Neutral Citation [2016] IEHC 480

THE HIGH COURT

JUDICIAL REVIEW

COMMERCIAL

[2015 No. 514 J.R.]

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

BETWEEN

O'FLYNN CAPITAL PARTNERS

APPLICANT

AND

DÚN LAOGHAIRE RATHDOWN COUNTY COUNCIL

RESPONDENT

JUDGMENT of Mr Justice Robert Haughton delivered on the 10th day of August 2016. TEXT CORRECTED PER ORDER 25th OCTOBER, 2016 – SEE PARA'S 148 & 249(15).

Introduction

1. In these proceedings the applicant challenges by way of judicial review the decision of the respondent, made on the 31st July, 2015, refusing planning permission for the development of a residential scheme on lands located at Beech Park, Old Bray Road, Cabinteely, Dublin 18.

2. On 8th June, 2015, the applicant applied to Dún Laoghaire-Rathdown County Council (the "Council" or the "respondent") for planning permission for one hundred and sixty four residential units to be called "Beech Park" on a 5.3 hectare site adjoining the N11. As part of the proposed development, in a rectangular area at the northern extremity of the development site, the applicant also sought planning permission for the construction of a section of roadway, approximately 150 meters in length ("the Druid's Glen Road"), linking with a planned signalised junction ("junction Q") on the N11. The Druid's Glen Road section of the site falls within a "Strategic Development Zone" ("SDZ"), a planning scheme for the Cherrywood area and, when constructed, the road will give critical access for extensive new development on lands to the west of the applicant's site owned by third parties and falling within the SDZ. However, the bulk of the applicant's development site, upon which all of the residential units of Beech Park would be constructed, lies alongside the N11 but outside the SDZ. The application also sought permission to construct a spur road within the SDZ to connect Beech Park to the Druid's Glen Road as access onto the N11 would not otherwise be permitted. It is necessary to refer to the statutory origin and status of the SDZ.

Strategic Development Zone

3. On 25th May, 2015, Part IX of the Planning and Development Act 2000 ("the Act") introduced into Irish planning law the new concept of Strategic Development Zones. Under s. 166 these may be designated by the government "to facilitate" specified development "of economic or social importance to the State". Before designation is made the Minister for Environment and Local Government must consult with the relevant development agency or planning authority. The SDZ is then designated by Ministerial order. Under s. 168 the relevant development agency or local authority must then prepare a "draft planning scheme" for all or part of the SDZ, which is a detailed written statement and plan indicating the manner in which it is intended the site is to be developed and in particular detailing the matters set out in s. 168(2)(a)-(g). These include the types of development, the extent of proposed development and:-

> "(d) proposals relating to transportation, including public transportation, the roads layout, the provision of parking spaces and traffic management".

An "appropriate assessment" of the draft scheme under Natura 2000 must be carried out in accordance with Part XAB. Section 169 then prescribes the process, providing for public consultation, that must be undergone before the draft planning scheme can be adopted by the members of a planning authority. It may then be appealed to An Bord Pleanála ("the Board"). The Board may direct an oral hearing and, following that, may approve the planning scheme, with or without modifications, or may refuse to approve it. In considering its task the Board must "…consider the proper planning and sustainable development of the area and consider the provisions of the development plan, the provisions of the housing strategy, the provisions of any special amenity area order or the conservation or preservation of any European Site…" (section 169(8)).

4. Once a planning scheme is confirmed "Strategic Development Zone" is now defined under s. 165 as the "site or sites to which a planning scheme made under section 169 applies". Thus it is no longer the area designated by the Government that is critical but rather the actual site or sites covered by the planning scheme which may, as in the present case, only extend to part of the original area designated as SDZ.

5. The importance of a planning scheme is the manner in which planning applications for development within the SDZ must then be considered and determined. This is governed by section 170:-

> "(1) Where an application is made to a planning authority under section 34 for a development in a strategic development zone, that section and any permission regulations shall apply, subject to the other provisions of this section.
>
> (2) Subject to the provisions of Part X or Part XAB, or both of those Parts as appropriate, a planning authority *shall grant permission* in respect of an application for a development in a strategic development zone where it is satisfied that the development, where carried out in accordance with the application or subject to any conditions which the planning authority may attach to a permission, *would be consistent* with any planning scheme in force for the land in question, and no permission shall be granted for any development which *would not be consistent* with such a planning scheme.
>
> (3) Notwithstanding section 37, *no appeal shall lie to the Board* against a decision of a planning authority on an application for permission in respect of a development in a strategic development zone.

(4) Where the planning authority decides to grant permission for a development in a strategic development zone, the grant shall be deemed to be given on the date of the decision."

Emphasis is added to wording the meaning of which has particular significance in this case.

6. It was submitted by counsel for the applicant that the wording of Part IX, and in particular s. 170, show that the objective of the legislature was to facilitate important development in three respects:-

(i) by providing certainty in that developers are assured that if their planning application is consistent with the relevant planning scheme they "shall" be granted planning permission (subject only to any conditions that the planning authority may lawfully attach);

(ii) that permissions will be obtained speedily in that the planning scheme has more detail than a Development Plan and is therefore a blueprint to enable matters to progress more quickly – and there is no appeal permitted to the Board; and,

(iii) that the development is infrastructure led because the planning scheme provides for planned and coordinated development of infrastructures in the planning scheme area.

7. In my view these are reasonable inferences as to the statutory purpose behind Part IX and from consideration of the wording in Part IX as a whole. They also reflect the views of the Council as expressed in the SDZ, namely the Cherrywood Planning Scheme ("the Planning Scheme") where it states under s. 1.4. thereof entitled "Background":–

"Why an SDZ for Cherrywood?

It was recognised that Cherrywood had the potential to be a major new residential and employment settlement in the County and the Region in the context of the sustainable provision of all associated social and physical infrastructure.

The Planning Scheme is capable of providing greater certainty regarding the phasing and delivery of new development, in tandem with the provision of essential infrastructure to serve and facilitate the development. The life of the Planning Scheme is not limited to the legal timeframe set down by the Planning and Development Acts."

The Cherrywood Planning Scheme

8. In 2008 the Government was requested by the Council to consider designating Cherrywood as a SDZ. On 25th May, 2010, Cherrywood became so designated by government order (S.I. No. 535 of 2010). The Council then prepared a draft planning scheme which was put on public display on 29th February, 2012. After a public consultation process the respondent's elected representatives resolved to make a number of material alterations. These went through further public consultation, and in December, 2012, the elected members resolved to make the Planning Scheme as amended and public notice of this was given on 17th December, 2012. From this decision there were sixteen appeals to An Bord Pleanála. An oral hearing was held over fifteen days in March/April, 2013, before an inspector Mr Tom Tabette. His report of 14th August, 2013, recommended approval by the Board subject to certain modifications. An Bord Pleanála approved the Planning Scheme on 24th April, 2014, whereupon it had the force of law.

9. The Planning Scheme encompasses approximately 360 hectares of largely undeveloped land situated at Cherrywood between the M50 and the N11, and plans for extensive mixed development including residential, business, retail and recreational, and it is to be served by a road and cycle network as well as the Luas. Part of the site on which the applicant seeks planning permission, some 0.7982 hectares being the rectangular section at the north end of the applicant's site mentioned above, falls within the Planning Scheme site in "Development Area 5: Druid's Glen". The balance of the applicant's site is located outside the Planning Scheme area. Thus in the normal way the applicant's planning application, insofar as it concerned property outside the Planning Scheme area, falls to be determined in accordance with the policies and objectives contained in the Dún Laoghaire-Rathdown County Development Plan 2010 – 2016. On the other hand the application for development of the 0.7892 hectares upon which the applicant proposes to construct part of the Druid's Glen Road, including part of a bridge over the Druid's Glen and the spur road to Beech Park, fall to be determined under section 170(2). It is central to the applicant's case that its planning application in relation to the 0.7892 hectares was consistent with the Planning Scheme, and that, accordingly, the Council was obliged to grant permission subject to such conditions as it might attach, and that the reasons given for refusal in relation to the 0.7892 hectares are invalid.

The Reasons for Refusal

10. In the impugned decision, dated 31st July, 2015, and in the Notification of Decision to Refuse Permission, the respondent gave the following reasons for refusing permission:-

"(1) The submitted Flood Risk Assessment does not satisfy the requirements of the Justification Test in Development Management, Section 5.15 of The Planning System and Flood Risk Management Guidelines for Planning Authority November, 2009 – OPW & DoEHLG. The proposed development is therefore unacceptable, as it is in an area which is at risk of flooding and also would be contrary to the aforementioned ministerial guidelines and to Section 9.3.6, 'Rivers and Waterway' of the Dún Laoghaire-Rathdown County Development Plan, 2010 – 2016.

(2) The proposed development fails to provide a high quality site specific design response for this site, in particular with respect to:

- Layout;
- Ecology;
- Landscape design.

The proposed development would, therefore, seriously injure the amenities or depreciate the value of property in the vicinity. The proposed development is contrary to the proper planning and sustainable development of the area.

(3) The proposed development, by itself or by the precedent that the grant of permission for it would set for other

relevant development, would adversely affect the use of the N11 by traffic prior to implementation of the Cherrywood Planning Scheme Signalised Junction Q.

(4) The proposed development is not consistent with the Cherrywood Planning Scheme in regard to the design and sequencing of development, as set out in Chapter 4 and Chapter 7 of the Planning Scheme.

(5) The proposed development is not consistent with the Cherrywood Planning Scheme, as the applicant has not demonstrated that the proposed development has had sufficient regard to Section 5.4.1 in particular GI 19 of the Planning Scheme."

It is not disputed that reasons (1) and (2) relate only to the residential part of the applicant's proposed development i.e. the Beech Park area falling outside the Planning Scheme site, and that reasons (3), (4) and (5) relate only to proposals for the 0.7892 hectares falling within the Planning Scheme site.

The Statement of Grounds
11. In the statement of grounds the applicant seeks orders quashing the entire decision, or alternatively the decision insofar as it relates to the 0.7892 hectares, and remission to the respondent for determination in accordance with the courts directions. Further, or in the alternative, declarations are sought –

• of consistency with the Planning Scheme of the proposed development of the 0.7892 hectares;

• of the respondent's failure to comply with s. 170(2);

• that the refusal was motivated by improper purpose namely to compel the applicant to provide access over its lands to adjoining landowners; and,

• that the manner in which the respondent considered, dealt with and/or determined the planning application gives rise to a reasonable apprehension of bias.

12. Although the applicant disagrees with reasons (1) and (2), there is no direct challenge to the validity of each of these reasons per se; however, it was argued that, insofar as the applicant pleads and contends that there was improper motive or objective bias, these are grounds that individually or together taint the entire decision. It was accepted that the validity of each of reasons (3), (4) and (5) is central to the challenge in these proceedings.

13. The grounds of challenge may be summarised as follows:-

(i) the planning application and in particular the design of that part of the Druid's Glen Road within the proposed development was consistent with the Planning Scheme and the respondent erred in law in determining otherwise, and it was obliged to grant permission under s. 170(2).

(ii) in particular and contrary to reason (4), the proposed development was consistent with the design and sequencing requirements of the Planning Scheme in chapter 4 and 7 and the respondent was mistaken insofar as it based its decision on the premise that the Planning Scheme prohibited the delivery of one part of the Druid's Glen Road in advance of the finalising of design or grant of permission for the entire Druid's Glen Road, including signalised junction Q.

(iii) that, insofar as there is any discrepancy between the planning application drawings of the Druid's Glen Bridge and drawings provided by the respondent's consultants, this is explained by the failure of the their drawings to have regard to the existence of a secondary stream along the boundary of the applicant's lands.

(iv) that the "plug-in" road linking the proposed Druid's Glen Road to the proposed Beech Park residential units, although in an area designated as land for "Green Infrastructure", is not inconsistent with the Planning Scheme and is not subject to a requirement that planning permission for the Druid's Glen Road Q-P3 be in place and the respondent was obliged by s. 170(2) to grant permission.

(v) with regard to reason (5), the planning application was consistent with the Planning Scheme, or alternatively the reason is void for uncertainty because it fails to make clear how the applicant failed to have "sufficient regard to section 5.4.1 in particular GI 19 of the Planning Scheme" or alternatively it fails to state "the main reasons and considerations" for the decision sufficient to satisfy s. 34(1) of the 2000 Act or the Development Management Guidelines for Planning Authorities (1997).

(vi) in that the decision relied on a planner's report and a report from the Transportation Planning Section of the Council expressing the view that the proposed development does not "satisfactorily facilitate provision of the Druid's Glen Road Q-P3 as there is no certainty or commitment to any agreements with adjoining landowners or implementation, maintenance, security and timing of delivery of the full bridge structure" or otherwise took into account the absence of any agreement between the applicant and adjoining landowners with regard to the delivery of the bridge, it was a decision motivated to a degree by an improper purpose; namely, to compel the applicant to provide access over its lands to adjoining landowners or, alternatively, was based on irrelevant considerations.

(vii) that the respondent changed its position with regard to the deliverability of the Druid's Glen Road and, while initially it was satisfied with the proposal to seek permission for only part of the road, it later changed its position and required that an application be lodged for the entire Druid's Glen Road, and this gives rise to a reasonable apprehension that the respondent was biased and predetermined or pre-judged the planning application and would not grant planning permission for any development unless it included the entire Druid's Glen Road.

The Statement of Opposition
14. This makes "Preliminary Objections" which may be summarised as follows:-

(i) The applicant has failed contrary to s. 50 of the Act of 2000 to set out any grounds for impugning reasons (1) and (2).

(ii) That, in seeking the reliefs at paras. D(2), D(3) and D(8) of the statement of grounds (the alternative claim to certiorari of that part of the decision relating to the 0.7892 hectares; a Declaration that the that part of proposed development is consistent with the Planning Scheme; and an order for remission in respect of that part of the proposed development with directions/observations of the court respectively), the applicant is impermissibly seeking an advisory opinion of the court.

(iii) That, insofar as the applicant relies on the content of statutory pre-planning consultations in the statement of grounds in relation to alleged improper motive or objective bias, or in adducing evidence in support of those pleas, it is precluded from so doing by s. 247(3) of the Act of 2000.

(iv) That the applicant could have appealed the decision to An Bord Pleanála insofar as it related to lands outside the Planning Scheme area, but did not appeal and has therefore failed "to use the available alternative remedy".

The respondent then substantively denies that any of the grounds pleaded by the applicant relate to reasons (1) and (2), and denies entitlement to the reliefs claimed and makes the following relevant pleas, in summary:-

(i) It denies that the Planning Scheme or the respondent required the Druid's Glen Road or the road between Point Q-P3 to be progressed as a single piece of infrastructure, or precludes permission being granted for part only, or necessitated delivery of the Druid's Glen Road by way of a single transaction, and asserts that this was the position of the respondent at all times.

(ii) Atkins Consultants were appointed by the respondent to produce a study to ensure that the Druid's Glen Road fulfilled the requirements of the Planning Scheme. Due to the undulating nature of the landscape, this study was critical to the assessment of discrete sections of the road. However, at the time the applicant chose to submit its planning application, the vertical and horizontal alignment of the proposed Druid's Glen Road from Point Q-P3 and a detailed design for junction Q was not in place. It is asserted that the applicant accepted this because the Construction Management Plan submitted with the application indicated that construction access would be required at junction Q.

(iii) That the National Roads Authority (NRA) in a letter dated 18th December, 2014, *inter alia* stated that, if it was proposed that the applicant's development would utilize junction Q, then the junction design was required to be addressed in the applicant's application. In the NRA submission of 8th July, 2015, they "strongly objected" to the application on the basis that "[t]he proposed development could prejudice plans for the design and agreement of the required junction upgrade and hence the application is premature pending the determination of this scheme. A grant of permission, in this instance, is considered at variance with the provision of the DoECLG Spatial Planning and National Road Guidelines for Planning Authorities (January, 2012)."

(iv) That, in early March 2015 following on from meetings with landowners including the applicant, the respondent engaged Atkins Consulting Engineers to provide a detailed design for junction Q and vertical and horizontal alignment of the Druid's Glen Road and to undertake a screening exercise.

(v) That the respondent was "not aware" of any advice given to the applicant at a meeting in or around 22nd April, 2015, that the Atkins design for junction Q would be available during the five week period following the applicant's proposed lodgement date for the planning application.

(vi) The position of the respondent was always that it would provide a letter of consent to the applicant to include junction Q in its planning application once a detailed design of junction Q had been finalised.

(vii) The "plug-in" access road was not a basis for the refusal of permission.

(viii) It is denied that the proposed development within the 0.7892 hectares was consistent with the Planning Scheme or that the respondent was obliged to grant permission under s. 170(2), or that the respondent erred in law or acted *ultra vires*.

(ix) With reference to reason (4), it is denied that the respondent erred in law or that the proposed development was not consistent with chapter 4 and chapter 7 of the Planning Scheme, or that reason (4) was based on a mistaken premise that the Planning Scheme prohibited delivery of one part of the Druid's Glen Road in advance of the entire road including junction Q.

(x) Reliance is placed on the statement of opposition and the affidavit of Ms Mary Henchy as showing the basis for the reasons (3) and (4).

(xi) In relation to reason (4) reliance is placed, *inter alia*, on the statement in the Senior Executive Planner's Report that "the scheme as proposed is not considered to be consistent with the Planning Scheme as the junction is a critical aspect of road Q to P3. To permit the road without the junction either designed and or approval in place is premature" and the respondent's assertion that the Atkins Consulting Engineers drawings were "not the detailed design for the junction at Point Q and the final vertical and horizontal alignment of the proposed Druid's Glen Road from Points Q-P3."

(xii) With regard to reason (5) the applicant's claims are denied and it is asserted that the respondent acted lawfully and *intra vires* and on foot of ample material and gave the main reasons and considerations for the decision in compliance with s. 34(10) of the Act of 2000 and complied with the principles of natural and constitutional justice. It is pleaded that the applicant has failed to demonstrate that the respondent failed to have regard to the development management guidelines for planning authorities or to comply with s. 28 of the Act of 2000. It is asserted that the applicant has not demonstrated that the proposed development had sufficient regard to s. 5.4.1 and in particular GI 19 of the Planning Scheme, or that it was entirely consistent with the Planning Scheme. The respondent asserts that the Senior Executive Planner's report and the report of the Council's Parks and Landscape Services Department identify the matters to which the applicant needed to have regard to demonstrate compliance with s. 5.4.1 and GI 19 thereof.

(xiii) It is further denied that reason (5) is void for uncertainty or that the failing to which it relates is unclear from the decision or the respondent's "planning reports", or that they were required to define "sufficient regard" or what the applicant had to do to demonstrate "sufficient regard".

(xiv) Improper motive is denied, and it is denied that any of the matters contained in the report of the Senior Executive Planner or Transportation Planning Department report support the contention that the motive was to compel the applicant to provide access over its lands to adjoining landowners.

(xv) It is asserted that the applicant has failed to state any grounds to support its claim of a reasonable apprehension of objective bias.

(xvi) It is denied that the respondent changed its position on "the deliverability of the Druid's Glen Road".

(xvii) It is denied that that portion of the Druid's Glen Road in the planning application which traversed the applicant's land was consistent with the planning scheme.

(xviii) It is denied that the applicant is entitled to remittal in whole or in part.

15. It is appropriate to address some of the respondent's preliminary objections at this point.

(i) No grounds stated for challenging reasons (1) and (2)
16. I am not satisfied that this pleading point is made out. In my view it arises from too narrow a reading of the statement of grounds. When the statement of grounds is read as a whole, and the grounds in para. E are considered in conjunction with the reliefs sought at D(5) and D(6), the wording is broad enough to allow the applicant to argue that the pleas of improper purpose and objective bias taint the entire decision, and are not limited to reasons (3), (4) and (5).

(ii) Advisory opinion
17. This plea seems to be more relevant to any order or directions that the court may make in the event that the applicant is successful, in whole or in part, rather than a preliminary objection

(iii) Alternative remedy of appeal to An Bord Pleanála
18. The respondent suggests that the applicant could and should have availed of the right of appeal to An Bord Pleanála insofar as the impugned decision relates to lands falling outside the Planning Scheme area, and that the failure to do so precludes the applicant from seeking judicial review of the decision insofar as it relates to those lands.

19. Strictly speaking this is not a preliminary objection, because the question of whether an applicant should have availed of an alternative remedy is a matter for the court to consider in the exercise of judicial discretion when deciding whether or not to grant an order of *certiorari*. Nevertheless it can be addressed at this stage by reference to principles established in two planning cases.

20. In *State (Abenglen Properties Ltd) v Corporation of Dublin* [1984] IR 381 the respondent argued that the application for *certiorari* quashing the grant of outline planning permission, with which the applicant was dissatisfied, should be refused because, among other reasons, the applicant failed to avail of a right of appeal. The Supreme Court agreed and O'Higgins CJ stated at p. 393:-

> "The question…arises as to the effect of the existence of a right of appeal or an alternative remedy on the exercise of the court's discretion. It is well established that the existence of such right or remedy ought not to prevent the court from acting. It seems to me to be a question of justice. The court ought to take into account all the circumstances of the case, including the purpose for which certiorari has been sought, the adequacy of the alternative remedy and, of course, the conduct of the applicant…In such cases, while retaining always the power to quash, a court should be slow to do so unless satisfied that, for some particular reason, the appeal or alternative remedy is not adequate."

This demonstrates a pragmatic approach to the question of alternative remedy.

21. The appropriateness of the suggested alternative remedy was the raised in *P & F Sharpe Ltd v Dublin City and County Manager* [1989] IR 701. The applicant sought certiorari of the respondent's decision to refuse planning permission, despite a resolution of the local authority under s. 4 of the City and County Management (Amendment) Act 1955 directing him to do so. The Supreme Court rejected the argument that the manager's refusal should have been appealed to An Bord Pleanála. Finlay CJ at p. 721 stated:-

> "The powers of An Bord Pleanála on the making of an appeal to it would be entirely confined to the consideration of the matters before it on the basis of the proper planning and development of the area and it would have no jurisdiction to consider the question of the validity, from a legal point of view, of the purported decision by the county manager. It would not, therefore, be just for the [applicants]…to be deprived of their right to have that decision quashed for want of validity."

22. The applicant argues that an appeal of part only of the respondent's decision relating to the proposal for development of residential units on Beech Park on the lands outside the SDX – an appeal in relation to the land falling within SDZ being prohibited by s. 170(3) – would be bound to fail because of its dependence on the Druid's Glen Road and "plug-in" road for access. The Board would exceed its jurisdiction if it had regard to the applicant's unappealed and unappealable proposals for the 0.7892 hectares.

