Tony McEvoy and **Michael Smith,** Applicants, v. **Meath County Council,** Respondent [2001 No. 359 JR]

High Court 2nd September, 2002

High Court 24th January, 2003

Planning and development – Development plan – Adoption of plan – Strategic planning guidelines – Regional planning guidelines – Whether planning authority had regard to strategic planning guidelines in making and adopting development plan – Planning and Development Act 2000 (No. 30) ss. 21(4) and 27(1).

Practice – Costs – Public interest – Discretion of court – Prolongation of proceedings – Transcripts – Whether unsuccessful applicant entitled to costs – Rules of the Superior Courts 1986 (S.I. No. 15) O. 99, r. 1(4).

Section 27(1) of the Planning and Development Act 2000 provides as follows:-

"A planning authority shall have regard to any regional planning guidelines in force for its area when making and adopting a development plan."

The applicants applied for a declaration that the respondent in making and adopting the development plan for County Meath failed to have due regard to the "strategic planning guidelines for the greater Dublin area". The applicants further applied for an order by way of *certiorari* to quash the decision by the respondent to make and adopt the plan. The strategic planning guidelines for the greater Dublin area were deemed regional planning guidelines within the meaning of s. 21 of the Act of 2000.

Held by the High Court (Quirke J.), in dismissing the application, 1, that the obligation imposed on the respondent by s. 27 (1) of the Act of 2000 to have regard to the strategic planning guidelines for the greater Dublin area when making and adopting its development plan, did not require it rigidly to comply with the guidelines' recommendations or even necessarily to adopt the strategy and policies outlined therein. It could depart from them for *bona fide* reasons consistent with the proper planning and development of the area for which they have planning responsibility.

Glencar Exploration plc. v. Mayo County Council (No. 2) [2002] 1 I.R. 84 followed. *Enfield London Borough v. Secretary of State for the Environment* [1975] J.P.L. 155; *R. v. C.D.* [1976] 1 N.Z.L.R. 436; *R. v. Police Complaints Board ex parte Madden* [1983] 1 W.L.R. 447 and *Simpson v. Edinburgh Corporation* [1961] S.L.T. 17 considered.

2. That the applicants failed to discharge the onus that the respondent acted irrationally and that it did not have before it relevant material which would support its decision.

O'Keeffe v. An Bord Pleanála [1993] 1 I.R. 39 followed.

Following the hearing of submissions on the question of costs it was:

Held by the High Court (Quirke J.), in ordering that the respondent pay 50% of the applicants' costs of the proceedings and the full costs of the daily transcript, 1, that the proceedings raised public law issues which were of general importance and the applicants had no private interest in the outcome of the proceedings. The applicants acted solely by way of furtherance of a valid public interest in the environment and the proceedings constituted a "public interest challenge".

O'Shiel v. Minister for Education [1999] 2 I.R. 31 and *R. v. Lord Chancellor, ex parte Child Poverty Action Group* [1999] 1 W.L.R. 347 considered.

2. That the trial of the proceedings was unnecessarily prolonged by the vast amount of documentation which had been analysed and considered in order to determine questions of fact which could have readily determined by agreement between the parties and the majority of such issues of fact were determined in favour of the applicants.

Cases mentioned in this report:-

Enfield London Borough v. Secretary of State for the Environment [1975] J.P.L. 155.

Glencar Exploration plc. v. Mayo County Council [1993] 2 I.R. 237.

Glencar Exploration plc. v. Mayo County Council (No. 2) [2002] 1 I.R. 84; [2002] 1 I.L.R.M. 481.

Lancefort Ltd. v. An Bord Pleanála (No. 2) [1999] 2 I.R. 270; [1998] 2 I.L.R.M. 401.

O'Connor v. Nenagh Urban District Council (Unreported, Supreme Court, 16th May, 2002).

O'Keeffe v. An Bord Pleanála [1993] 1 I.R. 39; [1992] I.L.R.M. 237.

O'Shiel v. Minister for Education [1999] 2 I.R. 321; [1999] 2 I.L.R.M. 241.

R. v. C.D. [1976] 1 N.Z.L.R. 436.

R. v. Lord Chancellor, ex parte Child Poverty Action Group [1999] 1 W.L.R. 347; [1999] 2 All E.R. 755.

R. v. Police Complaints Board, ex parte Madden [1983] 1 W.L.R. 447; [1983] 2 All E.R. 353.

Simpson v. Edinburgh Corporation [1961] S.L.T. 17; [1960] S.C. 313.

