ground level, and medical centres and associated offices on the first and second floors. Finally, it is intended that there be a temporary waste water treatment plant and a water main intended to discharge into the Urrin River on foot of a discharge licence previously approved, together with service water attenuation, landscaping, parking access and associated light works.

6. The wastewater treatment plant just referred to, is to operate pending upgrade of the Enniscorthy Waste Water Treatment Plant. This sewerage system is to travel for a distance in excess of 2.2 km to the point of discharge into the Urrin River, which, in turn, is a tributary of the River Slaney. That river is a Special Area of Conservation and also part of the Wexford Harbour and Slobs Special Protection Area.

The Inspector's Concerns

7. The inspector's concerns, expressed in her report, focused largely, but not entirely, on the environmental impact of the project. She considered the development would have a detrimental effect on the vitality and viability of Enniscorthy town centre itself. More directly, she was not satisfied that the integrity of the Slaney River Valley Special Area of Conservation and Wexford Harbour and Slobs Special Protection Area would be protected. Having considered the matter, the inspector drafted proposed reasons and considerations to be placed before the Board for its consideration.

8. Her reasoning was that the proposed development, which included a significant degree of retail and commercial building, would materially contravene the zoning objectives of the County Development Plan, and would be contrary to proper planning and sustainable development of the area. She considered that the plan conflicted with the objectives of the Enniscorthy and Environs Development Plan 2008 – 2014, and that the proposal would conflict with the advice contained in the 'Retail Planning Guidelines for Planning Authorities', which sought to direct new retail development to town centres or to the edge of such town centres. She was also of the view that the proposed development would conflict with retail planning policy.

9. But clearly, environmental concerns were to the forefront of her thinking. She proposed that the third reason to be given for refusal of permission should be that:-

> "(3) Having regard to:-
>
> (a) The proposed discharge of treated effluent to the Urrin River a tributary of the Slaney River Valley Special Area of Conservation, SAC – 000781; and upstream of the Wexford Harbour and Slobs SPA – 004076.
>
> (b) Article 5 of the European Communities Environmental Objectives (Service Waters) Regulations 2009, which requires that a public authority in performance of its functions shall not undertake those functions in a manner that knowingly causes or allows deterioration in the chemical or ecological status of a body of surface water.
>
> (c) Based on the level of details submitted with the application, the Board was not satisfied that the proposed development would not interfere with or have significant adverse effect on the environment of the candid special area of conservation and special protection area or would not seriously injure the amenities of the area."

10. On 19th January, 2011, a Board official prepared a draft order for the consideration of the Board, based on the inspector's report. The case was allocated to Ms. Angela Tunney, a board member, on 20th January, 2011, which meant she effectively had "carriage" of the case and presented matters to the board meeting, which took place on 25th January, 2011. The three members who considered the file were Mr. John O'Connor, the Chairman, Ms. Tunney and Mr. Connall Boland.

11. Having considered the matter, the Board decided to uphold the appeal, generally on the grounds identified by the inspector. However, it made a number of very minor handwritten amendments to the draft recommendation prepared by the inspector. These amendments were inconsequential, consisting of the insertion of the correct title of the *'Retail Planning Guidelines for Planning Authorities'* and the substitution of the words "Special Protection Area" for the abbreviation "SPA". The order was subsequently amended by the addition of three commas. At the meeting, the Board authorised Ms. Tunney to sign any order, and/or to issue such directions as might arise. It will be recollected that Ms. O'Connor's appeal was filed on 7th October, 2010. At lunchtime on 28th January, 2011, Ms. O'Connor's letter withdrawing her appeal was hand-delivered by Urrinbridge's planning consultant. However, the Board proceeded with the process, by then well in train. Ms. Morel of the administrative staff was requested to draw up the final order in accordance with the Board's decision. She prepared a draft board order of 31st January, 2011. Ms. Tunney signed both a direction and a board order on 31st January, 2011. The order was formally issued on 1st February, 2011. This would be the first occasion on which a party would become aware of the Board's decision. On 3rd February, 2011, a board official recorded details of Ms. Tunney's signature, and appended and affixed the Board's seal to the issued order. In a letter written on 7th February, 2011, Mr. Kealan McCluskey, Planning Consultant of Black Consulting, who advised Urrinbridge, confirmed the sequence of events regarding delivery of the withdrawal letter. He indicated that he had hand-delivered Ms. O'Connor's letter to the Board at lunchtime on 28th January, 2011. He pointed out that the board order was stamped 1st February, 2011, four days after the withdrawal of the objection. He requested that the Board exercise its powers under the Act of 2000, and refer the matter to the High Court for guidance on the legal point as to whether the Board had acted *ultra vires*: the Board declined to do so, however.