23. I find this to be a compelling argument, and one to which there was no answer, because a stand-alone appeal for Beech Park without any provision for access would inevitably not be consonant with good planning and development and would be bound to fail. I conclude that an appeal of part only of the refusal to An Bord Pleanála could not be regarded as an adequate or appropriate alternative remedy.

(iv) Pre-planning consultations
24. Before considering the evidence further it is necessary to address this preliminary point in a general way as much mention is made in the pleadings, affidavits and argument of "consultations" that took place between the applicant and its architect/engineer of the one part and the Council/its officials of the other part in relation to the proposed development.

25. Insofar as these were statutory pre-planning consultations of the sort contemplated in s. 247 of the Act, s. 247(3) provides:-

> "The carrying out of consultations shall not prejudice the performance by a planning authority of any other of its functions under this Act, or any regulations made under this Act and cannot be relied upon in the formal planning process or in legal proceedings."

26. It is agreed that the consultations held on 16th September, 2014; 17th December, 2014; 27th January, 2015 (two on this day);

and, 6th May, 2015, were pre-planning statutory consultations of the sort contemplated in s. 247 of the Act. A question arises as to the extent to which (1) the respondent as planning authority in considering and determining the planning application, and (2) the court in these proceedings, could, or should, take into account any evidence relating to the content of these consultations.

27. Section 247(1) provides that an intending applicant may, with the agreement of the planning authority, enter into such consultations "…in order to discuss any proposed development in relation to the land…" in which they have an interest, and "…the planning authority may give advice to that person regarding the proposed application." The planning authority may specify the times and locations at which consultations are held and is not obliged to entire into consultations. It must at least annually publish in a local newspaper the times and locations of consultations that it has held (ss.(4)); it must keep a record of each consultation and the attendees (ss.(5)); and, ss. (6) makes it an offence for any member or official of a planning authority to seek "any favour, benefit or payment, direct or indirect…in connection with any consultation…". Subsections (2) and (3) provide:-

> "In any consultations under subsection (1), the planning authority shall advise the person concerned of the procedures involved in considering a planning application, including any requirements of the permission regulations, and shall, as far as possible, indicate the relevant objectives of the development plan which may have a bearing on the decision of the planning authority.
>
> The carrying out of consultations shall not prejudice the performance by a planning authority of any other of its functions under this Act, or any regulations made under this Act and cannot be relied upon in the formal planning process or in legal proceedings."

Section 247 does not appear to have been the subject of any detailed judicial consideration but it was considered briefly by Hedigan J in *West Wood Club Limited v An Bord Pleanála* [2010] IEHC 16, where he stated at para. 70:-

> "The above provisions make it clear that the pre-planning consultations are precluded from being relied upon in the planning process. They serve mainly to advise an applicant of the relevant procedures in the planning sphere and the aspects of the development plan relevant to their application. In circumstances where they cannot be relied on in the planning process it is difficult to see how a failure to comply with any requirements in relation thereto could invalidate the decision reached at the end of that process. The applicant must be refused leave on this ground."

28. Section 247 puts upon a statutory footing a practice that had been ongoing for a number of years between local planning authorities and planning permission applicants/their advisors. It is clearly designed to encourage pre-planning consultation to facilitate the planning process and it is not hard to see its advantages. It avoids the making of many applications for planning that would materially breach the development plan or other principles of good planning and development and probably leads to more refined planning applications which thereby saves time and expense for applicants/developers and the making and consideration of planning applications that are bound to fail or at least necessitate requests for further information.

29. While s. 247(2) appears to be prescriptive in terms of what the planning authority must advise the intending applicant (the procedures, requirements of planning regulations and "as far as possible" relevant objectives of the development plan), a failure to advise, or incorrect advice as any of the matters mentioned cannot be relied upon either in the formal planning process or in any legal proceedings; this is the effect of subsection (3). Secondly, while indicating what advice should be covered, it does not purport to place any limits on the agenda or discussion at consultation, or prevent any exchange of documentation.

30. When subsection (3) is considered in the context of the section as a whole it is clear that the legislature intended to facilitate the widest possible discussion of planning matters at such consultations, and sought to achieve this by stipulating that neither side could rely on the content of such discussions either in the planning process or in any judicial review. It does not discriminate between the parties – it applies equally to applicants and planning authorities. Thus a commitment given by an applicant at such a consultation which was not carried into the subsequent planning application could not *of itself* be the basis for a request for further information or a refusal of the application. But that is not to say that for *bona fide* reasons consistent with good planning and development the planning authority could not request further information or refuse permission on the basis of the same facts that underpinned the commitment. Equally an applicant could not rely *of itself* on a statement or verbal commitment made by planning officials at such a consultation, either in the planning process, or in a judicial review, although that statement or commitment might inform the nature and content of the application.

31. It follows that, in general, reports and recommendations from planning or other local authority officials prepared in the course of the formal planning process in response to a planning application should not rely upon advice given or received at any statutory pre-planning consultation, and in turn should not be relied upon by the decision maker(s) when considering or determining the application.

32. There will be some circumstances in which it may be permissible for reference to be made to pre-planning consultations. For instance, it is difficult to see how an applicant could realistically object to a simple listing in a planner's report of the pre-planning consultations. It may be that documentation furnished at such a meeting, if furnished with the intention that it would used in a planning application, would not be covered by the s. 247(3) prohibition. It must also be open to an applicant for judicial review who asserts that there was improper reliance by a planning authority on the content of pre-planning consultations in "the formal planning process" to refer to sufficient material to support a case for breach of s. 247(3). There may be other exceptional circumstances in which evidence from a pre-planning consultation may be admissible, for example, where an egregious comment at such a meeting gives rise to an allegation of actual bias.

33. Of particular relevance to this case, it must also be noted that not all advance meetings between an applicant/its advisors and the local planning authority officials or advisers is convened as a statutory pre-planning consultation. Where it is not a statutorily convened consultation, s. 247(3) does not apply. The applicant claims objective bias arising from a meeting on 22nd April, 2015, which, it is agreed, was not covered by s. 247(3), and it is, therefore, permissible for the parties to rely on evidence of what took place at that meeting. It is also relevant that, outside of the confines of statutory pre-planning consultation in April, 2015, the applicant's traffic consultants were furnished by Atkins Consultants, road design consultants engaged by the respondent, with draft vertical and horizontal alignments for the Druid's Glen Road which were used to inform the planning application and in particular the Druid's Glen Bridge and the interface between the proposed Druid's Glen Road and the signalised traffic junction on the N11. Furthermore, the respondent identifies at para. 4 of the statement of opposition, four other non-statutory consultations as having taken place "between the relevant three landowners and the [respondent's] Projects Office on or about the 12th March, 2015, the 26th March, 2015, the 16th April, 2015 and the 22nd June, 2015."

Further Factual Background to the Planning Application

34. This is of particular relevant to the applicant's pleas in relation to improper purpose and objective bias.

35. The applicant engaged Tom Phillips and Associates Ltd as architects to prepare the planning application on its behalf. From the applicant's earliest engagement with the Council in July, 2014, the applicant advised the Council that it was its intention that the planning application would include only that part of the proposed Druid's Glen Road which traverses its lands, but would include junction Q on the Council's lands subject to receipt of the necessary letter of consent. The route of the proposed Druid's Glen Road to the west of the applicant's site is in the ownership of other landowners, the first being Tudor Homes (adjoining the applicant), and the second being the receivers of a company Benreef Ltd ("Benreef") owning land up to the western end of the Druid's Glen Road. The applicant's position was made clear at the meeting in July, 2014, attended by the applicant's traffic consultants Muir Associates Ltd ("Muirs") and the Council's Transport Department.

36. I disregard entirely the content of statutory pre-planning consultations held in September and December, 2014, and January, 2015.

37. In a letter dated 18th December, 2014, from the NRA to the applicant's architect Mr Tom Phillips, they indicate their view that the design of junction Q needs to be addressed in the planning application as it needs to meet certain standards:-

> "Either your Client's planning application should include the proposed junction, or someone else should deal with it so that your approval can be conditioned on an approved junction being in place…As a practical matter, given the wealth of data already developed for the developments planned in the area, any suggestion that it might take a year to prepare the documentation would seem a little pessimistic. Assuming one party or another actually started work on it following our meeting with Dún Laoghaire-Rathdown County Council on the matter on 3rd December, we would expect to receive a submittal as early as January or February next…"

38. In an email dated 9th January, 2015, from Ms Mary Henchy Senior Planner (Ms Henchy) to Mr Tom Phillips and the architects for the other two landowners, it is stated that "DLR are currently drafting a brief" for consultants for detailed design of junction Q and the vertical and horizontal alignment of the Druid's Glen Road Q-P3. She stated:-

> "At this stage it is DLR's intent to give the design work to the landowners to incorporate in a planning application. Without prejudice to any application it is likely that DLR would condition that the work on the N11 be carried out by the Local Authority."

It is accepted fact that in March, 2015, the Council appointed Atkins Consultants to prepare a preliminary design for the entire Druid's Glen Road followed by detailed design of junction Q. The applicant and its consulting engineers Muirs then engaged with Atkins Consultants, and also consultants appointed by the other two landowners affected by the proposed Druid's Glen Road, in order to ensure that the design for that part of it over the applicant's lands in the planning application complied with the Council's alignment for the entire road.

39. It is clear that, up until April, 2015, the applicant proceeded upon the basis that it would be seeking planning permission for and constructing junction Q as well as the section of the Druid's Glen Road traversing the applicant's lands. Accordingly the applicant's consulting engineers Muirs prepared Vertical and Horizontal Alignment plans. On 7th October, 2014, Muirs emailed the following to Clare Casey in the Council's Roads Department:-

> "1. Revised Druids Glen Road/N11 junction (with increased right-turning provision from 14m to 18m)
>
> 2. A sketch showing the future underpass on the Druid's Glen Road
>
> 3. Autotrack analysis of the junction for a rigid vehicle
>
> 4. Estimated vehicle trip generation for the proposed residential development."

40. Drawing no. D1741-SK-002 enclosed with that email shows a plan view of the proposed Druid's Glen Road, indicating the chainage at regular intervals along its full length from Q-P3. It also shows a longitudinal section. It is apparent from this that the Druid's Glen is a steep-sided glen and that the road must traverse this necessitating the construction of a bridge. An odd feature of this case – and one that may have had a bearing on the Council's thinking – is that the point at which the Druid's Glen Road bridge would meet the western boundary of the applicant's land with Tudor Homes is diagonally across the line of the proposed bridge in mid-air. The planning application ultimately sought permission to construct the bridge and bridge supports to this mid-point. The unfinished bridge at Avignon springs to mind. It is common case that, in the absence of appropriate consent, it is not permissible for one landowner to seek planning permission in respect of development over the property of another landowner. No point was especially raised in this case in relation to this peculiar feature of the planning application and it was not one of the reasons given for refusing permission. It was presumably assumed on all sides that the practical reality is that the construction of the Druid's Glen Road bridge could not be carried out until planning permission was granted to the applicant's adjoining landowner Tudor Homes and a co-ordinated or other approach taken to the construction work.

41. Also accompanying this email was drawing no. 1741-SK-003 showing "Druid's Glen Road – vertical alignment chainage 80-200", showing "future underpass to provide for riparian habitats". This demonstrates a cross-section of the proposed bridge, and indicates the boundary to the applicant's lands on the western side, and one bridge support and a short section of the bridge falling within the applicant's development site.

42. Also of significance are two drawings attached to this email concerning junction Q. On drawing 1741-SK-002 there is a "Plan View – Proposed N11 Junction Initial Layout" which demonstrates the proposed link between the Druid's Glen Road and junction Q, and junction Q lay-out. Drawing 1741-SK-004 provides more detail under the heading "Druid's Glen Road – N11 Junction Autotrack Analysis", demonstrating the turning curve at junction Q for rigid trucks up to 12m in length.

43. There was also a reference to the spur road that the applicant required to provide access from the proposed residential units in Beech Park linking to the Druid's Glen Road on the applicant's lands.

44. By March, 2015, the applicant was concerned about the absence of any consent from the Council in relation to the planning application including junction Q and was anxious to progress matters. This is evident from a letter dated 3rd March, 2015, from Mr Michael O'Flynn, the applicant's principal, to Ms Philomena Poole, Chief Executive of the respondent, seeking a "high level meeting" to address matters raised in the letter and to facilitate the lodgement of a planning application which Mr O'Flynn was assured by his design team could be lodged within a number of days. I disregard elements of this letter that refer to the contents of statutory planning consultations. He mentions having met with the other landowners' technical teams and his confidence that "…our current

design will facilitate the extension of our site entrance road". Having referred to the fact that only a portion of the Druid's Glen Road would traverse the applicant's lands, he went on to affirm the applicant's intention "…to develop the section of road referred to above within the limits of my ownership. This will facilitate the development of the SDZ in accordance with the Planning Scheme." Later on in the letter he states:-

> "We have engaged traffic engineering consultants to design the junction at the N11 and the length of roadway traversing our lands to meet the Local Authority's specifications and to facilitate the development of the SDZ. That is the extent of our obligations, we believe…"

Mr O'Flynn urged the Local Authority to provide the letter of consent to allow the planning submission to progress. He stated:-

> "Section 167 of the Planning and Development Acts 2000-2014 outlines the agreement that the relevant development agency and a person with an interest in land referred to in a Strategic Development Zone order may enter into agreement for the purpose of facilitating the development of the lands. I am clearly using best endeavours to enter into such agreement with the Local Authority, but there appears to be no reciprocal intent on the part of the Local Authority.
>
> As we understand it, the Local Authority's position is that no development can take place within the Cherrywood SDZ Planning Scheme until permission is granted for the section of road marked "P3 to Q". This is based on section 7.2.1 of the Cherrywood Planning Scheme. We have been advised by our legal advisor and by counsel that the Local Authority's interpretation of s. 7.2.1 is incorrect and overly restrictive. Section 7.2.1 is clearly intended to ensure that housing and other similar developments do not take place within the Planning Scheme area until permission is granted for essential road infrastructure. It is not intended to restrict the development of further ancillary road infrastructure and, in particular, it should not be interpreted in the manner that restricts the overall development of the site, as this would be contrary to the objectives of the SDZ designation in the first instance.
>
> Only a portion of our overall development lies within the Planning Scheme area, namely a small section of road – a 'spur' – to connect to the section of road marked "P3 to Q" immediately adjacent to the proposed connection to the N11. The rest of the development, comprising mostly housing, lies outside the Planning Scheme area but within the area previously designated by the Government as a SDZ. It therefore does not comprise 'development' within the true meaning of section 7.2.1 of the Planning Scheme, and to hold otherwise is inconsistent with the Local Authority's role and responsibility as Development Agency for the SDZ".

45. This letter was copied to Ms Henchy, a Senior Planner with the respondent, and Mr Declan McCulloch also of the Council, and to the applicant's architect Mr Phillips and the applicant's solicitors.

46. By letter dated 26th March, 2015, Tom Phillips and Associates on the applicant's behalf wrote to Ms Henchy seeking clarification on the respondent's progress with certain "critical steps" outlined in Chapter 7.3 of the Planning Scheme "without which any development in the area may have to be considered premature".

47. Chapter 7.3 includes a subheading "Prematurity" which reads:-

> "The over-riding focus to the phasing of development in Cherrywood is part of an holistic approach to the sustainable creation of living and working communities. To effectively manage and promote such development, there are a number of critical steps to be taken, without which any development in the area may have to be considered premature. The commencement of development is predicated on these critical steps, being addressed to the satisfaction of DLRCC. These critical steps are…"

There follows six bullet points which may be summarised as: the preparation of an Area Wide Travel Plan by DLRCC/NRA; replacement of a short portion of a critical trunk main from Bride's Glen Road; agreement with Bord Gais on the gas network; agreement on water allocation to Rathmichael Reservoir; financial contribution schemes for funding infrastructure and services; and the development of a protocol for assessment and monitoring of a strategic road network performance between DLRCC/NRA/NTA.

48. Ms Henchy responded by email dated 2nd April, 2015, outlining progress on "the critical steps" and adding the following:-

> "I understand the client you represent is O'Flynn Capital Partners, is your query will these steps mean that any application on the Beechpark site be considered premature until these issues have been addressed?
>
> It would be my opinion that *once the permission is in place for road Q to P3* that the section of road in Development Area 5 to access your clients site would not be considered premature on the basis of the critical steps set out in section. 7.3 of the Planning Scheme". [sic] [Emphasis added]

49. This is a particularly important email, because, as it transpired, Ms Henchy, as Director of Planning and Enterprise, was the authorised ultimate decision maker on the respondent's behalf in refusing permission. It is implicit from this email that, as of 2nd April, 2015, Ms Henchy did indeed regard an application for planning permission in respect of the access spur road to be premature until permission was in place for the Druid's Glen Road. Her opinion was that, under the Planning Scheme, permission would be required to be in place for the *entire* Druid's Glen Road ("Q to P3") before permission could be granted for the spur road. This email tends to confirm the attitude of the respondent's planners as stated (and disputed as legally correct) by Mr O'Flynn in his letter to Ms Poole on 3rd March, 2015, seeking a "high level meeting".

50. That letter did lead to a high level meeting between the applicant and the Council on 22nd April, 2015. This meeting is also of importance. It was – and the parties agreed on this – not a statutory pre-planning meeting. In his affidavit sworn on the 10th September, 2015, Mr O'Flynn averred as follows:-

> "12. On foot of this letter a meeting was held between OFCP and the Council on the 22nd April 2015 between representatives from OFCP, including myself, Mr Tom Phillips and Mr John Donohoe and Ms Poole, Chief Executive of the Council and Ms Mary Henchy, Senior Planner in the Council. At that meeting, I again expressed my concerns regarding the delay experienced by OFCP in securing the co-operation of the Council in its dual role as planning authority and SDZ Development Agency, particularly with regard to both (a) providing the letter of consent required to include the N11 junction in the planning application and progressing the design of the N11 junction and (b) its position that a single application should be lodged for the Druid's Glen Road in its entirety. Mary Henchy expressed a concern that OFCP may not complete the road infrastructure up to OFCP's site boundary and as such would create a physical ransom strip. I re-

iterated OFCP's commitment to include and complete the road infrastructure up to the site boundary."

51. Prior to this meeting Atkins Consultants had prepared both vertical and horizontal alignments for the Druid's Glen Road and had furnished same to the applicant's traffic consultants Muirs. Mr Tom Phillips, in an affidavit sworn on the 10th September, 2015, on the applicant's behalf, avers that "the horizontal and vertical alignment of the Druid's Glen Road as proposed as part of the planning application accords with the Atkins proposals of this date."

Mr Phillips then refers to the meeting on 22nd April, 2015:-

> "22. OFCP were advised at a meeting held on the 22nd April 2015 with Council officials that the Atkins Design Report in respect of the junction with the N11 would not be available before the proposed lodgement date for the OFCP planning application, but that it would be available during the 5 week observation period. The Council was advised that the alignment of the proposed road through the OFCP lands was in accordance with the latest draft of the Atkins Design Report and that if necessary a condition could be imposed on any grant of planning permission requiring any necessary alterations to the road alignment. A further request was made for the necessary letter of consent from the Council to allow the lands required for the N11 junction to be included within the red line planning application boundary. The Council advised that they would revert with a decision as to whether the letter would be forthcoming. No response was ever received from the Council on this issue and the planning application as lodged did not include the lands required for the N11 junction within the red line planning application boundary. However, I say and believe that, in so far as part of the proposed N11 junction is within OFCP's lands, the application drawings ensure that this was designed in accordance with the N11 junction as provided for in the Cherrywood Planning Scheme (April 2014) and will facilitate, and certainly will not preclude, the provision of the complete junction in due course."

In passing it should be noted that no expert evidence adduced by or on behalf of the respondent contradicts the opinion and averment in the last sentence of para. 22 of Mr Phillip's affidavit.

52. In a replying affidavit sworn by Ms Henchy on 16th November, 2015, she raises some doubt as to what was said at the meeting on 22nd April, 2015:-

> "31. With regard to the third reason for refusal, the applicant asserts that as of April 2015, the Council advised that the design for the signalised junction at point Q, where the Druid's Glen Road would connect with the N11, would be available during the five week consultation period following the planning application being lodged, but that same never materialised. I am not aware of any such advice having been given, and given the centrality of the National Roads Authority (the "NRA") in the process, I cannot see how any advice to this effect could have been realistically given. However, the very fact that the applicant sought a letter of consent is an acknowledgment by it that the design of the junction would be crucial in order to facilitate the development proposed under the planning application. This is underscored by the fact that the Construction Management Plan submitted as part of the planning application indicates that the N11 junction access at point Q would be required for construction access to the proposed residential development."

53. Two things are notable about this averment. First, although there are later averments in Ms Henchy's affidavit denying in more general terms that the Council prejudged the planning application because of concerns that about creating a "ransom strip", Ms Henchy does not deny expressing a concern at the meeting on 22nd April, 2015, that the applicant might not complete the road infrastructure up to their site boundary "and as such would create a physical ransom strip".

54. Secondly, Ms Henchy's averment falls short of denying that advice was given that the Atkins Design Report would be available during the five week observation period, but confines herself to saying that she was not aware that such advice had been given, or how it could realistically have been given.

55. In a further affidavit sworn by Mr Phillips on 4th December, 2015, he expressly addresses this second point in two places. In para. 8 he states:-

> "…With regard to the signalised junction at Q, the applicant was advised at a meeting held on the 22nd April 2015 with Council officials, and which is not a meeting designated by Ms Henchy as a pre-planning consultation pursuant to s. 247(3) of the Act of 2000, that the design would be made available during the 5 week period following the lodgement of the planning application. However, the design of the signalised junction at Q has still not been finalised by the Council and Ms Henchy provides no indication as to when this will be done."

At para. 11 he avers:-

> "Ms Henchy at paragraph 31 of her Affidavit avers that she was not aware that the applicant was advised that the design for the signalised junction at point Q would be available during the 5 week period after the planning application was lodged. I maintain that such advice was furnished to the applicant by the Council officials."

56. It was not contested that those present at the meeting of 22nd April, 2015, included Ms Henchy, Ms Poole, Mr O'Flynn and Mr Phillips. No affidavit contesting the averments of Messrs. O'Flynn and Phillips was sworn by Ms Poole, and Ms Henchy did not swear any subsequent affidavit further doubting or contesting the recollection of the meeting related by Messrs O'Flynn and Phillips.