Judicial review.

The facts have been summarised in the headnote and are more fully set out in the judgment of Quirke J., *infra.*

The High Court (O'Higgins J.) granted the applicants leave to apply for judicial review on the 31st May, 2001.

The application was heard by the High Court (Quirke J.) on the 16th to 19th, the 23rd, to 26th, the 30th and 31st July and the 14th August, 2002.

Ian Finlay S.C. (with him *Colm Mac Eochaidh*) for the applicants.

Parick A. Butler S.C. (with him *Thomas Clarke*) for the respondent.

Cur. adv. vult.

Quirke J. 2nd September, 2002

By order of the High Court (O'Higgins J.) made on the 31st May, 2001, the applicants were given liberty to seek the following reliefs by way of judicial review:-

(1) an order declaring that in making and adopting a development plan for the county of Meath in March, 2001, the respondent failed to have due regard to the strategic planning guidelines for the greater Dublin area published on the 25th March, 1999, as required by law and that in consequence the plan is void and of no effect and;

(2) an order quashing the decision of the respondent to make and adopt the plan.

Sequence of relevant events

On the 25th March, 1999, strategic planning guidelines (hereafter called "the guidelines") were published by the local authorities for the greater Dublin area and by the Department of the Environment and Local Government with the object of:-

(a) providing a strategic planning framework for development plans affecting the Dublin and Mid-East regions and;

(b) detailing the preferred direction for land use and transportation in those regions in the period up to the year 2011.

In April, 2000, a review and update of the guidelines was published which concluded that the greater Dublin area (comprising Dublin City and the counties of Dun Laoghaire – Rathdown, Fingal, Kildare, Meath, South Dublin and Wicklow) was growing more rapidly than envisaged so that some revised recommendations were necessary in that light.

On the 1st January, 2001, pursuant to the coming into effect of Part II of the Planning and Development Act 2000 the guidelines were deemed to be regional planning guidelines within the meaning of s. 21(4) of the Act of 2000.

On the 5th March, 2001, the respondent adopted the Meath county development plan 2001 and on the 20th March, 2001, notice of the decision to make and adopt that plan was published in An Iris Oifigúil.

In April, 2001, a further review and update of the guidelines was published which reviewed the effect of the guidelines, expressed some concerns, made recommendations and identified planning priorities for the greater Dublin area in the year 2001.

On the 31st May, 2001, the first applicant, who is an elected member of Kildare County Council and the second applicant, Mr. Smith, who is chairman of An Taisce (the National Trust for Ireland) sought and obtained liberty to seek the relief which is sought herein and on the 25th October,

2001, it was ordered by the High Court (Kelly J.) that these proceedings should proceed to hearing as if commenced by plenary summons without the need for pleadings and with certain liberty to the parties to adduce evidence *viva voce*.

The evidence adduced at the hearing of this action was largely documentary in nature comprising evidence on affidavit and with a number of documents agreed as evidence by the parties. Oral testimony was adduced by Mr. Michael Grace on behalf of the applicants and three witnesses (Mr. Tony McEvoy, Mr. Joseph Horan and Mr. Joseph Fahy) were cross-examined in respect of their evidence on affidavit.

The applicants' claim

Sections 21 to 27 inclusive of the Act of 2000 make provision for regional planning guidelines and s. 21(4) of the Act expressly provides that "…the strategic planning guidelines for the greater Dublin area …published on the 25th March, 1999, shall have effect as if made under this Part." It follows that the guidelines have precisely the same status as regional planning guidelines for the purposes of the Act and otherwise.

Section 27(1) of the Act of 2000 provides that:-

> "A planning authority shall have regard to any regional planning guidelines in force for its area when making and adopting a development plan."

The applicants claim that in making and adopting the Meath county development plan (hereafter called the Meath plan) the respondent:-

1. failed in its statutory obligation to have regard to the guidelines; and
2. adopted a development plan which contained errors on its face constituting errors on the face of the record which were of such magnitude as to:
   (a) render the decision to make and adopt the Meath plan unreasonable and irrational as a matter of law; and
   (b) vitiate the legal effect of the Meath plan.