The Relevant Provisions of the Planning and Development Act 2000

12. Section 37(1)(a) and (b) of the PDA 2000 deals with the issue of appeals to the Board. Insofar as is relevant, it provides:-

> "(a) An applicant for permission and any person who made submissions or observations in writing in relation to the planning application to the planning authority in accordance with the permission regulations and on payment of the

appropriate fee, may, at any time before the expiration of the appropriate period, appeal to the Board against a decision of a planning authority under *section 34*.

(b) Subject *to paragraphs (c)* and *(d),* where an appeal is brought against a decision of a planning authority and is not withdrawn, the Board shall determine the application as if it had been made to the Board in the first instance and the decision of the Board shall operate to annul the decision of the planning authority as from the time when it was given; and *subsections (1), (2), (3) and (4) of section 34* shall apply, subject to any necessary modifications, in relation to the determination of an application by the Board on appeal under this subsection as they apply in relation to the determination under that section of an application by a planning authority . . . "

13. Section 140(1) of the Act addresses the procedure which arises in the withdrawal of an appeal. It provides:-

"(1)(a) A person who has made –

(i) an appeal,

(ii) a planning application to which an appeal relates,

(iii) a referral,

(iv) an application for permission or approval (as may be appropriate) in respect of a strategic infrastructure development, may withdraw in writing the appeal, application or referral *at anytime before that appeal, application, or referral is determined by the Board*.

(b) As soon as may be after receipt of a withdrawal, the Board shall notify each other party or person who has made submissions or observations on the appeal, application or referral of the withdrawal." (*Emphasis added*).

14. It is fair to say that the entire focus of this judicial review hinges on the question of statutory interpretation. In one sense, the questions which arise are, whether it can be said the Board had already made its "determination", as a consequence of which Ms. O'Connor's withdrawal notification had no effect, or whether, on the contrary, that the very act of notification of withdrawal, in this case, prior to the Board notifying the parties of its decision, had the effect of depriving the Board of jurisdiction, and made its subsequent procedures *ultra vires*. In fact, as will be seen, I consider the key point in construing the statute in this case is actually the date the decision was notified to the parties concerned, or in the words of s. 50(7) of the PDA 2000, as substituted by s. 13 of the Planning and Development (Strategic Infrastructure) Act 2006, the date when "notice of the decision or act was first sent".

15. A central element to this case is the application of the accepted canons of statutory construction, now partly embodied in the Interpretation Act 2005. It is appropriate to make one or two preliminary observations on these principles. The criteria in question are aids to discerning the meaning of a statute. They have been described as interpretative tools. But, they are tools designed for measurement; they are not to be deployed for radical recasting, remoulding, expanding or contracting the terms to be interpreted into the form of some "desired" meaning (see Ch. 2.43, Dodd, '*Statutory Interpretation in Ireland*', Tottel 2008). They are not to be used as a shoehorn. It is important to ensure that correct weight is given to each principle. It is necessary that words and comparisons not be taken out of context. Specifically, here, I would point out that an over-narrow focus on some principles, to the detriment of others, can lead to a distorted perspective, and thus, faulty interpretation. The weight to be given to any one interpretive criterion may depend on its usefulness in addressing the interpretative question that arises, and in identifying the intention of the legislature. One does not use a microscope for astronomy; or a telescope for minute analysis. In this decision, greater weight is placed on one particular principle, which is that the words to be interpreted are used where a number of constitutional rights are engaged (see generally Dodd, Op. Cit.)

16. Section 5 of the Interpretation Act 2005 provides:-

"(1) In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction) –

(a) that is obscure or ambiguous, or

(b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of –

(i) in the case of an Act to which *paragraph (a)* of the definition of 'Act' in *section 2(1)* relates, the Oireachtas, or

(ii) in the case of an Act to which *paragraph (b)* of that definition relates, the parliament concerned,

the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole."