57. Counsel for the respondent referred the court to the note on the Construction Management Plan referenced by Ms Henchy in para. 31 of her affidavit. This is part of the planning application and states:-

> "Works to the N11 outside the site to facilitate the junction will be undertaken by Dún Laoghaire-Rathdown County Council as Roads' Authority".

The note appears on a Site Plan showing the residential units at Beach Park in the context of "Development Phasing". It is repeated on other plans in the same section of the planning application. However, this merely acknowledges the fact that the applicant would require access at junction Q for construction purposes and as such has no bearing, direct or indirect, on what was said at the meeting of 22nd April, 2015.

58. Counsel also relied upon the absence of any mention of the five week commitment in a letter which Mr Phillips sent to Mr Jerry D'Arcy, senior executive engineer in the Council on 20th July, 2015, in which he responded to a letter from the NRA dated 8th July, 2015, suggesting, *inter alia*, that the proposed development was "premature". In this letter, Mr Phillips exhorted Mr D'Arcy to

"expedite discussions with the NRA to ensure that the Application in front of the Planning Authority is not prejudice[d] by the lack of an agreement between the Local Authority and the NRA, which is beyond the control of applicant."

59. While Mr Phillips might have referred to the five week commitment on 22nd April, 2015, in this letter, it was not essential that he do so, and not mentioning it might have been the diplomatic option. I cannot and do not draw an inference from this submission that no such commitment was giving at that meeting.

60. I am satisfied that, if the respondent was serious about contesting the averments on behalf of the applicant as to what was said on the Council's behalf at the meeting on 22nd April, 2015, it would have filed further replying affidavits and/or applied for liberty to cross examine Messrs O'Flynn and Phillips on their affidavits, neither of which happened. I must therefore accept as factually correct the accounts of this meeting given by Messrs O'Flynn and Phillips.

61. Some confirmation of the Council's attitude emerges from the following averment in Ms Henchy's affidavit:-

> "21. Whilst, ideally, the Council may have indicated a preference for a single planning application in respect of the Druid's Glen Road between points Q-P3, it is quite clearly the case of the Council could have power to mandate same, as acknowledge in my email to Mr Phillips, amongst others, on 9th January 2015."

62. That email records the Council having met the three landowners whose land would be affected by the Druid's Glen Road between point Q-P3 and in it Ms Henchy states:-

> "At these meetings I have advised that the DLR's preferred approach would be for one planning application for this section of the road, I do appreciate this is a decision for your client."

She went on to state that the DLR had had two meetings with the NRA to progress the access route, that it had been agreed on 23rd December, 2014, that further modelling was not required, and "that we could go to design stage, agreeing the details of the junction of the N11 with them". She noted that the Council was currently (January, 2015) drafting a brief to engage consultants to advise on:-

> "- detailed design of the junction
>
> - the vertical and horizontal alignment of the road from Q-P3 having regard to the full length of the Druid's Glen Road
>
> - and screening"

She went on to state:-

> "At this stage it is DLR's intent to give the design work to the landowners to incorporate in a planning application. Without prejudice to any application it is likely that DLR would condition that the work on the N11 be carried out by the Local Authority."

63. As no letter of consent to the applicant applying for planning permission in respect of junction Q was forthcoming, and given that the horizontal and vertical alignment of the Druid's Glen Road prepared by Muirs accorded with the Atkins proposals, the applicant decided to lodge its planning application, notwithstanding that the Atkins Design Report in respect of junction Q was not to hand.

The Planning Application

64. The planning application was submitted to the Council on 8th June, 2015. It seeks permission for the development of a residential scheme comprising one hundred and sixty four residential units at "Beech Park" and identifies the site as including 0.7892 hectares forming part of Development Area 5 in the Planning Scheme. It states:-

> "The development will also consist of the construction of part of the Planning Scheme's Druid's Glen Road (also known as P to Q) to its connection with the western boundary of the subject site for a distance of approximately 158m from its connection to the N11 (and all associated development and infrastructure works).
>
> This includes the provision of up to 30m of the Druid's Glen Road bridge, comprising one complete and 2 No. partial bridge abutments, to the western boundary of the subject site…"

Permission was also sought for the demolition of eleven existing residential units which currently adjoin and directly access the N11 and in place of which the one hundred and sixty four new units were to be constructed.

65. The application did not provide for works to the N11 external to the planning application site to facilitate the construction of junction Q. This was because the Council had not provided a letter of consent. I also accept that Atkins Consultants had not finalised the design for the signalised junction at that point in time.

66. Accompanying the application are Muir's detailed drawings in relation to the proposed Druid's Glen Road and bridge, adopting the horizontal and vertical alignment that tallies with Atkins proposals. The design proposals for the Druid's Glen bridge are more detailed than previously furnished to the Roads Department engineers and include proposed northern and southern elevations and incorporate the entire bridge (although making it clear that permission is only sought for part of the bridge).

67. Drawing D1741-SK-002 shows "Plan View – proposed N11 junction (initial outlay)" and a further drawing on that page of "Typical cross section through Druid's Glen Road" demonstrates the carriageway, footpath and cycle track pavement details on the Druid's Glen Road. This corresponds with a section drawing in Chapter 4 of the Planning Scheme, and notes "carriageway, footpath and cycle track pavement details to be agreed with the Roads Authority".

68. The planning application includes an Engineering Report prepared by Muirs, and specifically commits to the construction of the part of the Druid's Glen Road situated on the applicant's lands (see section 2.0). The last paragraph in that section reads:-

> "Works to the N11 (external to the Application site) to facilitate the construction of the junction with the Druid's Glen Road will be undertaken by Dún Laoghaire-Rathdown County Council in its capacity as Roads' Authority for the area".

69. At para. 3.2 the Engineering Report deals in more detail with "vehicular access", indicating that this will be via the proposed

Druid's Glen Road and notes that the proposed development of the Druid's Glen Road "…facilitates an at-grade signalised junction with the N11". It also notes that the horizontal and vertical alignments shown on the submitted drawings were "…directly based on an alignments developed by Atkins on behalf of Dún Laoghaire-Rathdown County Council Road Projects Office in consultation with the applicant and the relevant adjoining landowners." Details are then given at para. 3.3 of the proposed "spur" access road linking the residential part of the development with the Druid's Glen Road.

70. In the Planning and Environmental Report accompanying the application, and prepared by Tom Phillips Associates, at the end of s. 1.2 it is stated:-

> "In particular, the proposed scheme will unlock the Planning Scheme lands as it includes the development of the first section of the "Q-P" road planned for in the *Planning Scheme*, which will connect the Cherrywood lands to the N11".

Counsel for the respondent in argument accepted that this assertion is correct.

71. In the Planning and Environment Report of Tom Phillips Associates accompanying the application, section 1.6.1 addresses as a key issue the Druid's Glen Road:-

> "The roadway has been designed in accordance with the Cherrywood Planning Scheme. We highlight that the horizontal alignment shown on the enclosed drawings is based on an alignment developed by Atkins…The completion of the Road beyond the applicant's land holding will be implemented once permission has been secured and implemented by the developers of the adjoining land holding(s)…Works to the N11 outside the site boundary will be undertaken by Dún Laoghaire-Rathdown County Council in its capacity as Roads' Authority for the area."

72. At para. 1.6.3 it is stated that "no environmental impact assessment [is] required" and that this was based this on legal advice – essentially to the effect that the Druid's Glen Road does not constitute a motorway or express road, or a "new road of four or more lanes". This was not the subject of any dispute.

73. Further reference will be made to the content of the report the Planning and Environmental Report prepared by Tom Phillips Associates when considering reason (5) for the refusal of planning permission.

74. The planning application was lodged at a time when *final* vertical and horizontal alignment for the proposed Druid's Glen Road between point Q-P3 and the detailed design for the signalised junction at Q had not been obtained by the respondent from Atkins Consultants. The applicant accepts this to be the case but asserts that neither of these were required as they were not stipulated in or contemplated by the Planning Scheme.

75. The NRA lodged a written observation to the planning application. This is dated 8th July, 2015 and stated:-

> "The Authority has examined the above application and considers that it is at variance with official policy in relation to control of development on/affecting national roads, as outlined in the DoECLG Special Planning and National Roads Guidelines for Planning Authorities (2012), as the proposed development by itself, or by the precedent which you grant of permission for it would set, would adversely affect the operation and safety of the national road network for the following reason(s):-
>
> • Official policy in relation to development involving access to national roads and development along such roads is set out in the DoECLG Special Planning and National Roads Guidelines for Planning Authorities (January, 2012). The proposal, if approved, would create an adverse impact on the national road and would, in the Authoritie's opinion, be at variance with the foregoing national policy in relation to control of frontage development on national roads.
>
> • The proposed development could prejudice plans for the design and agreement of the required junction upgrade and hence the application is premature pending the determination of this scheme. A grant of permission, in this instance, is considered to be at variance with the provisions of the DoECLG Special Planning and National Roads Guidelines for Planning Authorities (January, 2012), section 2.9 refers."

76. This is the observation which prompted Mr Phillips to write on 20th July, 2012 to Mr Gerry D'Arcy, senior executive engineer with Dún Laoghaire-Rathdown County Council. From that letter it appears that Mr Phillips, on receipt of the observation, contacted the NRA and verbally expressed concern that the application could be deemed premature because:-

> "The issue of a junction with the N11 was discussed at some length at the detailed Oral Hearing held by An Bord Pleanála in respect of the Cherrywood Strategic Development Zone (SDZ) in March 2013.
>
> I conveyed to Mr McCormack my concern that the NRA letter made no reference to this junction being critical to the instigation and success of the Cherrywood SDZ. Mr McCormack assured me that the NRA was in active discussions with the Roads Department of DLRCC, and stated that the NRA was very open to consultation with the Roads Authority to ensure finalisation of design of the junction."

77. A submission was also made by John Spain Associates on behalf of Benreef whose lands will be traversed by the western end of the Druid's Glen. Having referred to Table 7.1 in the Planning Scheme it was submitted:-

> "2.12 It is stated that prior to any permission being granted in the Development Area 5 that permission must be in place for the Druid's Glen Road from Q to P3. The implication of this is that Druid's Glen Road from Q to P3 must be delivered in its entirety, in one application. This condition is not fulfilled and will not be fulfilled by this application. Compliance with this requirement of the Planning Scheme can only be achieved if a single (or a series of concurrent applications) is granted for the entire length of road to Q to P3.
>
> 2.13 Our client has serious concerns that the partial delivery of the road in the manner proposed in the current application which would result in piecemeal development of road Q to P3 and could create a ransom strip, as access to the N11 from our client's lands is dependent on the completion of the Q to P3 route."

More concise observations from Tudor Homes Ltd along similar lines was received by the respondent on 10th July, 2015.

78. Benreef's submission included a letter dated 26th June, 2016, from Waterman Moylan Engineering Consultants supporting their

case. This mentions the meetings with the Council's representatives and Atkins in relation to the Druid's Glen Road Design and notes :-

> "Arising from the meetings, the preliminary design for Road Q-P3, both horizontal and vertical was substantially complete in May 2015 save for the final horizontal alignment locally in the area P3."

This is significant as P3 is some distance from the applicant's lands. It shows that, by the time the planning application was lodged, the horizontal and vertical alignment of the proposed Druid's Glen Road on the applicant's lands was complete from the perspective of Atkins and the Council's road officials.

79. Other submissions were received, including one from Inland Fisheries Ireland, and from the Council's Parks & Landscape Services Department, which will be referred to later in the context of reason (5).

The Planner's Report
80. A detailed Planning Report headed "Record of Executive Business Chief Executive's Orders" was prepared in respect of the applicant's planning application by Case Planner, Ms Siobhan McManus, and signed by her on 29th July, 2015. This document on p. 32 contains her recommendation that a decision to refuse permission be made, for five reasons – the same five reasons for which permission was in fact refused. This recommendation is endorsed on the second last page of the report by two Senior Executive Planners. On the final page it is signed and approved by Ms Henchy, under powers duly delegated to her as the appropriate Council official.

81. Remarkably, under the heading "pre-planning" pp. 3-7 refer to the pre-planning consultations, and in respect of each such consultation sets out a full set of minutes or records of the meeting. Passing on from these minutes the Report then refers to reports/submissions from Council departments and prescribed bodies and refers, *inter alia*, to those from Inland Fisheries Ireland, the Transportation Planning Department of the Council, the NRA (previously referred to) and the Parks and Landscape Services Department of the Council.

82. At p.13 the Planning Assessment commences with the introduction:-

> "Given that the application falls under two Plans (dlr County Development Plan 2010-2016 and the Cherrywood Planning Scheme 2014) it is considered appropriate to divide the assessment into two separate sections."

Then dealing first with the assessment under the Planning Scheme and concerning sequencing it is stated:-

> "1. According with the ordering of development:
>
> > The overall Plan area is divided into 8 Development Areas (see Chapter 6). Section 7.2 and Table 7.2.1 of the Planning Scheme relates to "Sequence of Development", and states that "the sequence of development is ordered so that development will be confined to identified Development Areas at all times". The First Growth Area is identified as Development Areas 2, 4, 5 and 6A.
>
> The portion of the site which lies within the Cherrywood Planning Scheme is within the First Growth Area and therefore accords with the ordering of development as set out within the Scheme."

83. On p. 14 under the heading "4. According with the Physical Infrastructure and Green Infrastructure requirements" in reference to the planning scheme, the report notes the importance of the Druid's Glen Road Q-P3, and that it is to provide essential access into the north-east area of Cherrywood and promote use of the N11 to the maximum extent while protecting the village of Cabinteely. It quotes s. 7.2 of the Planning Scheme stating the need "[t]o allow flexibility the plan is not prescriptive with regard to the timing of the delivery of infrastructure" but notes that "specific pieces of road infrastructure, schools and open space that require certainty on the timing of their delivery to ensure the orderly progression of the Development Areas". It is then stated:–

> "The scheme as proposed is not considered to be consistent with the Planning Scheme as the junction is a critical aspect of road Q to P3. To permit the road without the junction either designed and or approval in place, *is premature*. It is also considered that the statement on Drawing no. D1741-SK-004 Rev C regarding the future connection to the proposed road 'the extent of the Druid's Glen Road (Road Q-P) westward will be implemented once permission has been secured and implemented by the developers of the adjoining landholding'. This does not appear to be consistent with the sequencing of development outlined in Chapter 7 as set out in the paragraph above."
>
> [Emphasis added].

Thus the planner refers to prematurity. The planner does not explain why the annotations on the map mentioned are inconsistent.

84. It is expressly evident from this that the planner's interpretation of the Planning Scheme was first that junction Q had to be designed or approval in place before permission could be granted for the Druid's Glen Road. Secondly it is at least implicit that the planner's view was that permission had to be obtained by the two landowners holding land to the west of the applicant and over which the Druid's Glen Road is to traverse at the same time, or perhaps before, permission has been secured by the applicant.

85. The planner then notes the NRA submission that the application is at variance with official policy on the development on or affecting national roads and that "the proposed development could prejudice plans for the design and agreement of the required junction upgrade and hence the application is premature pending the determination of this scheme". The planner comments: "[g]iven the role of the NRA in relation to National Roads, it is considered that the proposal is not acceptable for the reasons stated within their report."

86. The planner dealt with green space issues and water courses that will be referred to later in this judgment, as they are relevant to reason (5).

87. At p. 16 the planner under the heading "5. Overall Design Detail" refers to the assessment by the Transportation Planning Section of the Council, and quotes its submission over the next one and a half pages. The most relevant quotes are as follows:-

> "Druid's Glen Road (Q-P3)

> The proposed development site is stated to include 0.7892ha of Development Area 5 which is within the First Growth Area of the Cherrywood Planning Scheme. As stated in section 7.2 of the Planning Scheme and Table 7.1 'Roads Infrastructure for First Growth Area' the Druid's Glen Road Q-P3 Infrastructure requires 'Permission in Place' prior to any permission being granted Development Area 5. The proposed development application site and land within the applicant's control only includes part of the Planning Scheme's Druid's Glen Road Q-P3…
>
> The applicant's proposal to provide up to 30m of the Druid's Glen Road Bridge comprising one bridge abutment and 2 incomplete bridge piers (abutments) for the proposed 3 span Druid's Glen Road bridge is unsatisfactory…
>
> The development as proposed does not satisfactorily facilitate provision of Druid's Glen Road Q-P3 as there is no certainty or commitment to any agreements with adjoining landowners on implementation, maintenance, security and timing of delivery of the full bridge structure…
>
> N11 Access
>
> As stated by the applicant the proposed development includes construction of part of the Druid's Glen Road to its connection with the western boundary of the site for a distance of approximately 158m from its connection to the N11. Works to the N11 (external to the Application site) to facilitate construction of the signalised junction at point Q are to be undertaken by DLRCC in its capacity as Roads Authority for the area. As yet there is no approved design for the N11 signalised junction at point Q. DLRCC agreement of road junction design with the NRA is unlikely to be achieved prior to the end of July 2015. As the N11 junction access is not included with this application and an approved design is not ready for Part 8 procedures or inclusion within a planning application the proposed residential development is premature as it is dependent on the future of Cherrywood Planning Scheme N11 (point Q) access for which permission is not in place…
>
> The principle of future access to this proposed residential development site from the Cherrywood Planning Scheme Druid's Glen Road is accepted by DLRCC however it is premature until permission is in place for the Druid's Glen Road Q-P3 50km/h Level 2 Road including the signalised junction Q at the N11. This planning scheme N11 junction access is required for construction access to this proposed development site as confirmed within the applicant's submitted Construction Management Plan."

88. It will be noted that the junction Q design was still not ready notwithstanding that Transport's report is dated 23rd July, over five weeks after the lodgement of the planning application. It is also evident that their view was that without that approved design the application was premature, and it is expressly their view that the application is "premature" until permission is in place for the entire Druid's Glen Road. The planner simply concludes this section with the comment:

> "It is clear from the above report that the overall detail design is not consistent with the Cherrywood Planning Scheme"

89. Before passing from this it may be noted that reasons (3) and (4) do not mention prematurity at all. The applicant also argued that these passages in Transport's report are objectionable in revealing an improper purpose in the refusal of permission under reasons (3) and (4) because they effectively require the applicant to agree in advance in relation to development on property outside their control and ownership, or submit a joint application, and that this amounts to an improper use of the planning process to force the applicant and other landowners into making joint applications, or a single coordinated application. They also asserted that there was no precondition in the Planning Scheme in relation to the design or delivery of junction Q, or any part of the Druid's Glen Road that would justify the refusal of planning permission or render the application inconsistent with the Planning Scheme.

90. The planners report contains the following overall conclusion on page 32:-

> "It is noted above that a number of pre-planning meetings were held in relation to this site over a period of time. The issues raised within the assessment of the current application were raised at pre-planning stage. The design of the proposed development has remained significantly unchanged following these meetings and the issues raised have not been satisfactorily addressed.
>
> The proposed scheme is not acceptable as currently proposed in terms of flooding issues, consistency with the Cherrywood Planning Scheme, housing design, layout and sitting, open spaces etc. It is noted that the application site has significant challenges and constraints in terms of development but it is considered that these could be overcome should the issues raised be addressed in a revised design. It is considered that a more site specific response should be proposed in terms of design which includes the protection of flood zones as noted above.
>
> The application was submitted as one but was required to be assessed having regard to both the Cherrywood Planning Scheme and the County Development Plan. It is considered that the design and layout does not accord with the County Development Plan and that the element of the road Q-P3 is not consistent with the Planning Scheme.
>
> The applicant is advised to continue discussion with the Local Authority in relation to the issues raised and the design and implementation of the Druid's Glen Road Q-P3."

91. Immediately following this is the planner's recommendation that permission be refused for the five reasons for which it was in fact refused. This was approved by Ms Henchy as the lawfully empowered officer of the respondent on 31st July, 2015, and Notification of Decision to Refuse Permission was formally made on that date.

First Issue: Construing the Planning Scheme

92. The central issue of substance that requires to be addressed concerns reasons (3) and (4), and is whether the respondent was correct in its interpretation of the Planning Scheme, or otherwise entitled to come to the interpretation that it did, in refusing permission. This first raises a legal issue as to the meaning and effect of s. 170(2) and who is to interpret the Planning Scheme, the planning authority or the court.

The Legal Issue - Section 170(2) and the role of the court in the construction of "Planning Schemes" in respect of SDZs

93. Counsel for the applicant contended first that construction of the Planning Scheme is a matter of law for the court to determine and that it is not bound by the interpretation or judgment of the Planning Scheme by the local authority. Secondly, it was submitted that the court should approach interpretation as it would the construction of a development plan.

94. As Counsel pointed out, section 169(9) of the Act of 2000, provides that:-

> "A planning scheme made under this section shall be deemed to form part of any development plan in force in the area of the scheme until the scheme is revoked, and any contrary provisions of the development plan shall be superseded."

95. In the absence of any authority of the Superior Courts in relation to how a Planning Scheme should be interpreted, it was argued that, by analogy, the case law relating to the interpretation of a development plan should be applied to the interpretation of a Planning Scheme. Counsel thus relied on the seminal case of *Attorney General (McGarry) v Sligo County Council* [1991] 1 IR 99 in which McCarthy J stated in relation to development plans:-

> "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 will 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"

96. It was argued that the interpretation of a development plan, and by extension a Planning Scheme, is a matter of law over which the courts have exclusive jurisdiction. Reliance was placed on the following passage from *Tennyson v Corporation of Dún Laoghaire* [1991] 2 IR 527, where Barr J stated at p. 534:-

> "Where a decision is made by a planning authority on an application made to it by a developer under s. 26 of the Act of 1963 for permission to proceed with a proposed development, it may be open to challenge on two broad grounds. First, on purely planning criteria (as, for example, a contention that the decision of the authority to exclude certain units from a proposed development was erroneous in that it was unnecessary and did not accord with good planning practice) and, secondly, that the decision is *ultra vires* the powers of the planning authority. The latter category of dispute includes issues relating to the meaning of the development plan relating to the particular application. The Oireachtas has provided in the planning code a forum for the adjudication of appeals from decisions of planning authorities within the first category i.e., those relating to planning matters *per se.* Such appeals are heard and determined by An Bord Pleanála which is a tribunal having the benefit of special expertise in that area. The court is not an appropriate body to adjudicate on such matters and in my view it ought not to interfere in disputes relating to purely planning matters. *However, where the dispute raises an issue regarding a matter of law such as the interpretation of the wording of a development plan in the light of relevant statutory provisions and the primary objective of the document, then these are matters over which the court has exclusive jurisdiction. An Bord Pleanála has no authority to resolve disputes on matters of law."* [Emphasis added].