The guidelines

The stated objective of the guidelines was to put in place a broad planning framework for the greater Dublin area in order to provide an overall strategic context for the development plans of each local authority within the area. This was deemed necessary by reason of "an unprecedented rate of growth which is reflected in the level of development and building activity and in the demand for developable land" within the area.

Within the guidelines a distinction was made between the existing built up area of Dublin and its immediate environs (called the metropolitan area) and the remaining part of the area (called the hinterland area) which comprises extensive areas of countryside together with a range of towns of various sizes.

The executive summary of the guidelines declares, *inter alia*, that:-

> "the principal issues in the metropolitan area related to pressure arising from rapid and intensive development, such as severe traffic congestion, whilst an important issue in the hinterland area is the spill-over of development pressures on the built-up area of Dublin … separate development strategies for the metropolitan area and the hinterland area are proposed … in both areas the strategy seeks for and, facilitates a better balance between public and private transport. This will require the consolidation of future growth into a limited number of locations … the growth of the metropolitan area will be balanced by the concentration of development into major centres in the hinterland … these 'development centres' will be located on existing or future transportation corridors … (and) … will be separated from each other and from the metropolitan area by 'strategic green belts'.
>
> It is intended that these 'development centres' will develop, in the longer term as self sufficient towns with only limited commuting to the metropolitan area. This will involve the development of a strong employment and service base in each of the 'development centres'.
>
> Development outside the metropolitan area and the identified 'development centres' in the hinterland area should be primarily to meet local rather than regional needs. Sporadic and dispersed development is regarded as unsustainable and should be subject to strict control."

The principles guiding the strategy within the guidelines were those of "sustainable development" consistent with European policy emanating from the European spatial development perspective and the decision to adopt the strategy was taken after examination of a range of alternative models and options for the accommodation of the expected levels of population growth in the area.

Chapter 9 of the guidelines provided that the population of the hinterland area (consisting principally of the counties of Meath, Wicklow and Kildare) was expected to increase by nearly 36%, reaching a total population in excess of 400,000 by the year 2011 and representing an increase in the total number of households in that area of over 63,000 (73%).

The "strategy for hinterland area" was set out in detail in the same chapter and contained proposals with:-

> "the objective of achieving over a period of time, a number of large towns (or adjacent sets of towns), each complete with a high

level of employment activities, high order shopping and the full range of facilities. Ideally such towns should be self sufficient with little or no commuting to the metropolitan area. However, it is recognised that this is an unachievable target in the time scale covered by the guidelines. Nevertheless the longer term objective should be to achieve self sufficient towns, and in the meantime to establish the conditions in these towns to allow for that. It is, therefore, proposed that future development in the hinterland area be strongly directed into 'development centres' comprising of:

Primary centres that is Drogheda, Navan, Balbriggan, Naas-Newbridge-Kilcullen and Wicklow. Apart from Navan each of these is on an existing transportation corridor.

Secondary centres at Athy, Arklow and Kildare-Monasterevin, all on existing or potential transportation corridors … it would be necessary to accommodate local growth in those parts of the hinterland area outside the proposed 'development centres'. However development outside of the designated centres should be strictly limited to local need. The spread of development intended primarily to serve the metropolitan area and generating significant levels of commuting is neither environmentally sustainable or economic and should be restricted using demand management techniques. … The basis for the growth of the 'development centres' is that they do not become primarily dormitory towns for the metropolitan area. For this reason it may be desirable to constantly monitor their development and seek to co-ordinate the release of residentially zoned land to broadly reflect the establishment of employment in the centres. … It is however recognised that commuting to the metropolitan area will continue from these centres, at least in the short to medium term and consequently a number of public transport facilities have been identified as being necessary for the growth of the major hinterland towns."

The guidelines conclude by making (at appendix 6) a series of 48 separate recommendations which are expressed to have arisen "from the preparation and formulation of the guidelines."

Those recommendations describe the development plans of local authorities as:-

> "… the principal planning tools for the orderly development of land and … an important means by which the strategy for the Greater Dublin Area will be implemented."

Recommendations 27, 28 and 29 deal with the zoning of land for both residential and employment use stating that the amount of such land "should be reviewed in the light of the requirements of the strategy."