17. As will presently be seen, the starting point in this task of interpretation is one of identification. The question to ask is whether the meaning of the word "determine" or "determination" is itself either "obscure or ambiguous" (s. 5(1)(a) Interpretation Act 2005). The meaning of the word is not "obscure". However, as has been pointed out in argument, the term is undoubtedly semantically "ambiguous". The Oxford English Dictionary lists many separate meanings of the term, grouped into a number of categories, which may connote generally, "to put an end or limit to"; "to bring an end to a dispute, controversy or doubtful matter"; "to conclude, settle, decide, fix"; or "to direct to some end or conclusion or to come to some conclusion." At its simplest, I think the question here is whether the matter was "determined" when a Board decision was made as to what the outcome of the appeal should be, or when the parties were told of this decision.

18. The Board's case, elegantly presented, is that the term "determination" used in s. 140(1) of the PDA 2000, should be applied to what occurred when the members made their decision to refuse permission on 25th January, 2011. It is said that this brought an end to the issue; that the matter which had been placed in controversy had been "determined"; and that any steps which were taken thereafter were purely matters of "detail". In essence, therefore, it is contended that the question in controversy, that is to say, the appeal, had been "concluded" or "ended" prior to the arrival of Ms. O'Connor's letter on 28th January, three days after the board meeting.

19. In seeking to discern the intention of the Oireachtas, it is true that assistance can be obtained by consideration as to how the

term "determination" is deployed in other sections of the Act. Here, the provisions of s. 111(4) of the PDA 2000 are of some importance. The meetings and procedures of the Board are governed by that section. Most relevant are the provisions of s. 111(4) of the PDA 2000 which provide:-

> ". . . (4) Every question at meeting of the Board relating to a performance of its functions shall be *determined* by a majority of votes of the members present and, in the event that voting is equally divided, the person who is chairperson of the meeting shall have a casting vote. " (*Emphasis added*).

20. The Board contends that, once it has decided the matter at its meeting, a matter is therefore "determined" and at an end. It is contended that at least, by implication, other provisions of the Act support this proposition and suggest that a determination should be construed in this way. However, the question which immediately arises is why, if that was the intention of the Oireachtas, this was not stated with absolute clarity in the Act? I examine first the other provisions in which similar or "cognate" terms are used which are said to support the Board's case.

21. Section 37(1)(b) of the PDA 2000 provides that, where an appeal is brought against a decision of a planning authority, and not withdrawn, the Board shall "determine" the application, as if it had been made to the Board in the first instance. It is said the use of the term here suggests finality. Also, under s. 132(1) of the PDA 2000, it is provided that the Board may request any parties to submit documents where it is "of opinion that any document, particulars or other information may be necessary for the purposes of enabling it to *determine* an appeal". Counsel submits that these words suggest that words outlining the procedures which take place before the board meeting necessarily imply that what happens when a decision is taken at the meeting itself it is final. It is said implications of finality can be gleaned also from s. 138 of the PDA 2000, where there is a general power vested in the Board to dismiss an appeal, when it considers that appeal to be frivolous or vexatious, or if it considers that an appeal should not be further considered. Counsel contends that a similar interpretation, connoting finality, should be imported into the term "determination" or "determined" as used in the material sections.

22. On foot of these, the argument is made that a decision of a Board, at its meeting, is i*pso facto* the Board's "determination"; that (for example) the preliminary submission of documents, or particulars, could only imply that the decision which then takes place on an appeal by the Board members where they meet to decide a matter, is a final one. It is said that these provisions preclude construing what occurs after the board meeting as being any part of a "determination".

23. It must be accepted that s. 138, which outlines the general power of the Board to "dismiss" an appeal which it considers vexatious, uses the term "dismiss" as opposed to "determine". Thus, an argument can be made that the court should view what took place on 25th January, 2011, as *the* "determination" of the Board, and that that *determination* must necessarily, therefore, have been final. However, I am not persuaded of this.

24. I think this argument is too closely focused on the word "determined" as used in some of the provisions, and pays insufficient regard to its meaning when used elsewhere, and more appositely. The entire argument hinges on the term having only one specific meaning: "decision-making" or "decision-taking" always connoting total finality. However, elsewhere, provisions in the Act itself undermine any such misconception. To some extent, the argument resembles a house of cards; if one vital base card is removed, the edifice begins to crumble, for reasons I will now explain.