97. Counsel therefore emphasised that this is not a case in which the court should apply the standard of review in *O'Keeffe v An Bord Pleanála* [1993] 1 IR 39 *i.e.* that the planning authority's decision could only be impugned if it "plainly and unambiguously flies in the face of fundamental reason and common sense". Rather, it is a matter for the court to construe the meaning of the Planning Scheme.

98. Counsel placed particular reliance on the decision of Ms Justice Finlay Geoghegan in *North Wall Property Holding Company Ltd and Ors v Dublin Docklands Development Authority and Ors* [2008] IEHC 305 where the court considered a planning scheme with similarities to the present one but arising under different legislation. As there is no jurisprudence on s. 170 of the Act of 2000 it is appropriate to compare the facts and statutory framework in that case in some detail.

99. In those proceedings the applicants sought an order of certiorari concerning a decision of the Dublin Docklands Developments Authority ("DDDA") to grant a certificate that a proposed development was "consistent" with the Docklands North Lotts Planning Scheme, the effect of which would have been that the proposed development was exempt from the requirement of planning permission. This necessitated consideration by the court of the statutory framework under the DDDA Act 1997 which established the DDDA whose duties included securing "social and economic regeneration of the Dublin Docklands area" (section 18(1)(a)(i)). For this purpose the DDDA was conferred with functions in relation to the Dublin Docklands area which included, under s. 18(1)(b):-

> "(i) to prepare a master plan for the regeneration of that Area in accordance with section 24, and to promote the implementation of the master plan;
>
> (ii) to prepare, where appropriate, planning schemes in accordance with section 25."

100. The Master Plan was duly prepared in accordance with s. 24 in written form and with plans setting out the overall objectives for the social and economic regeneration of the area on a sustainable basis in consultation with interested persons, and following the publication of a draft master plan. Thereafter Dublin Corporation, as the local planning authority, was advised under s. 24(5) to consider the making of a development plan "consistent with the master plan", or to amend the County Borough Development Plan "to secure consistency between that plan and the master plan". It was further provided that Dublin Corporation and An Bord Pleanála should, in deciding any application or determining any appeal for planning permission in respect of development in the Dublin Docklands area, "consider the relevant provisions of the master plan". Section 25 then set out the statutory scheme for the preparation of a Planning Scheme. Again this was required to consist of a written statement and a plan indicating the manner in which the area should be developed, the nature and extent of the proposed development, the proposed distribution and location of a uses, proposals in relation to the overall design of the proposed development, "proposals relating to transportation, including the roads layout, the provision of parking spaces and traffic management" (s. 25(2)(d)) and proposals in relation to the development of amenities. In preparing the planning scheme the DDDA was required to consult with Dublin Corporation and have regard to its development plan, and to make arrangements for the making of submissions by interested persons. The planning scheme had to be submitted by the DDDA to the Minister for approval. The Minister in turn had to consult with the Minister for Finance, and had one month within which to modify the planning scheme in such manner and to such extent as he thought proper and could approve the planning scheme as presented or as modified (s. 25(4) and (5)). Notice of approval by the Minister had to be published in *Iris Oifigiúil*. Subsection 7(a) then provided:-

> "(7)(a) Subject to paragraph (b) and (c), each of the following shall be exempted development for the purposes of the Act of 1963 –
>
> > (i) in an area in respect of which a planning scheme has been prepared and approved under this section, the carrying out by the Authority of any development in the area which is consistent with that planning scheme;
> >
> > (ii) in an area in respect of which a planning scheme has been prepared and approved under this section, the carrying out of any development in the area by a person other than the Authority which is certified by the Authority to be consistent with that planning scheme; provided that a certificate under this paragraph may contain such

conditions in relation to the carrying out of the development as the Authority considers appropriate."

101. In considering this framework Finlay Geoghegan J noted that there was a similar consultation procedure provided for in the DDDA Act for making a Master Plan, and a planning scheme, but the scheme had to be submitted to the Minister and Dublin Corporation, and obtain final approval by the Minister with or without modifications. At para. 21 she noted that:-

> "The potential impact of a Planning Scheme on the general statutory framework for planning and development is, as submitted by the parties, radical and extensive."

102. She found it surprising and regrettable that the Act of 1997 was silent as to how the DDDA was to exercise the certification function under s. 25(7)(ii), to issue certificates to persons that the proposed development is consistent with the relevant planning scheme. From para. 53 on in the decision Finlay Geoghegan J considered the nature of the s. 25 certificate decision. She noted extensive submissions in relation to the analogies and differences between the roll and function or purpose of the DDDA in taking such a decision, and a number of different decisions which may be taken by a Planning Authority under the Planning and Development Acts and judicial decisions relating to those powers. She commented at paragraph 54:-

> "Whilst helpful, they are not determinative. I have concluded that the nature of the function being exercised by the respondent in taking this decision, does not, unfortunately, fall neatly into any of the types of decisions which are taken by planning authorities under the Planning and Development Acts."

103. She went on to determine that the decision to grant or refuse a certificate of consistency was "an adjudicative function" distinct from the more general development functions of the respondent. She commented at para. 56:-

> "In relation to the procedure required, the respondent and notice party laid emphasis on the adjudicative nature of the decision making function and relied by analogy on the similar function now given a planning authority by s. 5 of the Planning and Development Act 2000, to determine a question as to what, in any particular case, is or is not exempted development within the meaning of the Act of 2000. I accept that there are similarities, but there also appear to me to be significant distinctions. Exempted development, for the purpose of the Planning and Development Acts, is defined either in the Act of 2000, or by regulations made by the Minister. Where a planning authority is required to determine what in any particular case is or is not exempted development, its function is confined to making a declaration on that question. Whilst the respondent, under the Act of 1997, has to determine whether or not the carrying out of a proposed development, is consistent with the relevant planning scheme, it is also given by reason of s. 25(7)(a)(ii) and (c) a power to include in the certificate conditions in relation to the carrying out of the development. The decision, therefore, goes beyond what is required of a planning authority in determining an application for a declaration under section 5 of the Act of 2000."

104. The learned judge then noted that the North Lotts Planning Scheme was not in all its provisions "certain and prescriptive", a further point of distinction from what does or does not constitute exempted development. Thus, she noted that it was prescriptive as to the maximum building heights but

> "… in relation to the network of new routes and spaces, [it is] not prescriptive, either as to the nature or location of the route. It is expressly stated, 'these routes can be pedestrian or vehicular to suit internal access and design'. It also states, 'these routes and spaces are not prescriptive in location'…"

105. In addressing the standard according to which the court should review the DDDA decision that the proposed development was consistent with the relevant planning scheme she noted at para. 65:-

> "The applicants submit that the North Lotts Planning Scheme is the blueprint for the development in the North Lotts Area. This is not in dispute. Further, that it is, in its nature, similar to a development plan under the Planning and Development Acts, albeit far more detailed in its terms than a normal development plan. They submit that it follows from this that the North Lotts Planning Scheme should be regarded as an "environmental contract" similar to a development plan, as described by McCarthy J. in *Attorney General (McGarry) v Sligo County Council* [1991] 1 IR 99."

106. She also noted their submission that the construction of the planning scheme "is a matter of law which should be determined by the courts in accordance with the decision of Barr J in *Tennyson*, and that the court should not defer to the [DDDA] in accordance with the principles in *O'Keeffe v An Bord Pleanála* [1993] 1 IR 39" – as had been submitted by counsel for the DDDA, who also submitted that the proper analogy was not with the development plan, but rather with a planning permission.

107. Finlay Geoghegan J stated:-

> "67. Having considered each of the decisions referred to above, I have concluded that, in substance, the submissions of the applicants appear correct. Whilst I think there are distinctions between a development plan and a planning scheme drawn up under s. 25 of the Act of 1997, it appears to me that a planning scheme is much closer to a development plan than to a planning permission. The Planning Scheme is drawn up by the respondent after public consultation, but then not ultimately determined by the respondent. It is determined by the Minister, with or without modification, following a further consultation procedure. It is, therefore, not the respondent's document, as would be a planning permission.
>
> 68. It also appears to me to have some of the hallmarks of the type of environmental contract referred to by McCarthy J. in *the Attorney General (McGarry) v. Sligo County Council* [1991] 1 I.R. 99. It is in the nature of a contract between the respondent and if not the public at large, at least the property owners within the area to which the planning scheme applies. Those property owners are entitled to rely on the fact that any development undertaken by the respondent in that area, without applying for planning permission, will be consistent with the Planning Scheme, and that the respondent will only grant a certificate to any other person pursuant to s. 25 if such development is consistent with the Planning Scheme. Each property owner is entitled to rely on the fact that any other property owner within the area will be only able to carry out development in accordance with this fast track method if it is consistent with the Planning Scheme.
>
> 69. Further, it appears to me that there is a close analogy between the decision impliedly entrusted to the respondent by the Oireachtas, having regard to the terms of s. 25, sub-section 7, and a determination by a planning authority that a grant of planning permission is not a material contravention of a development plan. This latter decision and the distinction of the appropriate nature of the review by the Courts of planning decisions which are a matter of planning judgment were described by Barr J. in *Tennyson* [the passage from Barr J. at p. 534 referred to previously was then quoted]…

> 70. Similarly, it appears to me that a decision by the respondent to grant a s. 25 certificate that the carrying out of a development is consistent with the North Lotts Planning Scheme, and to impose conditions in relation to the carrying out of the development, may be challenged on the basis either that it is *ultra vires* the powers of the respondent as, on the proper meaning of the Planning Scheme, the proposed development is not consistent with the Scheme or the conditions imposed are *ultra vires* or that the conditions while *ultra vires* are unreasonable in the legal sense. This latter matter, having regard, for example, to the terms of s. 25(7)(c)(iii), appears to be a matter which the Oireachtas has exclusively entrusted to the respondent and which would be subject to the *O'Keeffe* principles.
>
> 71. However, by contrast, it does not appear to me that the Court could construe s. 25(7)(a) as demonstrating an intention to entrust exclusively to the respondent the determination of whether or not a development is, or is not, consistent with the Planning Scheme. That sub-section provides that the carrying out of certain development will be exempted development. The first category is the carrying out by the respondent itself of any development in the area 'which is consistent with that planning scheme'. It could not be the intention of the Oireachtas that if a genuine dispute arose between an interested person, such as a landowner in the area, and the respondent as to whether or not a development which the respondent itself proposed to carry out was, or was not, consistent with the relevant planning scheme approved by the Minister pursuant to s. 25(5), that it would be a matter for determination by the respondent itself, subject only to review by the Courts in accordance with the *O'Keeffe* principles. Rather, it appears to me that such person is entitled to have the dispute as to the proper meaning of the planning scheme approved by the Minister under s. 25, which is in the nature of an environmental contract upon which they are entitled to rely, determined by the Court in accordance with the principles set out by Barr J. in *Tennyson*.
>
> 72. Further, the essence of the O'Keeffe principles are that the courts should not interfere with decisions of planning authorities on matters which the Oireachtas has clearly entrusted to those specialised bodies, and which are primarily a question of planning judgment, unless such decisions are unreasonable or irrational in the legal sense. The construction of what a planning scheme properly means has not been so entrusted to the respondent and it is not exercising such a planning judgment in determining what the planning scheme, as approved by the Minister, properly means. Further, in taking a decision on consistency on an application for a s.25 certificate, it is not exercising a development function entrusted to it by s. 18, but rather, an adjudicative function. Accordingly, I have concluded the Court should construe the North Lotts Planning Scheme and determine the dispute as to whether or not certain factually agreed aspects of the notice party's proposed development are or are not consistent with the Planning Scheme."

108. Counsel for the applicants contended that this Court should follow the approach taken by Finlay Geoghegan J in *North Wall* having regard to the similarities between the adjudicative functions of the DDDA under s. 25(7), and the adjudicative function of the respondent in this case under s. 170 of the 2000 Act.

109. Counsel for the respondents submitted that s. 170(2) is significantly different because it allows the planning authority greater subjectivity in reaching a decision as to whether or not an application for planning permission is "consistent" with a planning scheme. The planning authority must be "satisfied" that the development is consistent, and no permission may be granted where the proposed development "would not be consistent". In construing subs. (2) and the use of the word "satisfied" it was urged that the court should have regard to case law construing the use by the Oireachtas of terms such as "opinion" and "considers" in legislation conferring decision making responsibilities on a particular body. In *Cork Institute of Technology v An Bord Pleanála* [2013] IEHC 3 Hogan J was concerned with a decision of Cork City Council approved by An Bord Pleanála under Article 157 of the Planning and Development Regulations 2001 under which a fee for making a planning application is not payable where "in the opinion of the planning authority" the development proposed is to be carried out by or on behalf of a voluntary organisation, and which "in the opinion of the planning authority" is designed or intended for use for social, recreational, educational or religious purposes. At para. 23 of his judgment Hogan J stated:-

> "While these words involve some degree of subjective appraisal by the administrative decision maker, it has been nonetheless established that the decision maker must act *bona fide* and in a manner which is not unreasonable and factually sustainable: see,e.g., *The State (Lynch) v. Cooney* [1982] I.R. 337 and *Kiberd v. Hamilton* [1992] 2 I.R. 257. It may also be observed in passing that these principles have since been emphatically re-stated in the judgment of Fennelly J. for the Supreme Court in *Mallak v. Minister for Justice and Equality* [2012] IESC 59, albeit in a judgment whose delivery post-dated the hearing of the present case."

110. It must be observed that Hogan J's decision gives limited support to counsel's proposition in that it refers to "some degree of subjective appraisal by the administrative decision maker". Further in the ensuing paragraph (24) "[t]his statutory formula also presupposes that the decision-maker has, however, first correctly defined the relevant terms". The court appears to be saying that, before the decision maker, be it the local planning authority or An Bord Pleanála, reaches the point where it can form an opinion, it must first interpret or "correctly define" the relevant terms of the provision. Hogan J went on to consider the object and purpose of Article 157(1), and held that "the provision of education – not least in the field of science, technology and innovation – is of the first public importance" to that provision. He concluded at para. 39:-

> "Inasmuch, therefore, as the Board concluded to the contrary, it proceeded from an incorrect definition and understanding of the meaning of the critical term 'voluntary organisation' as this term is used in the context of Article 157(1). This conclusion was absolutely central to the Board's decision. It follows, therefore, that the Board's decision of 21st June 2011 cannot stand as a matter of law and I will accordingly grant an order of certiorari quashing this decision."

111. *Mallak v Minister for Justice, Equality and Law Reform* [2012] IESC 59 concerned an applicant for naturalisation whose application was refused by the respondent Minister without giving reasons. Although he failed in the High Court, the applicant succeeded in the Supreme Court where it was held, unanimously, that, notwithstanding that the Minister had "absolute discretion" to grant or refuse a certificate of naturalisation, this did mean that he was not obliged to have a reason. I do not think that this decision assists the applicant in this case because of the very different nature of the power afforded to the Minister under the statute which allowed him to take a decision in his "absolute discretion".

112. *The State (Lynch) v Cooney* [1982] IR 337 was a celebrated case in which a member of the Sinn Féin party sought an order quashing the decision made by the Minister for Posts and Telegraphs under s. 31(1) of the Broadcasting Authority Act, 1960 ordering RTÉ to refrain from broadcasting any matter made by or on behalf of or supporting Sinn Féin. The Minister was empowered to make such an order where "of the opinion" that it would be likely to promote, or incite to, crime or tend to undermine the Authority of the State. The claim succeeded at first instance before O'Hanlon J who considered that because the opinion of the Minister was not susceptible to judicial review, on grounds of reasonableness or otherwise, s. 31(1) was unconstitutional. The Supreme Court unanimously disagreed and allowed the appeal, holding that the Minister's opinion could be judicial reviewed, and that it must be held

bona fide and be factually sustainable and not unreasonable. As Henchy J stated at page 380:-

> "It is to be presumed that, when it conferred the power, Parliament intended the power to be exercised only in a manner that would be in conformity with the Constitution and within the limitations of the power as they are to be gathered from the statutory scheme or design. This means, amongst other things, not only that the power must be exercised in good faith but that the opinion or other subjective conclusion set as a precondition for the valid exercise of the power must be reached by a route that does not make the exercise unlawful — such as by misinterpreting the law, or by misapplying it through taking into consideration irrelevant matters of fact, or through ignoring relevant matters. Otherwise, the exercise of the power will be held to be invalid for being *ultra vires*.
>
> Because the prescribed opinion or other conclusion is necessarily subjective, there may be cases where it would be difficult, if not impossible, to subject to scrutiny the reasoning or the thought processes of the person or body exercising the power…"

113. Again I do not believe that this authority particularly assists the respondent. First it concerned the exercise of a discretionary executive power by a Minister. Secondly, as Henchy J pointed out, the opinion of the Minister in that case was "necessarily subjective". This would seem to be a condition that is inherent in the phrase "of the opinion" in the context of a ministerial or government decision.

114. Counsel for the respondent also relied by analogy on two decisions where the statutory requirement was that the decision maker "considers" certain matters. The first of these was *Kiberd v Hamilton* [1992] 2 IR 257. Section 4 of the Tribunals of Enquiry (Evidence) (Amendment) Act 1979 empowered the Tribunal, in this case the Beef Tribunal, to "make such orders as it considers necessary for the purposes of its functions…". Arising out of material published by the applicant in the Sunday Business Post, an order was made directing the applicant to appear before the Tribunal to disclose his source. Although the direction did not mention s. 4 as the jurisdiction for making the order, Blayney J dismissed the application for *certiorari* on the basis that the Tribunal was entitled to do what it considered necessary for the purposes of its functions and to make the disputed order. The court followed the judgment of Henchy J in *The State (Lynch) v Cooney*. Accordingly the court only had to be satisfied that the Tribunal's opinion that the making of the order was necessary for the purpose of its function was bona fide held, and that it was supported by facts and was not unreasonable. Again it seems to me that, for similar reasons given earlier in relation to *State (Lynch) v Cooney*, this decision is explained by the broadly worded power in s. 4 of the Act of 1979. Common to both decisions is that the opinion or consideration was not required to be made in the context of a statutorily adopted scheme.

115. Counsel particularly relied upon the judgment of Clarke J in *Tristor v Minister for Environment, Heritage and Local Government* [2010] IEHC 397. Under s. 31(1) of the Planning and Development Act 2000 "where the Minister considers that any draft development plan fails to set out an overall strategy for the proper planning considerable development of the area of a planning authority or otherwise significantly fails to comply with this Act, the Minister may, for State reasons, direct the authority to take such specified measures as he or she may require to ensure that the Development Plan, when made, is in compliance with this Act and, notwithstanding the requirements of Chapter 1, and the authorities shall comply with any such direction." Clarke J held that the word "considers" in the section was decisive – in other words the section did not require that there be a breach of Act, rather it required that the Minister considered that there be a breach. On this basis, Clarke J declined to grant leave to seek judicial review of the underlying exercise by the Minister or his power to intervene under s. 31(1), as he did not feel there was a substantial issue to be tried, but he did grant leave to seek judicial review on a fair procedures ground arising under the same section. In para. 5.4 of his decision Clarke J accepted that the Minister's view was subject to judicial review but he found that:-

> "In coming to that view the Minister must take into account all proper factors and exclude from his consideration any factors which are irrelevant. In addition, the view which the Minister ultimately forms must be rationally based on the materials available to the Minister at the time. However, subject to those limitations the Minister is entitled to come to a view, and if he does so, then it can properly be said that he 'considers' that a relevant failure of compliance has occurred such as entitles the Minister to exercise his jurisdiction under the section."

116. Counsel for the respondent also relied on the ensuing paragraphs in Clarke J's judgment to counter an argument made by the applicants in its written submissions (at para. 3.1 to 3.7) in the present case, arguments which were also made in *Tristor*. Clarke J held:-

> "5.5 A second limb of Tristor's argument under this heading was to refer to cases such as *Re XJS Investments Ltd* [1986] I.R. 750 and *Wicklow Heritage Trust Ltd v. Wicklow County Council* (Unreported, High Court, McGuiness J., 5th February, 1998), in which the Courts have consistently held that the construction of planning documents is to be conducted on the basis of how the document concerned would be viewed by a 'reasonably intelligent person without particular expertise'.
>
> 5.6 There is no doubt that planning documents are to be so construed in accordance with the jurisprudence. It does not, however, seem to me that that undoubted fact of itself changes the standard of review. Undoubtedly, any planning documents relevant to the issues which arise in this case need to be so construed. If, on the proper construction of any relevant documents, it were to transpire that it was not reasonably open to the Minister to reach a conclusion necessary to the exercise of the Minister's authority under s. 31, then there may well be consequences of such a finding. However, it does not seem to me that that question goes to the standard of review. Rather, it is a factor to be taken into account in exercising the ordinary standard of review as to whether the Minister came to a sustainable decision to exercise his powers under s. 31.
>
> 5.7 For those reasons, I am not satisfied that the standard of review to be applied to the Minister's decision in this case is anything other than the ordinary judicial review standard."

Clarke J was thus accepting that it was for the court to construe the planning document, but saying that the "proper construction" was only "a factor to be taken into account" in determining whether the Minister's decision was sustainable. At first blush this appears to conflict with the dictum of Barr J in *Tennyson*.

117. Counsel for the respondent further submitted that the consideration of the planning application in the context of the planning scheme was not simply a matter of construction or a matter of law. It was a mixed question of construing the Planning Scheme and assessing in a subjective way, such that it had to be satisfied, the planning application, and adjudication on whether or not it was "consistent". In making this submission counsel repeatedly emphasized that the application was for planning permission, and fell within the planning process mandated by the Act of 2000.

118. What emerges from the case law is that the standard of review varies depending on the statutory context and the words used. The cases where the decision maker has a discretion, or absolute discretion, fall on that side of the line that requires only that the discretion be exercised *bona fide*, be based on facts and not be unreasonable, and that reasons must be given so there is transparency and reviewability; it is otherwise a subjective decision. Closer to the line are the cases where the decision maker is required to form an "opinion" about a particular matter, or where the decision maker "considers" a particular matter to be the case. The ordinary judicial review standard applies. *Lynch*, and *Kiberd* come within this type of decision.