Particularly, it is expressly recommended (recommendation no. 28) that, with the exception of a limited provision for local needs, lands should not be zoned for residential purposes unless such lands are, (a) located within areas identified for development in the strategy envisaged by the guidelines, and (b) served by adequate public transport, water supply and drainage, *etc*.

The guidelines further expressly recommend (recommendation no. 29) that development plans should contain policies controlling development in areas outside the metropolitan area and the "development centres" to meet local needs (which should be identified in the plans) only.

The review and update of the guidelines published in April, 2000, concluded that national population and labour force projections prepared by the Central Statistics Office indicated that the greater Dublin area was growing more rapidly than envisaged in the original guidelines. It was therefore considered necessary to revise upwards the population, household and employment figures given in the original guidelines.

The update estimated that the population figure of 1.65 million which was envisaged in the guidelines for the year 2011 could now be reached by the year 2006 and, in particular, it predicted that for the year 2001 the population of the greater Dublin area was likely to be in the order of 1.535 million (about 2.9% higher than estimated in the guidelines), whilst for the year 2006 the population was predicted to be in the region of 1.65 million (about 4.9% higher than estimated in the guidelines).

The further review and update of the guidelines published in April, 2001, which was intended to inform the public of progress with the implementation of the strategy contained in the guidelines, *inter alia* identified "a divergence across the Hinterland in the interpretation of the terminology used in the strategic planning guidelines such as 'local need' and 'strategic green belt'."

One of the seven recommendations made in that document was that work should be undertaken with each of the constituent local authorities directed towards preparing a common understanding of the terms "local need" and "strategic green belt" within the hinterland area for the purposes of the guidelines.

The Meath plan

The Meath plan is contained in three volumes. The first volume outlines the "objectives for the county at large". The second volume comprises "written statements and detailed objectives for towns and villages"

and is supplemented by a "book of maps" and the third volume deals with conservation and does not have a specific relevance to these proceedings.

Volume one

Section 2 of Volume 1 of the Meath plan deals with the "strategic overview and development objectives" of the plan. At para. 2.2.2 (p. 8) under the heading "implications of the strategic planning guidelines for the greater Dublin area" the plan expressly provides that:-

> "These guidelines, published in May, 1999 and revised in April, 2000, have profound implications for the types of policies to be framed in this development plan and for the long term future of the county."

The paragraph then purports to summarise what are considered to be the main implications of the guidelines for County Meath, confining the summary to:-

(i) a suggestion that Navan may have a role in "the 'hinterland' of the 'metropolitan' part of the greater Dublin area" and

(ii) a conclusion that the landscape and resources of the county need protection for a variety of reasons.

The paragraph concludes in the following terms:-

> "This development plan has been prepared as an implementation mechanism for the strategy as it would apply to County Meath and a wide range of policies have been developed to respond to the issues raised."

Para. 2.6.2 (at p. 12) of Volume 1 of the plan sets out in some detail what are considered to be the "implications for urban growth from the strategic planning guidelines" and concludes (at p. 13) in the following terms:-

> "It is intended therefore that this development plan should set itself the task of implementing the guidelines as they apply to County Meath. Key issues that will arise therefore relate to:
>
> - the allocation of the majority share of the forecast population growth for the county to Navan as the central area of the county
> - restraint in relation to the expansion of south Meath towns allowing for primary organic rates of growth
> - protection of the countryside
> - framing of appropriate infrastructural needs with a particular emphasis on public transport."

There are further references within the Meath plan to the guidelines as follows:-

1. at para. 3.3.1, in the context of the need to increase the density of residential development at appropriate locations;
2. at para. 3.4, in the context of residential development in rural areas (para. 3.4.3.(ii) clearly defines the concept of "local needs" in this context in a manner which is consistent with the provisions of the guidelines);
3. at para. 2.2.3, under the heading "population trends" providing, *inter alia*, that:-

> "The population of the county in 1996 was 109,732 persons. … Assuming that the county will play its part of a regional population dynamic, the revised projections of the strategic planning guidelines for the greater Dublin area indicate that a population of approximately 130,000 could be reached in 2001, 161,000 in 2006 and 180,000 in 2011. In turn ,of the order of 16,000 extra households would need to be accommodated by 2006 and a further 18,000 households by 2011";

4. at para. 2.6.6, under the heading "a broad settlement structure", the Meath plan sets out an indicative urban population for the county estimated at a total of 116,700 persons by the year 2006.