25. To take one immediate example, section 116 of the PDA 2000 demonstrates the fact that the Board itself has reached "a determination" at a meeting need not necessarily be the "final" step at all. Section 116(6) provides:-

> "(a) Subject to *paragraphs (b) and (c)*, the Board may perform any of its functions through or by any member of the Board or any person who has been duly authorised by the Board in that behalf.
>
> (b) *Paragraph (a)* shall be construed as enabling a member of the Board *finally to determine* the points of detail relating to a decision on a particular case if the case to which an authorisation under that paragraph relates has been considered at a meeting of the Board prior to the giving of the authorisation and that determination shall conform to the terms of that authorisation.
>
> (c) *Paragraph (a)* shall not be construed as enabling the Board to authorise a person who is not a member of the Board *finally to determine* any particular case with which the Board is concerned." (*Emphasis added*)

26. I think the provisions of this section present an immediate obstacle to the "absolutist" interpretation which is urged on behalf of the respondent. The clear effect of s. 116, especially subs. (b) and (c) when placed in linkage with s. 111(4) cited above, demonstrates that, while the Board may "determine" matters at its meeting, this is not the final step in the decision making process at all. A single designated Board member alone may engage in "finally" determining the points of detail relating to a decision (section 116(b)). I take the view that this has the effect of rebutting any contention that what transpired at the Board meeting could, in itself, be the "final", concluded, determination.

27. While clearly not decisive of the point, I would add here that Article 74 of the Planning and Development Regulations 2001 (S.I. No. 600 of 2001), as amended by the Planning and Development Regulations 2006 (S.I. No. 685 of 2006), sets out in detail the procedure to be adopted by the Board in notifying parties as to the outcome of a "decision" on an appeal or referral. The term "decision" appears to be used almost interchangeably with the word "determination". I deal with this question later in the judgment. Obviously, a Statutory Instrument will often be immaterial in interpreting its parent statute.

28. However, I think the respondent's submissions suffer from a further and more fundamental frailty; that of precedent; the issue has already impliedly been decided by the High Court.

29. In *Friends of the Curragh Environment Ltd. v. An Bord Pleanála & Others* [2009] 4 I.R. 451 ("*Friends of the Curragh*"), Kelly J. had to deal with issues largely hinging on the effect of Council Directive 85/337/EEC, art. 10a. However, a further question which arose there in analysing the effect of the PDA 2000, was whether the legal rights of the applicant in that case had been unlawfully interfered with because of a significant delay between the making of a "decision" by the Board, and its notification to the applicant in that case. It was submitted that the time period given to the applicant to take such steps as might be appropriate, such as judicial review, had been foreshortened by twelve days because the Board, which was the respondent, had met on 6th January, 2006, made a decision to grant permission, but such decision/order was not finalised or issued until 18th January, 2006. When then was to be the date of the "decision" or "decision order"?

30. Although he was not directly addressed on the interpretive questions which arises here, Kelly J. decisively dealt with this point in

the following terms:-

> "[71] The contention here is that the applicant's legal rights were unlawfully interfered with because of the delay between the making of the respondent's decision and its notification. It is contended that the time periods given to it to take such steps as it might think appropriate were shortened by some twelve days. This is the subject of the letter from an administrative officer of the respondent from which I quoted earlier in this judgment.
>
> [72] It is difficult to see how any point of law, still less a point of law of general public importance, is sought to be raised in respect of this complaint.
>
> [73] *The respondent met on the 6th January, 2006 and made a decision to grant permission. The decision order was not finalised or issued until the 18th January, 2006. Accordingly the 18th January, 2006, is the date of the decision of the respondent from the point of view of the reckoning of time. Time began to run from that date for the purposes of s. 50 of the Act of 2000. I cannot see any way in which the applicant's legal entitlements were compromised in such circumstances." (Emphasis added*).

31. The judge quite clearly attached central significance to the date of *notification* of the decision. The decision did not take effect until it was "finalised or issued". That date of notification was the "date of the decision" from the point of reckoning of time. In that case, as here, the critical question is the reckoning of time. How can the Board decision in this case be seen differently, or as having taken legal effect until it was finalised or issued? Any interpretation other than that applied by Kelly J. would imply the rights of a hypothetical applicant could be seriously compromised. Such rights include the right of access to the courts to seek relief by way of judicial review, and property rights: they, therefore, have a constitutional provenance. To my mind, (and I use the term unavoidably), that authority is a "determination" on the issue in question here. Furthermore (by way of illustration), that very "determination" was made known by a judgment of the court which took effect at that time of its pronouncement or notification. Why then should the principle be different in this Board determination? It is difficult to escape the conclusion that the Board's stance here may have been attributable to concerns as to the unusual timeline of this case.