119. The courts have also shown that they are more reluctant to intervene where the executive branch of government is concerned. Thus in *Tristor*, Clarke J stated at para. 1.2:-

> "The extent to which it is appropriate that particular functions in the planning process are conferred on political decision makers or professional planners and the extent to which those decisions should be made either locally or nationally are primarily questions of policy to be determined by the Oireachtas and set out in relevant legislation. Subject to determining the proper interpretation of any such legislation and, if raised, considering whether such legislation is within the bounds of what is constitutionally permissible, it is no function of the courts to seek to second guess the *policy decisions made by the Oireachtas in that regard*." [Emphasis added].

This approach, in my view, distinguishes the decision in *Tristor* from the present one, which is the decision of a local planning authority as opposed to that of a political decision maker at executive level where the decision is more concerned with policy.

120. On the other side of the line are cases where the administrative decision maker is carrying out its statutory duty to examine and assess a development proposal in the context of a statutorily adopted development plan. In such cases, where the court has to consider whether the decision was within the powers of the decision maker, constrained as they are by another statutorily adopted document, the meaning of that document must be construed. In *Tennyson*, where the dispute involved interpretation of the wording of a development plan, Barr J held that the court had "exclusive jurisdiction", and this has been followed in subsequent cases such as *Wicklow Heritage Trust Ltd v Wicklow County Council* (unreported, High Court, McGuinness J 5th February, 1998). When considering the development plan in that case McGuinness J stated:-

> "The question is not whether the senior executive planner or the county manager were unreasonable in thinking that the Ballynagran site was not a material contravention; the question is whether they were correct in law in this opinion."

121. I agree with Counsel for the applicant that in the absence of any case law directly bearing on s. 170(2), the decision of Finlay-Geoghegan J in *North Wall* provides helpful guidance. Although the statutory process for adopting a planning scheme was somewhat different under the DDDA Act – it was approved by the Minister, where as here it was approved by An Bord Pleanála – there are many similar features. In both situations the planning scheme has it's origins in a "higher plan" (the DDDA Act master plan, and the SDZ Order respectively); in both there was a public consultative process before approval of the higher plan, as well as prior approval of the planning scheme, and significantly all property owners had the opportunity to make submissions and influence the content of the planning scheme; both were adopted by a party other than the development proposal decision maker in respect of a certificate of exemption (DDDA Act) or planning application (local planning authority); and, common to both is the underlying purpose of facilitating and expediting orderly, planned and strategic development.

122. Apart from the foregoing there are two particularly important features common to both: both contain, in accordance with statutory requirements, a significant level of detail, and far more than would be contained in the usual Development Plan. Most relevantly, both contain a radical provision providing that, where a proposed development is "consistent with [the] planning scheme", then the development must be permitted; under s. 25(7) of the DDDA Act a Certificate of Exemption from the requirement of planning permission is given; under s. 170(2) the planning authority "shall grant permission", subject in both instances to such conditions as may be lawfully attached. This introduces a major constraint on the decision-maker, because the detail against which the proposed development must be assessed has been pre-determined to large extent by the prior planning and consultative process.

123. It is difficult to discern any material difference that would warrant a different approach in this case to the role of the court in construing a planning scheme as construed by Finlay-Geoghegan J in *North Wall*, or to justify any different standard of review. It is true that the word "satisfied" does not appear in s. 25(7) of the DDDA Act, but I do not regard this as significant. The word "consistent" is central to both sections, and it follows that the critical requirement is the determination of consistency or otherwise with the relevant planning scheme.

124. I also reject the argument that the question of whether or not the planning authority is "satisfied" entitles the planning authority to apply a more subjective approach to accessing consistency. In my view, the use of the word "satisfied" in s. 170(2) is intended to set the standard of proof required rather than admitting of subjective decision making. Thus it would not be sufficient if the planning authority felt the proposal was "possibly" consistent; nor is it necessary that consistency be established beyond all doubt. It would seem to equate with the balance of probability. Thus if the applicant can establish that, as a matter of probability the proposal is consistent with a planning scheme *properly construed*, then the planning authority must grant permission.

The Proper Approach to Construction by the Court

125. As to the proper approach to construction by the court of planning documents, this was considered in the judgment of McCarthy J in *Re: XJS Investments Ltd* in the following passage at p. 756:-

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

126. These principles were applied by Barr J in *Tennyson*, and were applied by Finlay Geoghegan J in *North Wall*. It was not contested that these are the appropriate principles to apply in construing the Planning Scheme. With regard to "developers…agents" the court had the benefit of opinion evidence from the applicant's architect as to the construction of the Planning Scheme. Of its nature this is not independent evidence and while considering it I give it little weight. It seems to me that, in this case, the court should strive to put itself in the position of a developer studying this Planning Scheme with a view to preparing a planning application.

Consistency of the Proposed Development with the Planning Scheme

127. It will be recalled that reasons (3) and (4) state:-

> "(3) The proposed development, by itself or by the precedent that the grant of permission for it would set for other relevant development, would adversely affect the use of the N11 by traffic prior to implementation of the Cherrywood Planning Scheme Signalised Junction.
>
> (4) The proposed development is not consistent with the Cherrywood Planning Scheme in regard to the design and sequencing of the development, as set out in Chapter 4 and Chapter 7 of the Planning Scheme."

The "signalised junction" refers to junction Q. Chapter 4 of the Planning Scheme is concerned with Physical Infrastructure and deals *inter alia* with transportation, and Chapter 7 deals with the "Sequencing and Phasing of Development".

128. Chapter 4 para. 4.2.6 headed "Future Road Strategy" opens with the following Specific Objective:-

> "PI 14 It is an objective to implement the road infrastructure (including segregated pedestrian/cycle routes) proposed in this Planning Scheme to facilitate access to and within the area by all travel modes (see Map 4.5)."

Further on in para. 4.2.6 it is stated:-

> "A number of key proposals have emerged to address the constraints on the Plan Area (see Map 4.5) as follows:-
>
> • A new route onto the N11 at Cabinteely will provide essential access into the north-east area of Cherrywood and promote use of the N11 to the maximum extent, while protecting the village of Cabinteely and the character of Brennanstown Road (Barrington's Road and Druid's Glen Road)…"

Thus Map 4.5 shows the proposed "signalised junction", described as "junction Q", where the new Druid's Glen Road will feed into the N11.

129. Chapter 4.2.7 headed "Internal Road Proposals", commences with the sentence:-

> "The required network of internal roads is shown on Map 4.5 and on the accompanying Road/Street Sections."

There is a road section on p. 42 of the Planning Scheme of the proposed Druid's Glen Road, between junction Q and point "P". Point "P" lies well beyond the boundary of the applicant's lands on the western side and represents the western end of the Druid's Glen Road. The "not-to-scale" road section shown of the "Druid's Glen Road P-Q" shows a two way roadway, with carriage ways 3500mm in width on each side of a center line, and flanked by cycle tracks of 2250mm, in turned flanked by footpaths of 3000mm, with indicative tree planting on the inside edge of each footpath.

130. The applicant's planning application is consistent with the road line and road cross section shown in the Planning Scheme.

131. With regard to road design the following relevant passage appears in Chapter 4.2.7:-

> "Neighbourhood roads will be designed so as to be part of the built environment…The design of roads and streets shall accord with the detailed guidance in the current additions of:
>
> Traffic Management Guidelines – DoELG, DoT and DTO, 2003.
>
> National Cycle Manual – NTA, 2011.
>
> Design Manual for Roads and Bridges – NRA, 2011.
>
> Manual for Streets – DfT (UK), 2007.
>
> Design Manual for Urban Streets – DTTAS, due 2012.
>
> Development Works in Residential and Industrial Areas (Guidance Document) – DLRCC, 2012.
>
> In general footpaths shall be 3m to allow for the planting of street trees while still maintaining an unobstructed width of 2m for pedestrians."

132. Counsel for the respondent drew the courts attention to other provisions of Chapter 4 such as the introductory paragraph dealing with the planning that "informed the required network of infrastructure and services and the phasing of same", two provisions concerned with water supply and surface water drainage, objectives for transportation and it's potential (see Chapter 4.2, and 4.2.2), and to 4.2.5 concerning "existing transportation infrastructure", and 4.3 "utilities and telecoms". I do not regard these references as being of particular relevance. Counsel also opened passages concerned with "External Road Proposals" which, although mentioning "existing at – grade junctions along the N11", were not of relevance. At 4.2.7 the Planning Scheme then states:-

> "Specific objectives:
>
> PI 15 The Council will support the NRA in consultation with the NTA in implementing measures to improve the functioning of the M50/N11 road corridor."

This was followed by references to traffic congestion on both corridors at peak hours and the need for a range of measures identified by the NRA to preserve the strategic capacity of the national roads.

133. Counsel for the respondent then referred me to the following passage:-

> "The phasing of development set out in Chapter 7 provides for an assessment of road network performance at set intervals in conjunction with the NRA/NTA".

This appears to relate to the need for regular assessment of road network performance but had little relevance to the issues in this case. References to other elements of Chapter 4 dealing with gas (4.3.2) and telecoms (4.3.3) similarly had no relevance.

134. Adopting the ordinary meaning of the Planning Scheme thus far, and in particular in construing Chapter 4 as it would be understood by members of the public without legal training, as well as developers or their agents, two matters of note emerge. First Map 4.5 shows that junction Q falls within the Planning Scheme boundary. It was not disputed that the section of the N11 roadway upon which junction Q is to be constructed is not in the ownership of the applicant but is in the ownership of the Council or at any rate under its control. It was also common case that the applicant's segment of land upon which part of the Druid's Glen Road is to be constructed runs up to and adjoins the N11 at the point where junction Q is to be constructed.

135. Secondly, within Chapter 4 there is no design or plan for the construction of junction Q. The only prescription is that it must be designed in accordance with the guidance and current additions of the six documents listed under 4.2.7 (itemised above). It would also have been clear to the ordinary developer that in addition to complying with those road design manuals and guidance the line of the Druid's Glen Road had to follow that identified in Map 4.5 (and reflected in other maps throughout the Planning Scheme) and the road section for the Druid's Glen Road P-Q illustrated on page 42. Beyond this there is no prescription as to the design or detail of the link between the Druid's Glen Road and the proposed junction Q.

136. Before going on to consider Chapter 7 it is appropriate to briefly mention Chapter 6 headed "Development Areas". This established a division of the Planning Scheme area into "8 discrete Development Areas". Area 5 is "Druid's Glen", and incorporates in it's entirety the 0.7892 hectares in the ownership of the applicant and the subject matter of part of its planning application, but it extends to a large area lying to the west of the applicant's land comprising areas designated for residential use and green infrastructure traversed by the balance of the Druid's Glen Road as far as point P. In the introductory sections at para. 6.3 the following appears:-

> "Infrastructure Requirements: The water, surface water, river flooding, foul drainage and road infrastructure requirements are set out in Chapter 4 Physical Infrastructure. This sets out the elements of that physical infrastructure that are required to serve each Development Area. The extent of each infrastructural element in the tables is described using a letter or number ascribed to that section of the road…
>
> The infrastructure for each Development Area will amalgamate to form the necessary infrastructure required to serve the overall Planning Scheme Area."

This wording was relied upon by the respondent, but it does no more than refer back to Chapter 4 and state that the physical infrastructure described there is "required to serve" each Development Area. It does not purport to be prescriptive as to the phasing of the provision and construction of infrastructure – that is a subject left to Chapter 7.

137. Under para. 6.5 dealing with Development Area 5 under the heading "Specific Objectives" counsel for the respondent relied on the following:-

> "DA 35 After the alignment of the Druid's Glen Road has been agreed in writing with the Local Authority any lands remaining adjoining the N11 within the Planning Scheme boundary that have not been allocated a land use in the Planning Scheme may be developed for residential purposes in accordance with the then current County Development Plan. This will not be subject to the phasing requirement of the Planning Scheme…"

Insofar as Chapter 4 is already prescriptive as to the alignment of the Druid's Glen Road e.g. as delineated in Map 4.5, it cannot be said that this particular paragraph imposes a precondition of agreement between a developer and the respondent as to alignment of that road prior to the grant of planning permission. It seems to me that this sub-objective is to be read as governing the possibility for development for residential purposes of a very small amount of land on either side of the Druid's Glen Road adjoining the N11 which would be left over after the development of the Druid's Glen Road. As such it has no relevance to this case.

138. Table 6.5.2 headed "Infrastructure Requirements Development Area 5, Druid's Glen" refers to Maps 4.1 – 4.5 (in Chapter 4) and has the following relevant text:-

> "Road Requirements
>
> • Construct Road P3 – Q and close Lehaunstown Lane at its intersection with the western side of Druid's Glen Road. If secondary access is required onto Brennanstown Road to serve a limited number of units this will be contingent on traffic calming."
>
> "Construction Access
>
> • From N11, via route P3-Q".

139. Point P3 lies between the boundary of the applicant's lands and point P being the end of the Druid's Glen Road on the western side. It would be clear to any developer reading this, and intending to develop any of the lands within Development Area 5, that they would gain construction access from the N11 along the intended route of the Druid's Glen Road and that the Druid's Glen Road would have to be constructed along the designated route. It is clear, however, that this section of the Planning Scheme does not make the prior construction of either the Druid's Glen road in its entirety or the signalised junction at junction Q prerequisites to a grant of planning permission in respect of the development of the proposed residential area internal to Development Area 5. It would however be obvious to a developer seeking planning permission for residential development in the areas coloured yellow and orange on Map 6.5, lying well within Area 5, that these could only be accessed for construction work once that section of the Druid's Glen Road traversing the applicant's lands was constructed, and once the junction at Q on the N11 was constructed. This position is made abundantly clear when one turns to Chapter 7.

140. Chapter 7 is headed "Sequencing and Phasing of Development", and 7.1 states that:-

> "Concept
>
> The provision of infrastructure and services in a timely manner is crucial to the achievement of the vision for Cherrywood. In this regard the infrastructure and services required have been characterised into that which will be provided within Cherrywood and external strategic infrastructure and services which are essential to the development of Cherrywood…

> This Chapter sets out the sequencing of the development of the 8 Development Areas and identifies the internal infrastructure and services, which is required to be provided to facilitate this sequencing…
>
> The provision of external strategic infrastructure and services is to be provided on a phased basis which is linked to the overall quantum of development within Cherrywood. Details of this phasing are set out in Section 7.3 below. All planning applications within the Planning Scheme Area shall accord with these requirements."

The first point to note is that this case has nothing to do with "external strategic infrastructure" insofar as junction Q and the Druid's Glen Road lie entirely within the Planning Scheme Area.

141. Counsel for the respondent argued that the wording in 7.1 meant that the applicant was not entitled to get permission for the Druid's Glen Road without planning permission first being in place for junction Q, on the basis that that junction was "critical internal infrastructure". I do not accept that that follows from the general wording under the heading "Concept" given that, later on in Chapter 7, the Planning Scheme is prescriptive in relation to the infrastructures and permissions that must be in place or upon which work must have commenced within a specific Development Area.

142. At 7.2 under the heading "Sequence of Development" the Planning Scheme identifies three growth areas, and the "First Growth Area" includes Development Area 5. It is then stated:-

> "To commence development in the Second or Third Growth Area the infrastructure requirements of the previous Growth Area will have been completed and/or the service provided. The infrastructure requirements for each Development Area are set out in Chapter 6. In the sequence of development each Development Area within the previous Growth Area will have to be constructed up to the minimum level of development stated in the Development Type and Quantum Tables in Chapter 6. Applications may be considered premature unless the identified infrastructure as set out for each Growth Area in Tables 7.1 – 7.9 is either in place or permission for same is in place."

The respondent relied on the further following passage in 7.2:-

> "To allow flexibility the plan is not prescriptive with regard to the timing of the delivery of infrastructure other than that infrastructure identified in Table 7.1 to 7.6 in each Development Area. This delivery will generally be left to the developer in discussion with the Planning Authority. However, for each Growth Area there are specific pieces of road infrastructure, schools and open spaces that require certainty on the timing of their delivery to ensure the orderly progression of the Development Area. These are set out below."

143. Chapter 7.2.1 then headed "First Growth Area: Development Areas 2, 4, 5 & 6A" is immediately followed by Table 7.1 headed "Roads Infrastructure for First Growth Area". Only the first two lines of the table need to be reproduced:-

Infrastructure	Permission in Place	Work Commenced	Completed to a standard to be taken in Charge
Druid's Glen Road Q-P3	Prior to any permission being granted in Development Area 5	Prior to the occupation of 40% of Development Area 5	Prior to the occupation of 65% of Development Area 5.

144. The respondent contended that the reference to "Druid's Glen Road Q-P3" clearly included reference to the infrastructural requirement of the signalised junction at point Q on the N11. It was argued that, on a plain reading of the text, "applications may be considered premature unless the identified infrastructure…is in place", and that this, therefore, afforded the respondent discretion to refuse permission on the basis that it would be premature. It was argued that, although the text indicated a certain flexibility with regard to the timing of delivery of infrastructure, this did not apply to the infrastructure identified in Table 7.1, and that this was one piece of infrastructure that required "certainty on the timing of…delivery to ensure the orderly progression of the Development [of Area 5]".

145. The applicant on the other hand contended that nowhere in Chapter 7 or Table 7.1 is there a prescribed requirement that a final design of junction Q, or even final design of the vertical and horizontal alignment of the Druid's Glen Road (or the bridge part of which falls to be constructed on the western end of the applicant's land) be in place before *permission* be granted for the Druid's Glen Road.

146. I am of the view that a developer or architect without legal training reading the reference to "Druid's Glen Road Q-P3" under the first column in combination with the text of 7.2 would regard it as including as part of the infrastructure so described the signalised junction at point Q; however, the matter does not end there.

147. The second column in terms of sequencing then requires that planning permission be in place for the "Druid's Glen Road Q-P3 prior to any permission being granted in Development Area 5". The words "any permission…in Development Area 5" can only be sensibly read as a reference to planning permission for development *other than* "Druid's Glen Road Q-P3" within Development Area 5. To read it otherwise would be self-defeating and meaningless. I am satisfied that any member of the public or a developer or their agent considering Table 7.1 would conclude that the reference to "Development Area 5" in the second column is a reference to those areas upon which the Planning Scheme envisages residential and green space development as specified in Chapter 6.5.

148. Carrying this meaning through consistently to the third and fourth columns of Table 7.1, which in the court's view is the correct construction, it means that:-

> (1) Planning permission for the Druid's Glen Road Q-P3 (including junction Q) must be in place before *planning permission* is granted in relation to proposed residential developments within Development Area 5.
>
> (2) That work must have commenced on the Druid's Glen Road Q-P3, including junction Q, prior to the occupation of 40% of Development Area 5.
>
> (3) That the Druid's Glen Road Q-P3, including junction Q, must be completed to a standard to be taken in charge prior to the occupation of 65% of Development Area 5.

149. In other words the Planning Scheme envisages and is to be construed as meaning that no planning permission in respect of *residential development* within Development Area 5 can take place in advance of *planning permission* being granted in respect of Druid's Glen Road Q-P3, including junction Q. It does *not* mean that individual land owners along the route of the proposed Druid's Glen road cannot apply for planning permission in respect of that section of the road traversing their land. It also does *not* mean that planning permission for junction Q must be in place before planning permission can be granted for the Druid's Glen Road.

150. Counsel for the respondent relied on further parts of Chapter 7, and in particular 7.3 headed "Phasing of Development". For the most part that section is concerned with "the provision of external infrastructure and services of a strategic nature" in the region, including "measures to improve the function of the M50/N11 road corridor", but is not related to infrastructures internal to the Planning Scheme Area. It does contain a subheading "Prematurity" which provides:-

> "The over-riding focus to the phasing of development in Cherrywood is part of an holistic approach to the sustainable creation of living and working communities. To effectively manage and promote such development, there are a number of critical steps to be taken, without which any development in the area may have to be considered premature. The commencement of development is predicated on these critical steps, being addressed to the satisfaction of DLRCC. These critical steps are…"

There follows some bullet points which may be summarised as the preparation of an Area Travel Plan; replacement of a short portion of a critical trunk main from Bridesglen Road; agreement with Bord Gais on the gas network; agreement on water allocation to Rathmichael Reservoir; financial contribution schemes for funding infrastructure and services; and the development of a protocol for assessment and monitoring of a strategic road network performance between DLRCC/NRA/NTA.

151. As I have previously noted, neither reason (3) nor reason (4) referred to the proposed development as being "premature". I find that none of the bullet points identified in section 7.3 of the Planning Scheme under "Prematurity" require the construction of the signalised junction at junction Q on the N11 as being a critical step requiring to be "addressed" before any grant of planning permission in Development Area 5, or in respect of the Druid's Glen Road. Further, there is no reference, expressly, or by implication, to any requirement that a design or final design of junction Q be published or available prior to the grant of planning permission in respect of the Druid's Glen Road.

152. I have come to the conclusion that approaching the construction of the Planning Scheme in accordance with the principles enunciated in *XJS Developments Ltd*, neither Chapter 4 nor Chapter 7, nor those chapters taken together, nor the Planning Scheme viewed as a whole, can be interpreted as requiring that any design or final design of junction Q, or any planning permission for the development of junction Q, or the construction of junction Q (whether partial or complete) must be in place prior to the grant of planning permission in respect of the Druid's Glen Road. While these might be desirable, the Planning Scheme as it stands simply does not prescribe that these be in place.

153. It follows that any planning application in relation to the Druid's Glen Road must be assessed for consistency primarily by reference to the alignment of the road as it appears from the Planning Scheme and in particular Map 4.5, and consistency with the road section on page 42. Given that it traverses the Druid's Glen, and the undulating land contours, it must also show appropriate vertical and horizontal alignment. As the Planning Scheme gives no detail as to the design of the signalised junction at junction Q, it is sufficient for the applicant to propose a design of the Druid's Glen Road up to the point at which it would link with junction Q, in a manner that is "not inconsistent" with the Planning Scheme, and "not inconsistent" with the guidelines and manuals identified at Chapter 4.2.7. Any permission that might be granted can, as the NRA in fact suggested in its letter of 18th December, 2014, be conditioned on an approved junction being in place.

154. In any event the fact that the applicant might obtain permission for the Druid's Glen Road on foot of an application that does not include an application to construct the signalised junction at Q does not mean that the applicant can proceed with construction of Druid's Glen Road pursuant to that permission. As the access for construction must necessarily be from the N11 at point Q, it necessarily follows that some party, whether the applicant or the Council, would have to seek and obtain the requisite permission, and construct the junction at Q before the development of the Druid's Glen Road could commence.