On a date between May and October, 2001, the respondent, pursuant to Part V of the Act of 2000, published a draft housing strategy which, *inter alia* (at table 2.4 thereof), outlined the potential spatial distribution of new urban households within County Meath and the resulting population for the year 2007.

On the assumption (made in the Meath plan) that the dispersed rural population of the county remains constant at the level indicated in the 1996 census (62,881 persons), the Meath plan provides, at para. 2.6.6 thereof, (taken together with para. 2.4. of its housing strategy) for a spatial distribution of future population of 195,681 persons by the year 2006 and 244,856 persons by the year 2011.

Volume two

Volume 2 of the Meath plan sets out written statements including written development objectives for each of the 30 towns and villages covered by the plan.

The guidelines are referred to directly (but in a somewhat oblique fashion) in respect of three of these towns and villages (Clonee, Dunboyne and Dunshaughlin) and indirectly in respect of another (Enfield). Subject to the foregoing, volume 2 is confined to localised planning detail in respect of the towns and villages concerned.

Relevant evidence

The evidence adduced at the hearing of these proceedings established the following:-

1. On the 3rd July, 1998, the then county secretary, Mr. D. McLoughlin wrote to all elected members of the respondent advising that a new county development plan was due for adoption in November, 1999, after the prior publication and consideration of a draft plan.

2. In February, 1999, the planning department of the respondent published a strategic issues statement which:-

a) in its "introduction and overview" declared that it would be guided by "significant documents such as the regional planning guidelines being prepared for the greater Dublin area … and other relevant documents"; and

b) predicted an increase in population for County Meath to approximately 120,000 by 2001, 133,000 by 2006 and 154,000 by 2011; requiring 10,000 extra households by 2006 and a further 13,000 households by 2011; representing an increase of over 78% of the 1996 comparable figure; and

c) identified, amongst its "core development objectives", the following:-

(i) "to provide for the location of employment generating development in Navan, Trim, Kells, the east coast corridor, the south Meath fringe and economic corridor and other suitable urban locations"

(ii) "to accommodate growth of the greater Dublin area to provide for anticipated growth rates and population only in such centres where an environmental carrying capacity in terms of piped services, transportation options and social and community infrastructure can be established … in a sustainable manner and at appropriate locations in the county."

3. On the 6th November, 2000, the then county secretary, Mr. Stewart wrote to the chairman and each elected member of the respondent advising, *inter alia*, that the guidelines had been revised in light of a projected increase in the growth of population for the greater Dublin area and stressing that the revised guidelines had restated the need to implement the strategy of consolidation with associated emphasis on public transport, *etc*.

4. Between the 20th October, 1999, and the 5th March, 2001, more than 70 meetings, attended by elected representatives and officials of the respondent, were held at various locations throughout the county. All were related to and concerned the making and adoption of the Meath plan. These included:-

(a) special planning meetings of the respondent (notably on the 6th March, 2000, the 6th November, 2000 and the 5th February, 2001);
(b) meetings of the rural housing sub-committee convened between November, 1999 and October, 2000, for the express consideration of Meath plan; and
(c) electoral area meetings attended by the elected members and officials concerned with individual specific areas affected by the plan.

Minutes of the special planning meetings and of the rural housing sub-committee record that the guidelines were referred to at all of the meetings of those bodies.

Minutes of the meetings of the various electoral areas record that the guidelines were rarely if ever discussed or referred to. At those meetings a very large number of applications for the residential zoning of land were considered and many were decided.

Counsel on behalf of the applicants openly suggested that most land zoning decisions made at these meetings appear to have been influenced more by pressure and lobbying exerted by interested parties (such as local landowners) than by regional or other planning considerations. Close analysis of the minutes of the meetings fortifies that suggestion (which was not contradicted either in evidence or otherwise on behalf of the respondent). Furthermore, no individual land zoning application, amongst a very large number considered at more than 50 meetings, appears to have been determined (or even considered) in the context or against the background of the guidelines.