32. The analysis and conclusion in *Friends of the Curragh* comes into sharper focus when the point is considered in a less narrow, and I would suggest fuller, context.

33. Sections 50 and 50A of the PDA 2000 deal with the elapse of time for the purpose of bringing judicial review applications. Pursuant to s. 50(6), an application for leave to apply for judicial review under the Act shall be brought within the period of eight weeks:-

> "…beginning on the date of the decision, or as the case may be, the date of the doing of the Act by the planning authority, the local authority or the Board, as appropriate."

I think this has a broader connotation than describing that which occurs only at a board meeting. Section 50(7) is particularly *á propos*. It provides:-

> ". . . (7) Subject to sub-section (8), an application for leave to apply for judicial review under the Order in respect of a decision or other act . . . shall be made within the period of eight weeks beginning on the date on which notice of the decision or act was first sent." (Emphasis added)

Here, I think "decision", and "determination", are again used interchangeably from the time standpoint. As I have pointed out earlier, the terms are used in this same way in a statutory instrument promulgated under the Act. Section 19 of the Interpretation Act provides that a word or expression used in a Statutory Instrument has the same meaning in the Statutory Instrument as it has in the enactment under which the Instrument is made. It will be recollected that in the Statutory Instrument referred to above it is the decision which is notified to the parties. The Statutory Instrument was promulgated at a point close in time to the Act itself. While, of course, subordinate in the hierarchical interpretive order, and subject to the Act in the process of interpretation, I think such interpretation is consistent with the purpose and effect of the provisions in question. In this context, I consider that when a question of the consequential rights of a party arise such as bringing a judicial review, the Act itself clearly envisages that time runs from when notice of the decision is first sent or notified. The logical consequence of this is that the decision (or determination) cannot be binding on any party prior to that point. The legal effect of the determination is coterminous with the giving of notice. The consequence of another interpretation would be to bring about ambiguity and could lead to an effective curtailment of litigation rights of any party to an appeal.

34. At first sight, it might be thought another provision assists the Board in this case. Section 140(1)(b) of the PDA 2000 provides:-

> "As soon as may be after receipt of a withdrawal, the Board shall notify each other party or person who has made submissions or observations on the appeal, application or referral of the withdrawal."

Unavoidably, this shows that the Board may act *intra vires* after the withdrawal of an appeal. But that is only in certain circumstances, where there are other parties to an appeal whose rights may be affected. A withdrawal of itself will not always entirely deprive the Board of jurisdiction therefore, where there are other parties to an appeal. In such a situation, the Board may continue to have a residual jurisdiction. But here, there were no "other parties". The Board is itself a creature of statute and may act only within the bounds of the statute itself. It is not vested with some inherent jurisdiction to continue with a process unless (to use an analogy) there is some continuing lis pending before it. Ms. O'Connor and Urrinbridge were the only concerned parties here. Thus, I do not think this provision can be called in aid in construing the word determination as it arises in this case. The question depends, ultimately, on *when* the Board decision or determination has legal effect on the parties to an appeal; and binds them. It is fundamental to the rule of law that notice of a decision is required before it has legal effect. This is the logical consequence of the decision in *Friends of the Curragh*. (See also the decision of the majority, particularly the speech of Lord Hoffman in *R. (Anufrijeva) v. Secretary of State & Anor* [2003] All E.R. 353 (Jun), although in that case, in the context of asylum law).

35. It is important to consider further consequences which might flow from the interpretation urged by the Board. The elapse of time in *Friends of the Curragh* is a case in point. There, twelve days elapsed between the date of a decision and its notification. On the assumption that a similar, or perhaps even greater, elapse of time occurred, would the time for seeking judicial review be commensurately reduced or foreshortened through no fault of an applicant? I do not think this would be a constitutional interpretation or application of the provisions.

36. When a statute interferes with a constitutional right, it is to be strictly construed. This rule means that where there is a doubt or ambiguity as to the question of interpretation (as it is conceded exists here), the permitted meaning that is less restrictive of the

constitutional right should be presumed to be the intention of the Oireachtas. Any ambiguity here can only be interpreted in one way therefore: the "less restrictive" interpretation is that which is urged on the court by the applicant in these proceedings.