155. In coming to this conclusion I have also had particular regard to the question of vertical and horizontal alignment of the proposed Druid's Glen Road. It would be obvious to a developer, and probably to members of the public, that in designing for planning application purposes a road that is to link with an existing road, correct and appropriate horizontal and vertical alignment of the road way would be of great importance. This is covered by the requirement that the design of roads and streets comply with the detailed guidance given in the manuals listed in the Planning Scheme. If the planning application submitted was inconsistent with those manual/guidance documents in any material respect e.g. in vertical alignment, then it would be incumbent on the planning authority to refuse permission under s. 170(2) on the basis that the application was not consistent with the Planning Scheme, or at any rate, to impose suitable conditions designed to ensure consistency.

156. There is no suggestion in the reasons for refusal, or in the replying Affidavit of Ms Henchy, that the vertical and horizontal alignment proposed by Muirs in the planning application was anything other than consistent with the Planning Scheme and linking in to junction Q. As also noted, the only element of Atkins draft horizontal/vertical alignment that was incomplete appears to have been off site in the area of P3, and the uncontested expert evidence of Mr Phillips was that, when Muir's alignment was overlaid Atkin's alignment on the applicant's section of the proposed road they are in accord. Insofar as the vertical and horizontal alignment of the proposed Druid's Glen Road in the planning application is consistent – or "not inconsistent" – with those guidelines and manuals – and in particular, as is relevant here, at the interface between the proposed Druid's Glen Road and junction Q – then the planning authority is obligated by s. 170(1) to grant permission, but it may do so subject to any conditions which it may attach.

157. Under s. 34(1) of the Act of 2000 the planning authority enjoys a general power to impose conditions on the grant of permission, and these powers also apply where the application for permission relates to land within an SDZ. Without prejudice to that general power, under subs. (4) the conditions can include:-

> "(f) conditions for requiring the satisfactory completion within a specified period, not being less than 2 years from the commencement of any works, of the proposed development (including any roads, open spaces…), where the development includes the construction of 2 or more houses…
>
> (h) conditions for determining the sequence and timing in which and the time at which works shall be carried out"

Furthermore under s. 34(5) points of detail relating to the grant of a permission maybe agreed between the planning authority and the person carrying out the development, and in default of agreement can be referred to An Bord Pleanála for determination.

158. The scope of these provisions is such that, although obligated to grant a permission by virtue of s. 170(2) the planning authority could impose conditions relating to –

> • the design and construction of the Druid's Glen Road and it's interface with junction Q;
>
> • compliance with the guidelines and manuals or particular provisions within them set out in Chapter 4.2.7 of the Planning Scheme;
>
> • the time within which the Druid's Glen Road should be constructed;
>
> • the sequencing of it's construction in the context of and relative to the construction of junction Q; and,
>
> • requiring the detail of the road design and construction at the interface between the Druid's Glen Road and junction Q to be agreed between the Councils' roads department/engineers and the developer.

Thus the terms of the Planning Scheme and the powers of the planning authority under the Act of 2000 provide ample scope for the introduction of conditions and safeguards into a permission that the planning authority is obliged to grant pursuant to s.. 170(2). However what the planning authority cannot do is refuse a planning application based upon a strained or incorrect interpretation of the planning.

159. In the view of this Court a number of other matters emerge upon the construction of the Planning Scheme. First the Planning Scheme does not provide that the proposed Druid's Glen Road be constructed by the Council acting as roads authority. Instead it is envisaged that the road will be constructed by the developers of the land over which it traverses. However nothing in the Scheme constrains the existing statutory powers of the Council to acquire land within the SDZ by compulsory purchase order for road building or other statutory purposes.

160. Secondly, nowhere does the Planning Scheme, and in particular Chapter 7, suggest or require that the Druid's Glen Road be progressed as a single piece of infrastructure. Indeed it could not prescribe this as to do so would be to trespass on private rights by seeking to impose obligations to join with other landowners over planning and development.

161. Thirdly, there is nothing in the Planning Scheme or Chapter 7 that precludes planning permission from being granted for part only of the Druid's Glen Scheme.

162. I therefore accept the applicant's contention that, as properly construed, no part of the Planning Scheme necessitates the delivery of the Druid's Glen Road by way of a single trans-ownership or multiparty planning application and that an application for permission to construct a section of the Druid's Glen Road is "not inconsistent" with the Planning Scheme.

163. Judged against these findings reason (4) must be regarded as invalid as it is premised on an incorrect interpretation of Chapters 4 and 7 of the Planning Scheme.

164. Reason (3) is more difficult to understand:-

> "The proposed development, by itself or by the precedent that the grant of permission for it would set for other relevant development, would adversely affect the use of the N11 by traffic prior to implementation of the Cherrywood Planning Scheme Signalised Junction Q".

165. On one reading this makes no sense at all, because the planning application, if granted, would have had no adverse effect whatsoever on the use of the N11 until the signalised junction Q was implemented. Indeed, because it did not include junction Q, no access from the N11 or development could take place on foot of it prior to implementation of junction Q. It is also notable that the application, if granted, includes the demolition of eleven existing dwellings currently accessing the N11 directly, and the closure of their entrances onto that road – an aspect that would surely be of positive benefit to the N11.

166. The reference to the precedent it would set for "other relevant development" is even harder to understand. If the other relevant development is a reference to development by Tudor Homes or Benreef or elsewhere within Area 5, this also relies on the prior delivery of junction Q and that part of the Druid's Glen Road traversing the applicant's land, so it could hardly be a damaging precedent. On this interpretation reason (3) is meaningless and therefore invalid.

167. What reason (3) really seems to be saying, while avoiding use of the word "premature", is that the proposed development of Beech Park is premature before junction Q is constructed. At para. 36 of her Affidavit Ms Henchy seems to confirm this by quoting from the planner's report where reliance is place on the NRA submission and it is stated at p.18:-

> "…The principle of future access to this proposed residential development site from the Cherrywood Planning Scheme Druid's Glen Road is accepted by DLRCC however it is premature until permission is in place for the Druid's Glen Road Q-P3 50km/h Level 2 Road including the signalised junction Q at the N11. The planning scheme N11 junction access is required for construction access to this proposed development site as confirmed within the applicant's submitted Construction Management Plan."

168. It is true that the planning application was made expressly on the basis that access and construction access to the residential area would be via a "spur" road to the Druid's Glen Road and junction Q; however, as I have found that the Planning Scheme does not make the final design, planning permission or "implementation" of junction Q a pre-requisite to obtaining planning permission for the Druid's Glen Road (or any part of it) it follows that, if this is what reason (3) means, it is invalid.

169. In refusing permission based on reasons (3) and (4), the respondent and the Transport Department and the planner in their respective reports have misconstrued the Planning Scheme and probably failed to fully appreciate that its terms trump the particular objections raised by the NRA. I believe the planners have failed to have due regard to the status of the Planning Scheme – something that is not of statutory concern to the NRA who are a statutory consultee. There is no doubt that s. 170(2) is a radical provision and it requires planners who are used to assessing applications based on good planning and development in the context of a County Development Plan. To take a different approach: their assessment is now constrained by the pre-ordained terms of the Planning Scheme, a scheme that has been through rigorous design, planning and environmental checks and a public consultative process, and if the application is "consistent" with the Planning Scheme it must be granted.

170. In this context, the power of the respondent to grant permission subject to conditions must, in my view, form part of its overall consideration of "consistency" of a planning application within an SDZ. This follows from the wording of s. 170(2) which provides that "…the planning authority shall grant permission where satisfied that the development, where carried out in accordance with the application or subject to any conditions which the planning authority may attach to a permission". This mandates a holistic approach – the planning authority must consider not only the application but also possible conditioning. It is not open to the respondent to refuse a permission if it could reasonably be granted with the imposition of conditions which it is allowed to include under s. 34(4). This includes the possibility of a condition pursuant to s. 34(5) providing that "…points of detail relating to a grant of permission may be agreed between the planning authority and the person carrying out the development…". The respondent could, for instance, have imposed a condition under s. 34(4)(f) requiring completion of the section of the Druid's Glen Road on the applicant's lands within two years of the completion of junction Q; it could have conditioned the road design by reference to one or more of the guidelines and manuals listed in Chapter 4.2.7 of the Planning Scheme; it could have considered under s. 34(4)(h) the imposition of a condition concerning the sequence and timing of the building of the Druid's Glen Road bridge; and it could have required the details of the link of the Druid's Glen Road to junction Q to be agreed with the Council's transport planners. Regrettably, the Transport Planning Section report took a view that the application was premature and did not consider a grant subject to conditions of this nature, and this approach was carried through in the planner's report and is reflected in the refusal reasons.

171. The fact that an approved design for junction Q was not to hand prior to the refusal of permission also deserves comment. The SDZ was conceived and promoted by the respondent and junction Q was always part of the plan, and always a key to unlocking development in Area 5 (one of the First Growth Areas) and Area 1 to the south in a Second Growth Area. The Report of Senior Planning Inspector Tom Rabette of 14th August, 2013, to An Bord Pleanála prior to approval of the SDZ notes at p. 143 in the context of discussing "Creation of a Ransom Strip":-

> "As stated elsewhere in this report, a proactive Development Agency will be required to realise the Scheme…".

172. The Planning Scheme was approved in April, 2014. The Druid's Glen Road and junction Q were considered to be critical infrastructure. Given also that junction Q is to be constructed on N11 roadway within the control of the respondent, and that the presumption was that the respondent as Roads Authority would undertake that construction, it is surprising that road design consultants were not engaged immediately. It is regrettable that they were not briefed until March, 2015, thus inevitably delaying the commencement of strategic development. As the NRA commented on 18th December, 2014, had the design work commenced shortly after a meeting on 3rd December, 2014, it should have been completed by February, 2015. Had the respondent furnished a consent to the applicant in July, 2014, or at any time thereafter, to include the junction in its application, it is reasonable to presume that the design work on the junction would have progressed efficiently and been completed before submission of the application. In these circumstances, and in the absence of consent, the respondent should not have been surprised that the applicant decided to proceed to lodge the application. Remarkably, notwithstanding the further lapse of time before these proceedings came on for hearing, no evidence was put before the court in relation to whether or not junction Q had actually been designed, and if so, when that design was completed, let alone suggesting that the applicant's planning application was in any way inconsistent with such design. It became apparent at hearing that such design, if completed, had yet to be furnished to the applicant. I do not find that this extraordinary delay, or the failure of the respondent to obtain a final design of the junction within five weeks of the intended lodgement date of the application, to be reasons for finding reasons (3) or (4) invalid, but they greatly undermine the explanation of "prematurity" relied upon by Ms Henchy. This is relevant to the next part of my judgment.

Improper Purpose/Irrelevant Considerations

173. Although these grounds are separate, the relevant and admissible evidence (that the court is not prevented from considering by virtue of s. 247(3)) overlaps and it is convenient to consider them together.

174. Ms Henchy accepted in her email of 9th January, 2015, that "DLR's preferred approach would be one planning application" for the Druid's Glen Road, and she also accepted this in para. 21 of her Affidavit, whilst acknowledging "…it is quite clearly the case that the Council could have no power to mandate same…" Mr Phillips avers at para. 7 of his second affidavit that, at his meetings with Atkins and the Council's transportation department, "…a clear steer was given that the Council would prefer a single planning application be lodged in respect of the entire road." That this was the position still taken by Ms Henchy in April, 2015, is evident from her further email to Mr Phillips of 2nd April, 2015.

175. As I have already found, at the meeting on 22nd April, 2015, Ms Henchy (or Ms Poole) speaking on behalf of the respondent expressed concern that if the applicant was granted permission for that part of the Druid's Glen Road traversing the applicant's lands only, this would create a "ransom strip" such that the applicant could prevent other landowners in Area 5 developing their land.

176. Precisely this concern was addressed by the Senior Planning Inspector Tom Rabette in his August, 2013, Report which recommended approval of the Planning Scheme with modifications:-

> "9.2.4.3 Creation of a Ransom Strip
>
> > Concern has been raised by the appellant that as the eastern end of the proposed Druid's Glen Road, which is to include one of the main entrances off the N11 to the Scheme area, is outside of the control of the appellant, there is the potential of what was referred to as a 'ransom-strip' emerging.
> >
> > I refer the Board to s. 9.1.5 'Sequence of Development' in Part I of this Assessment where it is stated, *inter alia*, that such 'ransom-strip' scenarios could emerge at several locations across the plan area (and not just relating to roads infrastructure) given, *inter alia*, the land ownership pattern across the Scheme. Even without any SDZ designation some degree of co-operation and coordination between landowners would be required to deliver development. As stated elsewhere in this report, a proactive Development Agency will be required to realise the Scheme (if the Board approves its making), in that regard I note that there are a number of powers available to the Local Authority that may be of assistance in delivering the Scheme *e.g.* s. 167 'Acquisition of site for strategic development zone' and other Compulsory Purchase Order Procedures as provided for in the Planning and Development Act 2000 as amended."

177. As previously noted, Atkins had produced horizontal and vertical alignment for the Druid's Glen Road, and it appears that, by the time the planning application was lodged, these were complete insofar as the applicant's land is concerned. Certainly this was accepted by Waterman Moylan, Engineers in their submission on behalf of Benreef (save only in the relation to an area in the vicinity of P3), and not contested by the respondent in these proceedings, and any disparity in alignment did not feature as a reason for refusing permission.

178. The Transportation Planning Report on p. 2 states:-

> "…The proposed development application site and land within the applicant's control only includes part of the planning scheme's Druid's Glen Road Q-P3".

Then in bold lettering it is stated:-

> "The proposed application is considered premature as provision of an incomplete section Q-P3 does not accord fully with the planning scheme and does not provide any certainty on timing or potential for implementation of the required road infrastructure Q-P3".

Further on in the same section it is stated:-

> "The development as proposed does not satisfactorily facilitate provision of the Druid's Glen Road Q-P3 as there is no certainty or commitment to any agreements with adjoining landowners on implementation, maintenance, security and timing of delivery of the full bridge structure."

179. That report fed into and was effectively accepted by the planner's report.

180. The planner's report was unsatisfactory in that it set out in full the minutes of all statutory pre-planning meetings. Its "Conclusion" opens:-

> "It is noted above that a number of pre-planning meetings were held in relation to this site over a period of time. The issues raised within the assessment of the current application were raised at the pre-planning stage. The design of the proposed development has remained significantly unchanged following these meetings and the issues raised have not been addressed."

This reliance on pre-planning meetings refers to those "noted above" and clearly includes reliance on the minuted statutory pre-planning meetings.

181. While this was not a ground upon which judicial review was sought, it is relevant to the court's consideration of improper motive. The respondent should have had no regard to these statutory pre-planning meetings and minutes, yet it is quite clear that they formed part of the planner's report that informed the respondent's decision.

182. I am satisfied that the respondent was genuinely concerned in advance and during the planning process about a planning application for part only of the Druid's Glen Road, particularly where this related to part only of the Druid's Glen bridge. However the Planning Scheme did not prohibit such an application and the respondents now acknowledge same in para. 17 of their statement of opposition that it did not require "the Druid's Glen Road to be progressed as a single piece of infrastructure". This acknowledgment is in stark contrast to the criticism of an "incomplete section" in the Transport Planning Report, which was echoed in the planner's report, and the opposition to the creation of any possible "ransom strip" at the meeting of 22nd April, 2015.

183. I have come to the conclusion that the motive for refusing permission in respect of the Druid's Glen Road was to avoid any possibility of creating a ransom strip and to effectively oblige the applicant to make a joint application, or co-ordinated applications, with adjoining landowners in respect of the entire Druid's Glen Road, or otherwise to reach agreement with those landowners to enable those adjoining landowners to get access to develop their lands. I therefore find the complaint of improper motive made out. The only means by which the Council could lawfully ensure a controlled delivery of the entire Druid's Glen as a single project would be to utilise its powers of compulsory purchase, as pointed out by Inspector Rabbette almost two years previously.

184. It also follows from this analysis, and in particular from the contents of the Transport Planning report, that the respondent took into account irrelevant considerations in coming to its decision. Thus it was not relevant to consider whether or not the applicant had reached any agreement with adjoining landowners in relation to implementation of the Druid's Glen Road.

Objective Bias

185. The only case pleaded in respect of objective bias and pre-judgment is that:-

> "35. The respondent changed its position with regard to the deliverability of the Druid's Glen Road and while initially it was satisfied with the proposal to seek permission for only part of the said road it later changed its position and required that an application be lodged for the entire Druid's Glen Road…"

186. Mr O'Flynn in his affidavit says that at first engagement in July, 2014, it was made clear to the Council that the planning application would include only that part of the Druid's Glen Road that traversed its lands. He makes averments in general terms to support the allegation that this changed, but relies primarily on the reference to a concern over a ransom strip expressed by Ms Henchy on 22nd April, 2015. Mr Phillips in his first Affidavit at para. 15 makes averments as to a change of position at a meeting on 17th December, 2014, but as that was a statutory pre-planning meeting I disregard that evidence. At para. 54 he makes averments identical to those made by Mr O'Flynn in para. 9.

187. Ms Henchy denies bias and asserts at para. 52 that, if the design for the junction and horizontal and vertical alignment of the road had been completed, these would have been furnished along with a letter of consent.

188. There is insufficient evidence to satisfy the court that the respondent changed its position.

189. The remaining question therefore is whether the preference expressed by Ms Henchy in her email of 9th January, 2015, that a single application be lodged for the entire Druid's Glen Road – a view also expressed in the Transportation Planning Section observation and in the Planners Report – and Ms Henchy's reference to concerns over creation of a "ransom strip" at the meeting on 22nd April, 2015, which I have found proven, demonstrate objective bias.

190. The test of objective bias is now well established. In *Orange Communications Ltd v Director of Telecommunications Regulation (No 2)* [2000] 4 IR 159 Keane CJ stated at p. 186 that there is:–

> "…no room for doubt as to the applicable test in this country: it is that the decision will be set aside on the ground of objective bias where there is a reasonable apprehension or suspicion that the decision maker might have been biased, i.e.

where it is found that, although there was no actual bias, there is an appearance of bias".

191. In *O'Callaghan v Mahon* [2008] 2 IR 514 at p. 672-673 Fennelly J described the principles relating to objective bias to be applied as follows:-

> "(a) objective bias is established, if a reasonable and fair minded objective observer, who is not unduly sensitive, but who is in possession of all the relevant facts, reasonably apprehends that there is a risk that the decision maker will not be fair and impartial;
>
> (b) the apprehensions of the actual affected party are not relevant;
>
> (c) objective bias may not be inferred from legal or other errors made within the decision making process; it is necessary to show the existence of something external to that process;
>
> (d) objective bias may be established by showing that the decision maker has made statements which, if applied to the case at issue, would effectively decide it or which show prejudice, hostility or dislike towards one party or his witnesses."

192. These principles were approved by Denham CJ in *Goode Concrete v CRH Plc & others* [2015] 2 ILRM 289, and most recently by Dunne J when giving the unanimous decision of the Supreme Court in *O'Driscoll v Hurley & Health Service Executive* [2016] IESC 32.

193. The court must therefore disregard Mr O'Flynn's personal apprehension of bias, as expressed in his affidavit, and assess the evidence as a reasonable and fair minded observer who is not unduly sensitive and in possession of all the relevant facts.

194. Of particular relevance in the planning context is *Nurendale v Dublin City Council* [2013] 3 IR 417, where McKechnie J had to consider whether comments made by the Dublin Assistant City Manager in the course of a consultation process relating to the variation of the Waster Management Plan for the Dublin Region could give rise to an apprehension of pre-judgment/bias. The court had regard to the position held by the person making the statements at para. 169:-

> "It is thus clear that where a person not a member of the decision making body, but instead the occupier of a senior position within the organisation, makes representations or comments on the outcome of a decision yet to be taken, those statements may be sufficient to give a perception of prejudgment to the subsequent decision. Obviously not all statements by all persons employed by an administrative body will be capable of so tainting a subsequent decision. However, as stated the ultimate question must always be; would a reasonable person have a reasonable apprehension of bias on the part of the decision making body. In this context, the more senior, and thus more influential, the person is who commits the impugned actions, the more likely it is that a reasonable person would conclude that those actions are attributable to the body as a whole and thus have a reasonable apprehension of bias with regards to a related decision of that body. This will be particularly the case if by reason of the authority and status of the person in question, and by virtue of the function and role assigned to and expected of him, that person either by a process of reporting or recommendation, or otherwise, is in a position of real influence with the ultimate decision maker. In such circumstances a reasonable person would reasonably apprehend that the bias of the presenter would become the bias of the decision maker and thus taint the decision in that way."

195. While I accept that Ms Henchy was in a position of authority, and was indeed the effective decision-maker, I am not satisfied that objective bias is shown in this case, particularly having regard to principle (c) enunciated by Fennelly J that "objective bias may not be inferred from legal or other errors made within the decision making process; it is necessary to show the existence of something external to that process."

196. In my view, in this context, a broad view should be taken as to what constitutes the "decision making process". In a planning application such as the present one preplanning meetings – and not just statutory consultations – and exchanges of information and documents are an important part of the process, giving appropriate direction and leading to refinement of the eventual planning application. I consider the statements of Ms Henchy in her email of 9th January, 2015, and at the meeting on 22nd April, 2015, as coming within the decision making process in this broad sense of the term. In addition, the statements in the Transportation Section observations, and the planner's report, being made after and in response to the planning application, clearly come within the decision making process. I am not, therefore, satisfied that the applicant has identified material sufficiently *external* to the process to show the existence of bias.

197. I also have regard to the actual wording used by Ms Henchy in her email of 9th January, 2015, which was sent to Messrs Tom Phillips, Christie O'Sullivan, John Spain and copied to Mr Michael Mangan. The opening part reads:-

> "Good Afternoon,
>
> In the past month DLR have met the three landowners whose land the section of the Druid's Glen Road from Point Q-P3 passes. At these meetings I have advised that DLR's preferred approach would be for one planning application for this section of the road, I do appreciate this is a decision for your client. What was clear at these meetings is that all three landowners want to progress so as to be able to bring forward development."

In referring to her "preferred approach" Ms Henchy is demonstrating her acceptance that another valid approach would be an application for development of part only of the Druid's Glen Road. This wording is balanced and transparent, and is not such that "a reasonable and fair minded objective observer, who is not unduly sensitive, but who is in possession of all relevant facts" would reasonably apprehend that there was a risk that Ms Henchy would not be fair and impartial in her decision making.

198. I have already found that reasons (3) and (4) in the impugned decision were unlawful having been prompted by improper purpose and the taking into account of a relevant considerations. These were legal errors internal to the process and as such are not evidence that, in this case, can be used to establish objective bias.