5. Both on affidavit and in oral evidence, Mr. Joseph Fahy, the senior engineer in the planning department of the respondent explained his understanding of the guidelines in some detail and he insisted that, at all stages of the process which led to the adoption of the plan, he had informed the elected members of the respondent of the nature and significance of the guidelines. He referred to a special presentation on the guidelines made by a Mr. Niall Cussin to the elected members on the 1st November, 1999, during which the members were advised of the nature and significance of the guidelines and of their obligations under the Act of 2000 in relation thereto. Mr. Fahy is now a member of a special group charged, pursuant to the provisions of the 2001 update of the guidelines, with the responsibility of developing a "common understanding" (with other local authorities) of the terms "local needs" and "strategic green belt" within the context of the guidelines. That group has met on several occasions since its establishment in November, 2001 and has now produced a second draft of a proposed report on the terms concerned.

6. Mr. Joseph Horan who was county manager at all times material to these proceedings also testified, outlining his understanding of the guidelines and stating that, in addition to his responsibilities as county manager for Meath, he had been appointed as a member of the steering committee which helped to prepare the guidelines and that the respondent had been represented by the then county engineer, Mr. Oliver Perkins on the technical working group which helped prepare the guidelines and by two of its elected members (Councillors Oliver Brooks and John Fanning) on the local and regional authority members committee responsible for the preparation of the guidelines.

7. On the 15th December, 2000, Ms. Mary Moylan, assistant secretary of the planning policy section of the Department of Environment and Local Government wrote a detailed letter on behalf of the Minister for the Environment and Local Government (hereafter called "the Minister") to Mr. Stewart, the then County Council secretary for Meath, referring to proposed amendments to the Meath plan.

The letter reminded Mr. Stewart of the detail of the strategy set out in the guidelines and of the Minister's formal request (in April, 1999) that each planning authority should ensure that its development plan was in line with that strategy.

The letter went on to refer to the Minister's concern about particular aspects of the Meath plan in relation to zoning in a number of specific towns and districts. A report was requested from the respondent as a matter of urgency "… In relation to the issues raised in this letter with specific reference to the apparent conflict with the strategic planning guidelines for the greater Dublin area."

Mr. Stewart replied by letter dated the 6th February, 2001, dealing in detail with all of the matters raised by Ms. Moylan in her letter of the 15th December, 2000.

On the 23rd February, 2001, Ms. Moylan wrote again to Mr. Stewart accepting on behalf of the Minister that the proposed amendments to the Meath plan were "substantially in compliance with the strategic planning guidelines for the greater Dublin area" and granting the request for an extension of time for the adoption of the Meath plan.

8. Extensive oral and affidavit evidence was adduced by the first applicant, during which he explained in detail his understanding of the principles which underlined the guidelines and of their history, nature and objectives.

In particular, he drew attention to a number of anomalies and inconsistencies within the Meath plan and its housing strategy relevant to the estimates for future population growth within the county and relative to the

proposed spatial distribution of future population with particular reference to residential zoning.

He expressed the view that both Mr. Horan and Mr. Fahy have misunderstood and continue to misunderstand the guidelines and their core objective and he stated that, as a consequence, the elected members and officials of the respondent have also misunderstood and continue to misunderstand the guidelines since their understanding had been based upon the advice of Mr. Fahy and Mr. Horan.

9. Mr. Michael Grace, who is a highly qualified planning consultant, testified, stating that he is and was at all material times a partner in the firm of Brady Shipman Martin (a member of the consortium of consultants which prepared the guidelines). He explained his understanding of the principles underlining the guidelines and of its intended objectives and he endorsed the first applicant's view that Messrs. Fahy and Horan (and by extension the elected members and officials of the respondent) have fundamentally misunderstood and continue to misunderstand the guidelines and the manner in which they should be applied in the context of the Meath plan.

The issues and the law

In these proceedings two issues fall to be determined that is to say:-

1. whether the respondent failed in its obligation to "have regard to" the guidelines as required by s. 27(1) of the Act of 2000; and
2. whether the Meath plan contained errors on its face and otherwise which were of such magnitude as to:-
   (a) render the decision to make and adopt the plan unreasonable and irrational as a matter of law, and
   (b) vitiate the legal effect of the plan?

The *Oxford Dictionary and Thesaurus* (Oxford University Press, Oxford, 1995 reprint) defines the term "regard" as, *inter alia,* "give heed to; take into account; let one's course be affected by; look upon or contemplate mentally in a specified way … (of a thing) have relation to; have some connection with … (followed by to or for) attention or care".