37. The consequence of accepting the Board's case can also be seen in another way; it is a principle of interpretation to apply a construction which removes undesirable ambiguity or uncertainty. Were the Board, for some reason, not to notify the parties of the fact that it had in fact reached a "determination", from when would time run for the purposes of judicial review? That point in time would be uncertain, in an area where certainty is a requirement. It begs the question as to how a party could be expected to challenge a decision of which it had not been informed and had not been notified. The problem is not confined to planning law, and might arise in other circumstances where a range of rights is in question. The interpretation therefore sought by the Board suffers from the further defect of lack of clarity, also relevant in the context of statutory interpretation. If it were to be the case that this enactment was to attenuate a constitutional right, it would be expected that such attenuation be expressed with absolute clarity. The interpretation which is urged by the Board would be to run counter to the clear provisions of s. 50, cited earlier. Certainly, there is no express statutory wording supporting the interpretation now urged by the respondent (see Dodd, '*Statutory Interpretation in Ireland*' (Tottel Publishing, 2008), para. 11.51). It has not been shown it was the intention of the legislature to create a situation where the rights of such persons were to be further restricted by the enactment of the Act of 2000.

38. In this context, the decision of the Supreme Court in *K.S.K. Enterprises Ltd. v. An Bord Pleanála* [1994] 2 I.R. 128 ("K.S.K.") is of considerable assistance. It requires analysis. *K.S.K.* concerned s. 82 of the Local Government (Planning and Development) Act 1963. This was amended by s. 19(3) of the Local Government Act 1992, by inserting two subsections, 3A and 3B, which dealt with the procedure for applying for judicial review of a planning decision. The statute in question is a predecessor of the PDA 2000. The question or issue was the time limit of judicial review, similar to the instant case. Subsection 3A provided, *inter alia*:-

> "…3(A)
>
> A person shall not question the validity of — . . .
>
> (b) a decision of the Board on any appeal…otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts (S.I. No. 15 of 1986) (hereafter in this section referred to as 'the Order')."
>
> Subsection 3B provided *inter alia:—*
>
> (a) An application for leave to apply for judicial review under the Order in respect of a decision referred to in subsection (3A) of this Section shall –
>
> (i) be made within the period of two months commencing on the date on which the decision is given, and
>
> (ii) be made by motion on notice (grounded in the manner specified in the Order in respect of an ex parte motion for leave) to —
>
> (I) if the application relates to a decision referred to in subsection (3A) (a) of this section, the planning authority concerned and, where the applicant for leave is not the applicant for the permission or approval under Part IV of this Act, the applicant for such permission or approval,
>
> (II) if the application relates to a decision referred to in subsection (3A)(b) of this section, the Board and each party or each other party, as the case may be, to the appeal.
>
> (III) any other person specified for that purpose by order of the High Court,
>
> (b) (i) The determination of the High Court of an application for leave to apply for judicial review as aforesaid or of an application for such judicial review shall be final and no appeal shall lie from the decision of the High Court to the Supreme Court in either case save with the leave of the High Court which leave shall only be granted where the High Court certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court.
>
> (ii) This paragraph shall not apply to a determination of the High Court in so far as it involves a question as to the validity of any law having regard to the provisions of the Constitution."

39. The Board decision in *K.S.K.* was made on 1st December, 1993. On 31st January, 1994, a notice of motion, grounding affidavit and statement of grounds were filed on behalf of the applicant in the Central Office, seeking leave to apply for judicial review. The notice of motion was served, but only on the first respondent, within the two-month time period pursuant to s. 82(3B) of the Local Government (Planning and Development) Act 1963 on 30th January, 1994. It was returnable for 14th February, 1994. On 16th February, 1994, the High Court dismissed the application on the respondent's preliminary point that the application was time-barred, holding that an application for leave to apply for judicial review must be returnable to the court within two months of the decision in question having been served on all relevant parties. However, pursuant to s. 82(3B) of the Act of 1963, Flood J. certified that the decision involved a point of law of exceptional public importance.