Reason (5)

199. This reason for refusal states:-

> "The proposed development is not consistent with the Cherrywood Planning Scheme, as the applicant does not demonstrate that the proposed development has had sufficient regard to section 5.4.1 in particular "GI 19 of the Planning Scheme".

200. The applicant complains that:-

> (1) That the proposed development did comply with GI 19 of the Planning Scheme.
>
> (2) That it is not a valid reason for refusal and does not comply with the requirements of s. 34(10) of the Act of 2000 which stipulates that "the main reasons and considerations on which the decision is based" must be stated.
>
> (3) That the reasons for refusal are not clear and unambiguous or self contained contrary to Development Management Guidelines for Planning Authorities (June 2007) ("the Guidelines").

201. The respondent joins issue with these arguments, asserting that reason (5) is consistent with the Planning Scheme, and sufficiently clear and certain to record with legal requirements.

202. Section 5.4.1 of the Planning Scheme provides:-

> "5.4.1 Natural Green Space
>
> Several water courses at the boundaries of the Planning Scheme form significant landscape features. The river/stream valleys of key significance to the Planning Scheme are the Carrickmines stream, the Loughlinstown River and the Bride's Glen River. These are of importance to amenity and biodiversity and, together with linear park to the rear of Cherrywood Business Park, they form an interconnected framework of important wildlife corridors. The Shanganagh River, downstream of the Planning Scheme area, is a salmonid river.
>
> Special Objectives:
>
> GI 19 To safeguard the ecological integrity of Carrickmines, Loughlinstown and Bride's Glen rivers and the linear park adjacent to Cherrywood Business Park, and to require the sensitive improvement and management of these areas for biodiversity, education, landscape integration and visual amenities.
>
> GI 20 To require sensitive low-key improvement of the Druid's Glen Valley, such as the control of non-native vegetation, provision of a safe and naturalistic pedestrian pathway, provision of appropriate interpretation, and the minimisation of access points and disturbance, with particular regard to the Cherrywood SDZ Biodiversity Plan.
>
> GI 21 To require an ecological buffer area to the south side of Druid's Glen, in compliance with the Cherrywood SDZ Biodiversity Plan, that includes an avenue of large canopy trees, pedestrian and cycle routes, native shrub, woodland and meadow planting, and a SuDS swale. The need for this buffer area is detailed in Appendix D.
>
> GI 22 To require the improvement and continuation of the Linear Park adjacent to Cherrywood Business Park and proposed Town Centre to link with surrounding greenways and habitats, at Bride's Glen Road and Bride's Glen Luas stop."

203. The applicant asserts that the planning application was consistent with these objectives. Accompanying the application were an ecological assessment of the Stage 1 Screening for Appropriate Assessment, an ecological assessment prepared by Natura Environment Consultants, and section 4.1.1 of the Planning Report prepared by Tom Phillips and Associates Ltd. The issue of GI 19 was raised by Scott Cawley, ecologists engaged by the respondent to carry out a peer-review. Scott Cawley generally agreed with the overall conclusions of Stage 1 Screening Report, the screening for Appropriate Assessment, and the Site Description and Evaluation. It accepted that the impacts during construction were addressed and key impacts identified, and that they could be addressed by mitigation measures. At para. 3.c the author Mr. Paul Scott stated:-

> "The likely impacts of the 30m of the Druid's Glen Road, the abutments for the bridge, the partial spanning of the stream and the diversion of 40m of the stream appears to have been overlooked in this Ecological Assessment and it is recommended that the council seeks further information on the likely impacts of these works if this is included within this application. Especially it recommended that a method statement is provided as to the steps to be taken for the diversion of the stream particularly as it would appear that it is outside the development application boundary, how this will be access by machinery and how the riparian vegetation can be retained. In doing so the applicant should be referred to the proposed zoning of the riparian corridor in this area as natural greenspace and objectives GI 19 – 22 of the SDZ Planning Scheme applied to this stretch of the river."

204. Under the heading "Section 5: Mitigation Measures" at subpara. (e), Scott Cawley stated:-

> "The Planning Authority should ensure that they are convinced that the functions of the natural greenspace can be integrated into the landscape design for the partial spanning of the stream. It is not clear that enough emphasis has been given to ensuring passage for otters, fish, bats, badgers and birds across/under the new road. It is appreciated that some of the stream crossing will be subject to another application but it would be reasonable to expect detail at this stage given the proximity to the stream. Cross sections of how the bridge may appear can be found in the Planning Application (Ref: D1741-SK – 003) but there is no assessment of this design."

205. The planner's report at p. 15 deals with the natural greenspace element of the development site, and quotes the relevant parts of the Scott Cawley report replicated above, and states on page 16:-

> "It is considered that further information would be required to satisfy the Local Authority on the appropriateness/acceptability of the works proposed in relation to the protection of the natural greenspace and the biodiversity associated with the water course and its riparian habitat."

206. In his first affidavit sworn on the 10th September, 2015, at para. 47, Mr Phillips, on behalf of the applicant, asserts that the applicant's design team:-

> "had full regard to the Scheme including exploration of the implications of Section 5.4.1 by several professional disciplines including ecologists (Natura Environmental Consultants) and landscape architects (Brady Shipman Martin). Natura Environmental Consultants prepared a detailed Ecologist Assessment and complementary Appropriate Assessment Screening Report. These assessments included the carrying out of various surveys (including general habitat and bird surveys and aquatic and water quality surveys), an assessment of the likely ecological impacts on proposed mitigation

measures. The mitigation measures contained a series of actions designed to control *inter alia* discharge during construction and operation, protect roosting bats and nesting birds and to control invasive planned species issues – issues which had been highlighted in the Cherrywood SDZ Biodiversity Plan referenced in Objective GI 20. The bridge location was also designed with biodiversity in mind to cross over a secondary stream in addition to the Carrickmines Stream referred to in Objective GI 19. The Druid's Glen Buffer referred to in Specific Objective GI 21 does not cross and is not adjacent to the site of the proposed development. Finally, in my professional planning opinion Specific Objective GI 22 is not relevant to the proposed development as it relates to the Cherrywood Business Park and proposed Town Centre."

207. Based on this the applicants argument was that, while the Scott Cawley report and the planner's report justified the delivery to the applicant of a request for further information, it did not provide a basis for refusal of permission.

208. In her replying affidavit Ms Henchy relies on the same reports and avers, at para. 46, that these "…clearly identify the perceived shortcomings of the planning application with regard to these matters". She also places reliance on the report on the planning application prepared by the respondents Parks & Landscape Services Department where, at s. 1.2.2 under the heading "Aquatic and Terrestrial Ecology" the following view was expressed:-

> "1. The Ecological Assessment by Natura Environmental Consultants seem satisfactory, though the in-stream biological assessments seem somewhat cursory and limited (e.g. no comments on habitat quality + potential relative to biota – invertebrates – fish spawning etc. **Significantly the report is silent on the likely damaging impacts of the proposed Druid's Glen Road (see pg. 12 Ecological evaluation of site. Equally; moreover it fails to recognise this regional significance, not local, of the salmonid fishery status** (see G. Hannigan's em 14.7.15 referral submission on APAS).
>
> 2. I fully concur with Mr. Paul Scott's assessment of the Natural report and with his recommendations…"

209. The ultimate recommendation from this report was that "…there are very strong grounds for refusal and so recommend that planning authority does not permit this development, as currently formulated". However, this report does not confine itself to mentioning Section 5.4.1 of the Planning Scheme, and notably takes the stance that the Druid's Glen Road should be delivered in it's entirety from Q to P, and that the application is premature "insofar as it is contrary to infrastructural requirements of the Planning Scheme notably in respect of the delivery of Ticnock Park". I have already found that these were improper reasons for refusing permission, and this undermines Ms Henchy's reliance on this report.

210. It is also significant that the author of this report adopts Scott Cawley's recommendation and must therefore be taken as agreeing with them that the particular concerns over Section 5.4.1 and GI 19 warrant a request for further information rather than refusal of the application. Ms Henchy's reliance on the Parks & Landscapes Services Department report in this regard is therefore misplaced.

211. I must reject the applicant's argument that the respondents were obliged to request further information, rather than refusing permission, on the basis of reason (5). I am of the view that the objectives set out in Section 5.4 although described as "specific" are worded in general terms, and in this sense are not prescriptive. They allow for a margin of appreciation. There was material before the respondent within the Scott Cawley report, which was carried in to the planner's report, from which the respondent could come to the conclusion that the application as presented would not safeguard the ecological integrity of the rivers named in Section 5.4.1 and GI 19. The respondent was not therefore obliged to follow the recommendation of the planner's report that further information be requested. This is so particularly in light of the respondent's decision to reject the application on other grounds, thus rendering a notice requesting further information a futile exercise in the circumstances as they appeared to the planners at the time of the decision.

212. Furthermore, although not argued in this case, it is questionable whether a planning authority can ever be obliged to serve a request for further information. Rather it seems it may determine an application based on the information submitted, and may decide to refuse permission.[1]

213. There remain the further questions whether reason (5) complies with s. 34(10) and is sufficiently clear and unambiguous and self-contained in compliance with the Guidelines – arguments that will be taken together.

214. Section 34(10) of the Act of 2000 provides:-

> "(a) 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."

215. The Guidelines were issued by the Minister for the Environment, Heritage and Local Government under s. 28(1) of the Act of 2000:-

> "(1) The Minister may, at any time, issue guidelines to planning authorities regarding any of their functions under this Act and planning authorities shall have regard to those guidelines in the performance of their functions."

216. Paragraph 7.14 of the Guidelines states:-

> "7.14 Reasons for refusal of planning permission
>
> Notwithstanding any pre-application consultations which may have taken place, some applications will be refused, and it is in the interests of all that the same care and attention is devoted to the drafting of refusal decisions as is given to grants of permission.
>
> Section 34(10) of the Planning Act requires that a decision (and the notification of the decision) shall state the main reasons and considerations on which the decision is based. This is of fundamental importance to applicants so that they can assess options open to them as a consequence of the refusal. Reasons for refusal should therefore be clear and unambiguous, as informative and helpful as possible, should be self-contained statements, and should be related specifically to the particular development proposal.

> All substantial reasons for refusal should be stated since it is in the interest of prospective developers to be aware of all the fundamental objections to their proposals if they are considering whether to amend the scheme and re-lodge or to appeal. It is essential to avoid a situation where some fundamental reason for refusal is not given and the subsequent amended application is refused for that reason. Also, as stated in para. 6.8 information deficits should be referred to in the planning decision so that the applicant is made aware that there could be further obstacles to the grant of permission other than the reasons listed."

217. Paragraph 7.15 is also relevant:-

> "7.15 Refusals arising from development plans or local area plans.
>
> A statement of objectives in a development plan should not be regarded as imposing a blanket prohibition on particular classes of development and does not relieve the planning authority of responsibility for considering the merits or otherwise of particular applications. A brief reference to an objective or policy statement is not, therefore, adequate as a reason for refusal if it is not made clear what the objective is, *how it would be contravened by the proposed development*, and why that contravention would be contrary to the proper planning and sustainable development of the area. A reason for refusal must, as far as possible, bring out the reasonableness of applying the provisions of the plan in the particular case. Accordingly, caution should be exercised when refusing permission on the grounds that the proposed development would materially contravene the development plan. Where such a reason is given it must be clearly shown that specific policies/objectives of the plan would be breached in a significant way." [Italicised emphasis added]

While para. 7.15 refers to "development plans and local area plans" it seems to the court that a purposive approach should be adopted, and that the spirit and purpose behind para.7.15 is equally referable to a Planning Scheme made under Part IX of the Act of 2000.

217. In terms of whether a statement of main reasons and considerations is adequate, both parties in their written submission cited *Mulholland v An Bord Pleanála (No 2)* [2006] 1 IR 453, where Kelly J (as he then was) stated at pp. 464-465:-

> "I am of opinion that, in order for the statement of considerations to pass muster at law, it must satisfy a similar test to that applicable to the giving of reasons. The statement of considerations must therefore be sufficient to:-
>
> (1) 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;
>
> (2) arm himself for such hearing or review;
>
> (3) know if the decision maker has directed its mind adequately to the issues which it has considered or is obliged to consider; and
>
> (4) enable the courts to review the decision.
>
> Thus, 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 main reasons."

Where counsel disagreed was whether reason (5) complied with these criteria.

218. Counsel for the applicant also relied on the decision of Kelly J in *Deerland Construction Ltd v Aquaculture Licenses Appeals Board & Ors* [2008] IEHC 289. The court was there considering s. 40(a)(n) of the Fisheries (Amendment) Act 1997 which provides that a determination of an aquaculture license appeal and the notification of that determination "shall state the main reasons and considerations on which the determination is based". The context was that the applicant had been granted planning permission in 2007 for a hotel development which would extend into Wexford harbour foreshore, where certain land which would have to be reclaimed was also contained within an area covered by the notice party's aquaculture license which was renewed in 2006. The applicant appealed that decision, but the grant of a renewal licence was upheld by the Board. The decision of the Board recited the fact of the appeal by the applicant from the decision of the Minister to grant the aquaculture license, the determination of the Board to uphold the grant, and in a *pro forma* manner it stated that the Board took into account "…the matters referred to in s. 61 of the Fisheries (Amendment) Act 1997, as amended and substituted and having regard to the aforementioned, the appeal file and reports of the Board's technical adviser and being satisfied that it is in the public interest to do so…"

219. In his judgment Kelly J quoted with approval Stanley Burton J in *Nash v Chelsea College of Art and Design* [2001] EWHC (Admin) 538, at para. 34 of that decision:-

> "In my judgment, the following propositions appear from the above authorities:-
>
> (i) Where there is a statutory duty to give reasons as part of the notification of the decision, so that (as Law J put it in *R. v Northamptonshire C C ex parte W* [1998] E.L.R. 291) 'the adequacy of the reasons is itself made a condition of the legality of the decision', only in exceptional circumstances if at all, will the court accept subsequent evidence of the reasons.
>
> (ii) In other cases, the court will be cautious about accepting late reasons…"

Kelly J then stated at para. 85:-

> "The first of those propositions is particularly relevant in this case since the legislature by the amendment effected in 2001 positively required the first respondent to state its reasons and considerations in its determination. The giving of these reasons and indeed their adequacy is a condition of the legality of the determination of the respondent."

He found support for that in Simons, *Planning and Development law* (2nd Ed., 2007), and quoted with approval from p. 708:-

> "Some confusion has arisen in the case law as to whether a failure to state the reasons may be remedied by the giving of proper reasons subsequently…*The better view, however, is that a failure to state reasons at the time of the decision invalidates the decision under Irish law, and same should be set aside in judicial review proceedings.* The statutory

obligation is to give reasons contemporaneous with the decision, both in the decision itself and in the notification of it, and one cannot therefore be satisfied by the giving of reasons subsequently. One of the objectives of the duty to give reasons is to facilitate a challenge to the decision, whether by way of statutory appeal or by way of an application for judicial review. The bringing of such a challenge is subject to very tight statutory time limits, and the failure to give reasons at the time of the decision would frustrate the preparation of a focused challenge within timeframe (Emphasis added)."

Kelly J agreed with the author's "better view", and held that the Board's failure to state its reasons for its decision meant that the decision was invalid. He proceeded at paras. 89-92:-

> "On dealing with recourse to a planning inspector's report in the absence of reasons being given on the face of the decision, Mr. Simons observes at p. 706, following an analysis of the case law, that:-
>
> > 'One device often employed by the courts to overcome the paucity of reasoning in the formal statement of reasons was to supplement same by reference to the planning officer's, or the inspector's internal report ("planning reports"). The reasoning contained in the report would, in effect, be imputed to the planning authority or An Bord Pleanála. With respect, this practice is undesirable and, hopefully, will not survive the amendments introduced under s. 34(10). The statutory requirement (now) is that the decision itself states the main reasons and considerations on which it is based. The report is not part of the decision, and thus no matter how detailed the reasons contained therein, it cannot be regarded as fulfilling the statutory requirement. This would be the position even were the formal decision to include an express cross-reference to the report, such as 'the Board decided to grant permission in accordance with the inspector's recommendations'.
> >
> > The decision itself must state the main reasons and considerations.
> >
> > If, contrary to what is suggested above, it is acceptable to supplement the formal decision by reference to the contents of the planning report(s), this should only be done where the formal decision expressly adopts the recommendations, findings and conclusions of the inspector or the planning officer. One of the more questionable aspects of the earlier case law was the eagerness with which the courts were prepared to assume that the members of the Board were in full agreement with the inspector.'
> >
> > I entirely agree with the views of the author as stated in this passage.
> >
> > This approach appears to me to capture what the legislature had in mind when ordaining that a body such as the first respondent should state its reasons. It is not too much to expect that a body such as the first respondent carry out its statutory obligation in the precise terms in which the legislature has directed. It did not do so here.
> >
> > I do not see why an applicant such as the applicant should not know from reading the decision the reasons for it. That is what the legislature expressly required when it passed s. 10 of the Fisheries (Amendment) Act 2001. It is not good enough that an applicant, in order to find out the reasoning, if any, should have to trawl through the Board minutes and then through a technical adviser's report running to some 52 pages in order to try and glean the reasons for the decision in suit."

220. Counsel relied on these passages to support arguments that the applicant, and hence the court, should not have to resort to the planner's report or other reports considered by the respondent, or the *ex post facto* evidence in Ms Henchy's affidavit, in order to find the basis for, explain or justify reason (5).

221. Counsel for the respondent sought to distinguish *Deerland* on the basis that it was in reality a "no reasons" decision, and that, insofar as Kelly J's observations went beyond finding that the Board had failed to give reasons, they should be regarded only as *obiter dicta*.

222. Strictly speaking this may be correct. While the Appeals Board in *Deerland* stated in its decision that it took into account various matters including the reports of the Board's technical advisor, it does not in fact identify any specific elements in those reports or the appeal file, or any reasons arising there from, as being the basis for its decision to confirm the license. I therefore regard Kelly J's further observations as largely *obiter dicta*. However I find them, and passage quoted from Simons at para. [89], to be persuasive, at least in their general thrust in advocating that planning authorities should generally state their main reasons in the body of their decisions, and without cross-referencing material in planning reports in a manner that obliges interested parties to trawl through such reports in order to ascertain the reasons.

223. I also find *Deerland*, and the passage quoted from Simons at para.[88], to be strongly persuasive of the proposition that s. 34(10) does not allow a planning authority to give or explain its "proper" reason subsequently. Any different construction of s. 34(10) would simply negate the core requirement that the "…decision…and the notification of the decision shall state the main reasons and considerations on which the decision is based…".

224. Since *Deerland* the question of whether reasons are valid if they incorporate reasoning by reference to another document, or by adoption of a stated report, has been the subject of further consideration, and both parties referred the court to the decision of the Supreme Court in *EMI Records (Ireland) Ltd & Or. v the Data Protection Commissioner* [2013] IESC 34.

225. In that case under s. 10(4)(a) of the Data Protection Acts 1988 and 2003 the Commissioner had an obligation to specify in an Enforcement Notice his reasons for being of the opinion that there was a contravention of the Acts. The decision is authoritative and binding in relation to the Data Protection Commissioner, but the carefully considered *dicta* of Clarke J who delivered the only judgment of the court was clearly intended to be of wider application to administrative decisions where there is a statutory obligation to give reasons.

226. At para. 6.5 Clarke J stated:-

> "It follows that a party is entitled to sufficient information to enable it to assess whether the decision is lawful and, if there be a right of appeal, to enable it to assess the chances of success and to adequately present its case on the appeal. The reasons given must be sufficient to meet those ends."

He then referred to his own decision in *Sister Mary Christian v Dublin City Council* [2012] IEHC 163 which concerned whether it was

necessary for reasons to appear in a City Development Plan in relation to parts of that Plan. He also referred to the judgment of Fennelly J in *Mallak v Minister for Justice Equality & Law Reform* [2012] IESC 59, and Clarke J then proceeded:-

> "6.8 While the comments made in *Christian* related to the specific circumstances of that case and derived from the context of a development plan, it seems to me that there is a more general principle at play. Legal certainty requires, as was pointed out in *Christian*, that it must be possible to accurately determine what the reasons were. There should not be doubt as to where the reasons can be found. Clearly, an express reference in the decision itself to some other source outside of the decision document meets that test. Where, however, it is suggested that the reasons can be found in materials outside both of the decision itself together with materials expressly referred to in the decision, then care needs to be taken to ensure that any person affected by the decision in question can readily determine what the reasons are notwithstanding the fact that those reasons do not appear in the decision itself or in materials expressly referred to in the decision.
>
> 6.9 Where, for example, an adjudicator makes a decision after a process in which both sides have made detailed submissions it may well, as Fennelly J. pointed out in *Mallak*, be that the reasons will be obvious by reference to the process which has led to the decision such that neither of the parties could be in any reasonable doubt as to what the reasons were. But it seems to me that, in a case where any party affected by a decision could be in any reasonable doubt as to what the reasons actually were, it must follow that adequate reasons have not been given.
>
> 6.10 There may, of course, be cases where it is easy to see what reasons have been given and where the real issue is as to whether those reasons are adequate. However, the first point has to be to determine what reasons, if any, have been given, and where those reasons may be found."

Clarke J continued, in a passage upon which counsel for the respondent placed particular reliance:-

> "6.11 It follows that in reasons cases there may well be three questions raised:-
>
> 1. Do reasons have to be given and if so what type of reasons;
>
> 2. Where can the reasons be found, and by reference to what evidence or materials can the Court objectively ascertain the reasons; and
>
> 3. When the reasons given, if any, have been ascertained, are those reasons sufficient to meet the requirements established in the case law?"

227. The decision in *EMI Records* therefore does countenance reasons being given by an administrative tribunal by reference to other materials. In the present case the respondent has not framed reason (5) by cross-referencing planning reports, so it is not necessary for the court to resolve the question whether, in the sphere of planning decisions, that may be a legitimate exercise, notwithstanding pronouncements such as those of Kelly J in *Deerland* disapproving of it as a practice. However it does seem that this Court should endeavour to follow the approach of the Supreme Court in *EMI Records*, and apply the principles enunciated by Clarke J in the passages just quoted.