The most noteworthy feature of these definitions is that the actions connoted by the term "regard" are permissive in nature, *i.e.* the action involves volition as opposed to taking an action or reaching a conclusion pursuant to prescription with no choice involved.

The statutory obligation to "have regard to" particular policies and objectives was considered by the Supreme Court in *Glencar Exploration plc. v. Mayo County Council (No. 2)* [2002] 1 I.R. 84.

That case concerned the statutory obligation imposed by s. 7 of the Local Government Act 1991 upon a local authority to "have regard to … (e) policies and objectives of the Government or any Minister of the Government insofar as they may affect or relate to its functions"

The High Court (Blayney J.) in *Glencar Exploration plc. v. Mayo County Council* [1993] 2 I.R. 237 considered the matter in the following terms at p. 248:-

> "Counsel for the County Council submitted that since the members of the County Council had adjourned the meeting of the 16 December, 1991 specifically for the purpose of considering the Department's letter, they had had regard to the policy of the Government as required by the section. I am unable to accept that submission. Without attempting to define precisely the meaning of the phrase 'shall have regard to' I am satisfied that a local authority could not be said to have had regard to the policy of the Government in regard to mining when it adopted as part of its development plan a policy which was totally opposed to that policy. The members of the County Council may have considered the Government's policy but, having considered it, instead of having had regard to it, it seems to me that they totally disregarded it."

He went on to determine the issue on other grounds.

However in the Supreme Court, Keane C.J. expressly decided the issue as follows in *Glencar Exploration plc. v. Mayo County Council (No. 2)* [2002] 1 I.R. 84 at p. 142:-

> "I should add that I am also satisfied that counsel for the respondent was correct in submitting that it had not been established that the respondent had acted in breach of its statutory obligation pursuant to s. 7(1)(e) of the Local Government Act 1991 to 'have regard to … (e) policies and objectives of the government or any Minister of the government in so far as they may affect or relate to its functions'.
>
> There was no evidence to indicate that the respondents simply ignored the letter from the Minister for Energy: on the contrary they adjourned the meeting at which they were to make the vital decision so that the Minister's view could be considered. The fact that they are obliged to have regard to policies and objectives of the Government or a particular minister does not mean that, in every case, they are obliged to implement the policies and objectives in question. If the Oireachtas had intended such an obligation to rest on the planning authority in a case such as the present, it would have said so."

The statutory obligation to "have regard to" the provisions of a development plan was also considered in the Scottish case of *Simpson v. Edinburgh Corporation* [1961] S.L.T. 17.

In that case the requirement imposed by s. 12 of the Town and Country Planning (Scotland) Act 1947 for local authorities considering applications for planning permission to "have regard to the provisions of the development plan, so far as material thereto and to any other material considerations" was considered where the owner of a dwelling house sought a declaration that a purported planning permission granted to the University of Edinburgh was *ultra vires* and void as contravening the city's development plan.

In considering that statutory obligation, Lord Guest observed at p. 20 that:-

> "Section 12, which has already been quoted, obliges the local authority in dealing with applications for planning permission to 'have regard to the provisions of the development plan so far as material thereto and to any other material considerations'. It was argued, for the pursuer, that this section required the planning authority to adhere strictly to the development plan. I do not so read this section. 'To have regard to' does not in my view mean, 'slavishly to adhere to'. It requires the planning authority to consider the development plan, but does not oblige them to follow it. In view of the nature and purpose of a development plan, to which I shall refer later, I should have been surprised to find an injunction on the planning authority to follow it implicitly, and I do not find anything in the Act to suggest that this was intended.
>
> If Parliament had intended the planning authority to adhere to the development plan it would have been simple so to express it."

Simpson v. Edinburgh Corporation [1961] S.L.T. 17 was cited with approval and followed by Melford Stevenson J. in *Enfield London Borough v. Secretary of State for the Environment* [1975] J.P.L. 155 in relation to identical provisions contained in s. 29 of the Town and Country Planning Act, 1971.