40. The applicant's argument in the Supreme Court was that either (a) the filing of a notice of motion in the Central Office of the High Court amounted to making an application for leave, or alternatively, (b) that service on one of the respondents, in addition to filing amounted to the "making" of an application. On behalf of the Board, it was submitted that the application for leave to apply could not be made until such time as it was made in court, even if moving it was only for the purpose of asking that it be taken on another day; or alternatively, an application could not be interpreted as having been made until two things had occurred; namely, that a notice of motion had been filed in the High Court, and that it had been served on *all* of the mandatory respondents as provided for in s. 82(3B)(a)(ii) of the Act of 1963.

41. The Supreme Court dismissed the appeal, holding that the requirements of s. 19(3B) of the Act of 1963, were satisfied for the purposes of making an application by the filing in the Central Office of the High Court only on service on *all* necessary parties of the notice of motion within two months of the date of the impugned decision. The court concluded that, in construing s. 82(3B)(a) of the Act of 1963, it was obliged to look at the particular subsection in which it was contained, and those apparent legislative objectives of

the provisions, including the particular subsection. It noted that the scheme of the amendments was intended to confine the possibility of judicial review in challenging or impugning a planning decision, either by a planning authority, or the Board. The court observed that the legislature, in confining the opportunity of persons to impugn decisions of planning authorities, thereby intended that a person who had obtained planning permission should, within a short time thereafter, in the absence of judicial review, be free of any further challenge to that decision, and therefore be able to act on the basis of that decision. As a matter of construction, where a restriction was imposed upon the exercise of a statutory right, it should be capable of being construed in a clear and definite fashion. Therefore, to construe "making an application" as meaning simply the point where an application of some description was made to court would be too imprecise a cut-off point. The court concluded that if the notice of motion had not been served on all the parties identified mandatorily under s. 82(3B) of the Act of 1963 (as distinct from the power of the court at a later stage to order the service of additional parties), the application had not been made within the time limited by section 82. Accordingly, since the applicant had served only the first respondent within the time limited, but had not served the other respondents, the application was time-barred and could not be maintained. Although the point is different, the judicial observations are as material here.

42. Having outlined the statutory provisions, Finlay C.J. observed at p. 135 of the report:-

> "From these provisions, it is clear that the intention of the legislature was greatly to confine the opportunity of persons to impugn by way of judicial review decisions made by the planning authorities and in particular one must assume that it was intended that a person who has obtained a planning permission should, at a very short interval after the date of such decision, in the absence of a judicial review, be entirely legally protected against subsequent challenge to the decision that was made and therefore presumably left in a position to act with safety upon the basis of that decision."

43. But he added, significantly for this case:-

> "Having regard to these general considerations and to my view of *the importance of a notification to the developer in particular and to the planning authorities also of any challenge within the time limited*, I must reject the contention that the application made within the two months could be constituted by the mere filing of a notice of motion in the court offices…" (*Emphasis added*).

44. He made this important statement of principle at p. 136:-

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

45. To this he added:-

> "It seems to me that to conclude that an application could only be made for leave to apply for judicial review under this sub-section where an actual application of some description was made in court or where it could be established that an application would have been made in court if the court had been able to reach it in a list on the day concerned *is to create too imprecise a cut-off point in time for the making of an important application." (Emphasis added*).

46. *K.S.K.* is highly significant in a number of ways. First, it illustrates, if this were needed, that there should not be any lack of clarity in time limitations. It reiterates a policy against any interpretation leading to such a contingency. It made clear that the 1963 legislation had already *confined* the opportunity of persons who sought to impugn decisions to within a short time after the making of that decision. It showed that a statute which imposes such a restriction must be capable of being construed in a clear and definite fashion; there should be no "imprecise" cut-off point therefore.

47. The consequence of accepting the argument urged by the Board in this case would run counter to the rationale of that decision. *K.S.K.* shows that the intention of the Oireachtas in enacting and amending the 1963 Act had been to restrict the rights identified. The rationale, or policy basis of the decision was set out in the judgment.

48. I turn again to the circumstances of this case. I take the view that, had it been the intention of the Oireachtas *further* to attenuate constitutional rights in the PDA 2000, such intention would necessarily have had to have been clearly and precisely indicated in the statute. There is no such clear indication. Such interpretation would necessarily bring about a lack of clarity by creating an unnecessary dichotomy between the date of a "determination" and its notification.