228. The first question "Do reasons have to be given, and if so what type of reasons" is easily enough answered. Section 34(10) mandates that the main reasons and considerations be given. *Mulholland* adds that these must give such information as may be necessary or appropriate for the applicant to consider whether he has a reasonable chance of succeeding in an appeal or judicial review, to arm himself for such hearing, to know if the decision maker has directed its mind adequately to the issue which it has to consider, and to enable the courts to review the decision. To this may be added the requirement under the Guidelines that the reasons be clear and unambiguous.

229. The second question is "where can the reasons be found, and by reference to what evidence or materials can the Court objectively ascertain the reasons". This brings the court to reason (5) but its wording is fraught with uncertainty. It does not indicate how the applicant has "not demonstrated" that the proposed development has had "sufficient regard" to the particular section and objective. It must be accepted that the respondent was entitled in reason (5) to make express reference to the Planning Scheme, and to identify "Section 5(1) in particular GI 19", and the court must look to this document. However, reading reason (5) and the relevant part of the Planning Scheme does not elucidate the difficulties with the wording. Thus there is no material which indicates what "regard" would be "sufficient", or how the applicant is to "demonstrate" that it had such regard.

230. As already indicated, Specific Objective GI 19 is quite generic in its wording:-

> "to safeguard the ecological integrity of…and to require the sensitive improvement and management of…"

reason (5) does not demonstrate any particular aspect of ecological integrity, or any particular aspect of the improvement or management of the area concerned, which the respondent determined was not consistent with the Planning Scheme. Similarly reason (5) does not identify in what respect it is said that the applicant failed to have "sufficient regard" to those objectives of the Planning Scheme.

231. Accordingly in its own terms and, when read with the Planning Scheme, reason (5) does not present clear and unambiguous reasons sufficient to satisfy the *Mulholland* criteria, and fails the third limb of the test enunciated by Clarke J in *EMI Records*.

232. The respondent then seeks to rely on the often cited judgment of Murphy J in *O'Donoghue v An Bord Pleanála* [1991] ILRM 750 where, at p. 759, he observed that "...it has never been suggested that an administrative body is bound to provide a discursive judgment as a result of his deliberations…" It is argued that the alleged uncertainty with regard to reason (5) is removed by the reports prepared in respect of the planning application and considered in the planner's report, which informed the decision.

233. The first problem with this submission is that reason (5) does not cross-reference the planner's report, or any of the observations or reports that informed the planner's report.

234. Even if this submission is correct, it requires the applicant (or indeed any other interested party) and the court to turn to the detail in the reports to ascertain the basis for reason (5). Adopting the wording used by Clarke J at para. 6.8 of *EMI Records* , can the basis for reason (5) be "readily determined" from these reports? And if so, are the reasons sufficient to satisfy the *Mulholland* criteria?

235. In respect of ecological impacts the planner's report was primarily informed by Scott Cawley, but their report is a wide ranging ecological assessment of the planning application, and even a close examination of that report fails to disclose with any precision in what respects it may be asserted that the planning application/proposed development is not consistent with "section 5.4.1 in particular GI 19". The closest that that report comes to this is in para. 3(c) where the author suggests that the likely impacts of 30m of the Druid's Glen Road, of the abutments for the proposed bridge and partial spanning at the stream and diversion of 40m of the stream "appears to have been overlooked", and recommends that the respondent seek further information and a method statement in relation to diversion of the stream. This is not even a definitive finding that the planning application fails to comply with section 5.4.1 and GI 19, and it does not even prompt Scott Cawley to recommend refusal of permission.

236. The other report which might be said to underpin reason (5) is the Parks & Landscape Services department observation. Again this a wide ranging report and, while para. 1.2.2 concurs with the Scott Cawley assessment, it also regards the Ecological Assessment by Natura Environmental Consultants lodged with the report as being "satisfactory". In essence it takes us no further than Scott Cawley.

237. Accordingly, reason (5) does not incorporate by a reference any of the reports considered by the respondent, and the exercise of trying to identify what parts of the most relevant planning reports form a basis for the inconsistency with the Planning Scheme referred to in reason (5) is neither straightforward nor conclusive. At the very least it objectively considered it leaves a doubt as to the basis for reason (5). Given such doubt, reason (5) fails the *Mulholland* criteria for adequacy of reasons.

238. In summary I find:-

> (1) that reason (5), even when read with Section 5.4.1 and GI 19 of the Planning Scheme, is not self-explanatory;
>
> (2) that it is neither clear nor unambiguous;
>
> (3) that it does not incorporate by cross reference or otherwise the planner's report or reports/observations that informed that report;
>
> (4) that even after examining the relevant reports the court cannot readily determine or objectively ascertain the basis of the reason for refusal as it is expressed in reason (5); and,
>
> (5) that reason (5) fails to give the applicant the necessary information to consider whether he has a reasonable chance of judicially reviewing the reason, or to enable the court to review the decision.

Remedy

239. Having found that reasons (3), (4) and (5) are invalid, the question remains whether the court can or should grant reliefs in circumstances where no specific challenge has been made to reasons (1) and (2). Counsel for the respondent argued that the impugned decision remains valid because it is based on two reasons that have not been challenged in these proceedings, nor appealed to the Board. It is also pointed out that these two reasons relate to the residential development applied for on lands falling outside the Planning Scheme, but at no stage has the applicant appealed to the Board or challenged same by way of judicial review. It is argued that the applicant cannot be entitled to remittal of the decision to the respondent in circumstances where these first two reasons have not been challenged, thereby indicting the applicant's acceptance of them.

240. Counsel for the respondent further argued that the applicant cannot avail of s. 50A(9) of the Act of 2000 (inserted by s. 13 of the Planning and Development (Strategic Infrastructure) Act 2006). This subsection provides:-

> "If an application is made for judicial review under the Order in respect of part only of a decision or other act to which section 50(2) applies, the Court may, if it thinks fit, declare to be invalid or quash the part concerned or any provision thereof without declaring invalid or quashing the remainder of the decision or other act or part of the decision or other act, and if the Court does so, it may make any consequential amendments to the remainder of the decision or other act or the part thereof that it considers appropriate."

241. Counsel for the respondent relied on the decision of the Supreme Court in *Talbot v An Bord Pleanála* [2009] 1 IR 375, and in particular the decision of Kearns J That appeal concerned the refusal of an application for leave to appeal for judicial review to challenge a decision of the Board refusing the applicant's planning permission to construct a family home in Co. Kildare. The planning authority refused permission for two reasons. The first was that the applicants did not come within the class of persons entitled to the "positive presumption in favour of one of houses" provided by the Kildare County Development Plan. The second combined a number of specific planning reasons related to the character of the proposed development and "suburban type sprawl in a rural area". Peart J in the High Court refused leave to seek judicial review on the basis that no benefit would result to the applicants from the order sought because it seemed that the court's decision could not touch on the second ground of refusal. Peart J certified a point of law for the determination of the Supreme Court concerning the exercise of the High Court discretion to refuse leave and asking – "if the court is so entitled to refuse leave on that basis, is it permissible to reach a conclusion that leave should be so refused by drawing an inference from the material put before the court on the application for leave that any further application for planning permission would be refused in any event on the ground or grounds which was/were not sought to be impugned in the proceedings for judicial review?"

242. Fennelly J, with whom Finnegan J agreed (Kearns J dissenting) allowed the appeal. At p. 384, para. 29, Fennelly J stated:-

> "However, a person entitled to the positive presumption may be in a better position to persuade the planning authority to decide in his favour, depending, of course, on the strength of the countervailing planning considerations. In other words, I do not think that those considerations are necessarily in a watertight compartment, uninfluenced by the status, *vis-à-vis* the issue of positive presumption, of the applicant for permission. I merely say that it would be open to a planning authority or the first respondent to modify their position. I would not wish to say any more and I certainly do not state that they would or should modify their position. There is no doubt that the planning history constitutes very strong evidence that the applicants face an uphill battle in seeking to obtain planning permission. However, I am satisfied that a judge is not entitled to presume in advance what the outcome of an application will be. That is exclusively a matter for the statutory bodies charged with those functions."

He went on to state at para. 30:-

> "…Nor have I given any consideration at all to the question, discussed by Kearns J. in the judgment he is about to deliver, of whether the fact that one only of a number of reasons in the first respondent's statement of reasons for refusal is invalid in law, the decision is necessarily invalid. The court has not been addressed on the issue. It might be necessary to consider, for example, the decision of this court in *Kennedy v. Law Society (No. 3)* [2002] 2 I.R. 458 at p. 487, where reference was made to "the general problem of plurality of purpose as a 'legal porcupine which bristles with difficulties'…": (see also Glidewell J. in *R. v. I.L.E.A., Ex p. Westminster City Council* [1986] 1 W.L.R. 28). I express no opinion on the likely outcome."

In his judgment Kearns J agreed with Fennelly J that "…a judge is not entitled to presume in advance what the outcome of a future planning application might be, given that this is exclusively a matter for the statutory bodies charged with such functions", but went on to hold that the High Court was entitled to refuse leave. At p. 386, para. 37, he stated:-

> "…In my view the High Court Judge was perfectly entitled to take the view, as he did, that as there no challenge brought to the second reason for refusing planning permission, the overall decision remained valid, regardless of any challenge, successful or otherwise, to the first reason for refusal."

He went on to state at para. 39-40:-

> "The latter reason for refusal has not been challenged in the instant proceedings. It follows therefore that unless an error by the respondents in respect of the first reason for refusal vitiates the refusal for the second reason, the overall decision to refuse permission remains valid.
>
> Of course there will be cases where, if part of a decision is impugned, it logically must follow that the entire decision must be quashed. If the grounds for granting relief in respect of part of a decision relate, for example, to bias on the part of a planning authority, failure to take into account a relevant consideration or want of fair procedures, these would all be reasons which would taint the overall decision."

Having noted that there was no challenge of that nature advanced in the case before him, Kearns J went on to state at para. 42:-

> "I find support for this view in s. 50 of the Planning & Development Act, 2000 where it provides as follows at s. 50(4)(g)2 :-
>
> > "Where an application is made for judicial review under this section in respect of part only of a decision referred to in subsection (2), the High Court may, if it thinks fit, declare to be invalid or quash the part concerned or any provision thereof without declaring to be invalid or quashing the remainder of the decision or part of a decision, and if the court does so, it may make any consequential amendments to the remainder of the decision or part of a decision that it considers appropriate."

243. Counsel for the respondent argued that any findings that the court may make in respect of reasons (3), (4) and (5) will not taint reasons (1) and (2), and that, accordingly, the decision to refuse should remain in place even if any invalid parts are severed.

244. I am not persuaded by these submissions. The factual background to *Talbot* was very different. It concerned a single unit dwelling on its own rural site. As Fennelly J made clear, the court had not been addressed on the issue of whether the fact that one only of a number of reasons in a refusal of permission is invalid in law, the decision as a whole is necessary invalid, and he did not decide same. The decision of Kearns J is at best *obiter* on the point and an argument could be advanced that s. 50A(9) does not contain wording that would warrant the restrictive construction ascribed to it in his judgment.

245. Even if one were to accept the observations of Kearns J as correct, at para. 40 of his decision he expressly distinguishes cases such as bias or "failure to take into account a relevant consideration" where "these would all be reasons which would taint the overall decision".

246. As I have found in this case that reasons (3) and (4) were prompted by improper motive, and that the respondent took into account irrelevant considerations, the invalidity of these reasons taints the overall decision.

247. Moreover, the very unusual circumstances of the present planning application, with a development site straddling as it does the boundaries of a SDZ and land not covered by the SDZ, militate against the respondent's argument in this particular case. I have already rejected the argument that an appeal by the applicant from part only of the decision *i.e.* that part relating to the proposal for development of residential units on Beechpark on the lands outside the SDZ – was a realistic alternative remedy, because such an appeal would have been bound to fail due to its dependence on the Druid's Glen Road and "plug-in" road for access (in respect of which there could be no appeal by reason of s. 170(3). There is thus a complex interdependence between the two parts of the present planning application, and the absence of any right of appeal in respect of that part of the development land falling within the SDZ is a factor that the court must take into account.

248. I therefore conclude that it would be inappropriate to avail of the power in s. 50A(9) to declare invalid or quash part only of the impugned decision.

Summary

249. The main findings in this judgment may be summarised as follows:-

> (1) Although there is no specific challenge to the validity of reasons (1) and (2) in the refusal of planning permission in the statement of grounds it is sufficiently broadly worded to entitle the applicant to argue that a successful challenge to reasons (3) and (4) on grounds of improper motive, taking into account irrelevant reasons, or objective bias, would taint the entire decision.
>
> (2) The claim that the applicant is seeking an advisory opinion of the court is rejected.
>
> (3) The availability of an appeal to An Bord Pleanála in respect of the refusal under reasons (1) and (2) relating to that part of the development site lying outside the Cherrywood Planning Scheme area upon which the residential units are to be developed is not a realistic alternative remedy in circumstances where s. 170(3) deprives the applicant of any right of appeal in respect of the part lying within the Planning Scheme area, which part provides the essential and only access to the proposed residential development such that any appeal would be bound to fail.

(4) The effect of s. 247(3) of the Act of 2000 is that in general, reports and recommendations from planning or other local authority officials prepared in the course of the formal planning process in response to a planning application cannot rely upon advice given or received at any pre-planning consultation held under s. 247, and in turn should not be relied upon by the decision maker when considering or determining the application, or by the court in determining legal proceedings. Accordingly the court has disregarded such evidence of the contents of these meetings as appears from the affidavits and exhibits.

(5) This general prohibition is probably subject to exceptions: for example, an omnibus listing of such meetings in a planner's report; the furnishing of information or documents to an intending applicant on the basis that such information or documents would be used in or inform the planning application; or an egregious statement by a planning official demonstrating actual bias.

(6) The s. 247(3) prohibition did not apply to information or documentation arising from non-statutory meetings or communications, including emails from Ms Henchy (the ultimate decision-maker on behalf of the respondent) of 9th January, 2015, and 2nd April, 2015, technical information furnished by the respondent's road design consultants Atkins to the applicant/its consultants, and a meeting between the applicant and Ms Henchy and Ms Philomena Poole on 22nd April, 2015.

(7) In her email of 9th January, 2015, Ms Henchy expressed a preference for there to be a single planning application for the entirety of the Druids Glen Road Q to P – which would have necessitated cooperation between the applicant and two other landowners. That this was still her view on 2nd April 2015 is implicit from an email that she sent to the applicant's architects Tom Phillips & Associates on that date.

(8) The court finds as a matter of probability that at the meeting of 22nd April, 2015, Ms Henchy

> i. expressed concerns that the applicant might not complete the road infrastructure up to its site boundary and as such would create a physical ransom strip, and
>
> ii. indicated that the final design for signalised junction Q on the N11 would be available within the 5 weeks observation period for the intended planning application.

(9) Although Atkins Consultants final vertical and horizontal alignment for the Druid's Glen Road was not to hand when the planning application was lodged, there is no evidence that the alignment of the proposed road prepared by the applicant's engineers Muirs and accompanying the application was inconsistent with Atkins in any material respect, and this was not a reason for refusing permission.

(10) The respondent failed to obtain or make available the design of signalised junction Q within the five week period for observations or at any time prior to the impugned decision.

(11) The Transport department observations and planner's report advised that the application was premature in advance of planning permission for the entire Druid's Glen Road, but prematurity was not stated as a reason for refusal.

(12) The interpretation of a Planning Scheme in respect of Strategic Development Zone made under Part IX of the Act of 2000 is a matter of law within the exclusive jurisdiction of the court: *Tennyson v Corporation of Dún Laoghai*re [1991] 2 IR 527 and *North Wall Property Holding Company Ltd and Ors v Dublin Docklands Development Authority and Ors* [2008] IEHC 305 followed by analogy.

(13) The Planning Scheme falls to be construed in its ordinary meaning as it would be understood by members of the public, without legal training as well as by developers and their agents, unless the document, read as a whole, necessarily indicates some other meaning: the dictum of McCarthy J in *Re: XJS Investments Ltd* [1986] IR 750 at p.756 applied.

(14) The effect of s. 170(2) of the Act of 2000 is that if an the applicant can establish that, as a matter of probability, the development proposed is consistent with a planning scheme properly construed, or the planning authority is satisfied that it would be consistent if granted with any conditions that the planning authority may attach, then the planning authority must grant permission or grant it subject to conditions – but must refuse permission if the development would not be consistent with the planning scheme.

(15) The Cherrywood Planning Scheme as properly construed means that -

> i Planning permission for the Druid's Glen Road Q-P3 (including junction Q) must be in place before *planning permission* is granted in relation to proposed *residential developments* within Development Area 5.
>
> ii That work must have commenced on the Druid's Glen Road Q-P3, including junction Q, prior to the occupation of 40% of Development Area 5.
>
> iii That the Druid's Glen Road Q-P3, including junction Q, must be completed to a standard to be taken in charge prior to the occupation of 65% of Development Area 5.

(16) As properly construed, no part of the Planning Scheme necessitates the delivery of the Druid's Glen Road by way of a single trans-ownership or multiparty planning application and accordingly an application for permission to construct a section of the Druid's Glen Road is not per se inconsistent with the Planning Scheme.

(17) The Planning Scheme also does not mean that a final design of junction Q must be to hand, or that planning permission for junction Q must be in place, before planning permission can be granted for the Druid's Glen Road.

(18) As the access for construction on the applicant's land, or in Development Area 5, must necessarily be from the N11

at point Q, it follows that the applicant or the respondent or some other party would have to seek and obtain the requisite permission and construct the signalised junction at Q *before the development of the Druid's Glen Road could commence*.

(19) Judged against these findings reason (4) must be regarded as invalid as it is premised on an incorrect interpretation of Chapters 4 and 7 of the Planning Scheme.

(20) Insofar as reason (3) is read to mean that the proposed development by itself or the precedent that grant of permission would set for other relevant development (which must refer to other development by other landowners in Development Area 5), would adversely affect the use of the N11 by traffic prior to construction of signalised junction Q, it is meaningless and invalid because no effect on the traffic can take place in any event until junction Q is constructed as there is no other access to the N11.

(21) Insofar as reason (3) means that planning permission for the proposed development is premature before junction Q is "implemented" it is invalid because this is not so stated in, or a requirement of, the Planning Scheme, and the respondent has misconstrued the Planning Scheme.

(22) It would be open to the respondent to grant permission in respect of that part of the Druid's Glen Road owned by the applicant subject to conditions e.g. as to timing or sequencing under s. 34(4)(f) or (h) or subject to further agreement under s. 34(5) with the respondent as to points of detail in relation to the link in to junction Q.

(23) I find that the respondent's real motive for refusing permission under reasons (3) and (4) in respect of the Druid's Glen Road was to avoid any possibility of creating a ransom strip and to effectively oblige the applicant to make a joint application, or co-ordinated applications, with adjoining landowners in respect of the entire Druid's Glen Road, or otherwise to reach agreement with those landowners to facilitate adjoining landowners in gaining access to develop their lands.

(24) This was an improper motive, or alternatively involved the taking into account of irrelevant considerations, and the refusal of permission is thereby rendered invalid in its entirety.

(25) There is insufficient evidence of change of position by the respondent to constitute objective bias.

(26) The other suggested evidence of objective bias consists largely of statements of Ms Henchy made outside of statutory consultations but which the court considers were made within "the decision making process" as that term is broadly construed. As such the statements were not external to the process and not capable of demonstrating objective bias: principles enunciated by Fennelly J in *O'Callaghan v Mahon* [2008] 2 IR 514 and in particular principle (c) at p. 672-3 applied.

(27) In any case in merely expressing a preference for a single planning application for the entire Druid's Glen Road Ms Henchy's statements did not objectively demonstrate bias.

(28) Refusal reason (5) was based on advice obtained by the respondent and contained in a wide ranging ecological assessment from Scott Cawley, ecological consultants, which was adopted in the respondent's Parks & Wildlife section observations and in the planner's report - although reason (5) makes no reference to and does not incorporate these reports.

(29) Reason (5) is not invalid on the ground that the Scott Cawley report recommended a request for further information rather than refusal of permission.

(30) Reason (5) is invalid because it fails to state the main reasons and considerations in accordance with s.34 (10) of the Act of 2000 and /or fails to comply with Guidelines 7.14 and 7.15 in that:-

i. even when read with "Section 5.4.1 in particular GI 19" of the Planning Scheme it is not self-explanatory;

ii. it is neither clear nor unambiguous;

iii. it does not incorporate by cross reference or otherwise the planner's report or reports/observations that informed that report;

iv. even after examining the relevant reports the court cannot readily determine or objectively ascertain the basis of the reason for refusal as it is expressed in reason (5); and,

v. Reason (5) fails to give the applicant the necessary information to consider whether he has a reasonable chance of judicially reviewing the reason, or to enable the court to review the decision.

Criteria of Kelly J in *Mulholland v An Bord Pleanála (No. 2)* [2006] 1 IR 453, and *dicta* of Clarke J in *EMI Records (Ireland) Ltd. & Ors v the Data Protection Commissioner* [2013] IESC 34 applied. *Deerland Construction Ltd. v Aquaculture Licenses Appeals Board & Ors.*[2008] IEHC 289 considered.

(31) As the basis for finding reasons (3) and (4) invalid includes improper motive and the taking into consideration of irrelevant considerations this taints the entire decision to refuse planning permission. It is therefore inappropriate to avail of the power in s. 50A(9) of the Act of 2000 to declare invalid or quash part only of the impugned decision, and the entire decision should be quashed and the matter remitted to the respondent. *Talbot v An Bord Pleanála* [2009] 1 IR 375 considered.

Orders

250. Accordingly, the court will make an order quashing the decision of the respondent made on the 31st July, 2015, in its entirety. I will further order that the matter be remitted to the respondent to be determined in accordance with law.

251. It is my intention that the effect of the remittal order should be:-

> (1) to enable the respondent to consider its decision on the planning application based on the observations and submissions already before it on 31st July, 2015, and the conclusions in this judgment; and,
>
> (2) so far as the Act of 2000 and Planning and Development Regulations 2001 (as substituted by the 2006 Regulations) permit, to afford sufficient time, *should the respondent see fit,* for the respondent to raise with the applicant a request for further information and/or a request to produce evidence in accordance with Article 33 of the Regulations, and/or an invitation to the applicant under Article 34 to submit revised plans or other drawings or other particulars providing for modification of the development to which the application relates.

252. I will hear the parties further in relation to the form of the order best designed to achieve these objectives.

[1] See Simons "Planning and Development Law"(Thomson Roundhall, Second Ed.) para.3-105 and fn.122.

[2] This subsection is the precursor of s. 50A(9) quoted earlier, and does not differ in any material in respect for the purposes of this judgment.