49. Clearly, in the relevant subsection of the 1963 Act as it stood in K.S.K., the term "given" is used in relation to a "decision" of the Board; the phrase used in subs. 3B(a) refers to the "period of two months commencing on the date on which the decision is given". This differs from the terms deployed by the draftsperson in the PDA 2000 quoted above. But, I do not think the differences are in any sense material. Nothing here indicates a legislative intention further to derogate, attenuate or reduce the rights of a party. I think "decision" and "determination" are to be seen as being synonymous in this context.

50. In *Keelgrove Properties Ltd. v. An Bord Pleanála* [2000] 1 I.R. 47 ("Keelgrove"), Quirke J. had to consider a somewhat similar issue. There, he had to interpret the words "within the period of two months commencing on the date on which the decision was given". His view was that the words should be seen as being the date upon which a planning decision was "given" within the meaning of s. 82(3B)(a)(i) of the Act of 1963. By analysing the words in the subsection in their ordinary and natural sense, he concluded that the date in question (the date upon which the *order* which gave effect to the decision was made), was the date upon which the decision was "given", unless the contrary was shown. *Keelgrove* is of importance in that it again closely associates the making of the order and its being *given*, in the sense of being notified.

51. More recently, in *Ryan v. Clare County Council and Others* [2009] I.E.H.C. 115, (Unreported, High Court, Hedigan J., 11th March, 2009), the court accepted a contention that an *unauthenticated* decision of a County Council could not suffice as a *formal decision* for the purposes of the PDA 2000. The judge also concluded that any decision or other act done in the performance or purported performance of a function under the Act by a planning authority or the Board, must be a decision or other act in respect of which any party to an appeal is made or becomes aware of the order, in order that the party may exercise its right under s. 50 of the Act to take steps based on the decision.

52. The learned author of Simons, *'Planning and Development Law'* 2nd Ed., (Thompson Round Hall, 2007), also takes the view (at p. 533), that time should begin to run from the date the formal decision is issued or drawn up, rather than from the date of the Board meeting upon which the decision was reached. In expressing this view, he echoed the views expressed in Walsh, 'Planning and Development Law' 2nd Ed., (Keane Ed. Incorporated Law Society of Ireland, 1984). A decision of the Court of Appeal in *Griffiths v.*

Secretary of State for the Environment [1983] 2 A.C. 51 is to similar effect.

53. I was also referred to the judgment of the Supreme Court in *Dublin Well Woman Centre Ltd. and Others v. Ireland and the Attorney General* [1995] 1 I.L.R.M. 408, where the point at issue was whether a preliminary "determination" made by a High Court trial judge, consequent to an application that she herself was objectively biased, and should recuse herself, constituted a "decision" within the meaning of Article 34.4.3 of the Constitution. In my view, this authority is, in fact, supportive of the applicant's position in this case. Denham J., speaking for the Supreme Court, stated, in relation to the High Court judge's adjudication on that preliminary issue that:-

> ". . . the determination had all the characteristics of a decision. The preliminary issue had been raised before the High Court, arguments were submitted on behalf of opposing parties, the law and the Constitution was referred to, the judge reserved her decision, and then delivered a written judgment in which she gave her *determination* and the reasons therefor. Therefore a High Court order on the issue, and regulating the appeal, was drawn up." (Emphasis added)

54. It is helpful here to look at all the indicia of the "determination" which were found to constitute a "decision" there. These included: (i) the raising of an issue; (ii) a fact-finding, or fact gathering process; (iii) submissions on law; (iv) a judicial decision making process, which, of its nature, involved (v) the writing, delivery, and recording in permanent form of the judgment in open court, necessitating prior notification of the parties. Contrary to what was suggested, I do not think that the passage cited is in any way an authority for the proposition that a "decision", such as that made by the Board on 25th January, 2011, necessarily constituted a final binding "determination" for the purposes of the PDA 2000. Rather, the converse is true in the context of the constitutional considerations which I have outlined earlier. Here, I find the determination took effect when notice of the decision was first sent; there were no other parties concerned.

55. I will grant the declaration that the decision of the respondent to refuse permission in this case was null and void, being *ultra vires* of the powers of the Board by reason of failure to comply with the provisions of ss. 37 and 140 of the PDA 2000. It follows that I must also grant an order of *certiorari* against the decision of the Board wherein it refused permission to the applicant. I do so with some concern arising from environmental issues raised in the inspector's report. However, I do not think that such a consideration can impinge on the question of statutory interpretation which must be the basis of this decision.