In *R. v. C.D.* [1976] 1 N.Z.L.R. 436, Somers J. in the Supreme Court of New Zealand considered the expression "shall have regard to" contained in s. 5(2) of the Costs in Criminal Cases Act 1967 which required the court when exercising its discretion in relation to particular costs to "have regard to all relevant circumstances and in particular … (where appropriate)" to seven considerations. It was held that the words "shall have regard to" are not synonymous with "shall take into account". Somers J. held that:-

> "if the appropriate matters had to be taken into account, they must necessarily in my view affect the discretion under s. 5(1) and it is clear from s. 5(2) that the matters to be regarded are not to limit or affect that discretion. I think the legislative intent is that the court has a complete discretion but that the seven matters, or as many are as appropri-

ate, are to be considered. In any particular case, all or any of the appropriate matters may be rejected or given such weight such as the case suggests is suitable."

In *R. v. Police Complaints Board, ex parte Madden* [1983] 1 W.L.R. 447, the statutory obligation to "have regard to" guidance given by the Secretary of State relative to disciplinary charges imposed upon the Police Complaints Board was considered by McNeill J. who found at p. 471 that:-

> "… the board's statutory obligation to have regard to the criteria means precisely that, no more and no less. If, having had regard to the Guidance, the board is persuaded that it should accept its Director's view and determines accordingly, so be it. If, on the other hand, the board determines that despite the Director's view, and bearing in mind the standard of proof required, disciplinary proceedings should be recommended or directed it would, it seems to me, be doing precisely the task which Parliament created it to do."

It is clear from the foregoing authorities and in particular the decision of the Supreme Court in *Glencar Exploration plc. v. Mayo County Council (No. 2)* [2002] 1 I.R. 84, that the obligation imposed upon the respondent by s. 27(1) of the Act of 2002 to "have regard to" the guidelines when making and adopting its development plan does not require it rigidly or "slavishly" to comply with the guidelines' recommendations or even necessarily to adopt fully the strategy and policies outlined therein.

Rural, urban and regional planning policy matters are primarily within the remit of the Oireachtas and Chapter III of Part II the Act of 2001 has been enacted, *inter alia*, for the purpose of implementing a particular regional planning policy.

It may not be without significance that s. 27(2) of the Act of 2000 provides as follows:-

> "The Minister may, by order, determine that planning authorities shall comply with any regional planning guidelines in force for their area, or any part thereof, when preparing and making a development plan, or may require in accordance with Section 31 that an existing development plan comply with any regional planning guidelines in force for the area". (Section 31 empowers the Minister to direct planning authorities to take such specified measures as the Minister deems necessary to enforce compliance with the guidelines).

The effect of s. 27(2), therefore, is to vest in the Minister the discretionary power to require compliance by planning authorities with regional planning guidelines during the preparation or upon the making (and indeed throughout the duration) of a development plan.

If it had been the intention of the Oireachtas that s. 27(1) should be construed as imposing upon planning authorities an obligation to "comply"

with regional planning guidelines then its enactment rendered subs. (2) of the same section superfluous.

Manifestly, s. 27(1) of the Act of 2000 must be construed as imposing some obligation upon the respondent.

It is implicit in the judgment of Keane C.J. in *Glencar Exploration plc. v. Mayo County Council (No. 2)* [2002] I.R. 84 and it follows from the application of reason, that the provisions of the subsection do not permit the respondent to ignore the guidelines and proceed as if they did not exist.

In seeking to assess or measure the extent of the obligation which is imposed by the subsection it is difficult to disagree with the view expressed by McNeill J. in *R. v. Police Complaints Board, ex parte Madden* [1983] 1 W.L.R. 447 that the statutory obligation to "have regard to, … means precisely that, no more and no less."

I am satisfied that the duty or obligation imposed by s. 27(1) of the Act of 2000 upon a planning authority when making and adopting a development plan is to inform itself fully of and give reasonable consideration to any regional planning guidelines which are in force in the area which is the subject of the development plan with a view to accommodating the objectives and policies contained in such guidelines.

Whilst reason and good sense would dictate that it is in the main desirable that planning authorities should, when making and adopting development plans, seek to accommodate the objectives and policies contained in relevant regional planning guidelines, they are not bound to comply with the guidelines and may depart from them for *bona fide* reasons consistent with the proper planning and development of the areas for which they have planning responsibility.

It is contended on behalf of the applicants that the respondent failed to inform itself fully of and to give reasonable consideration to the guidelines whilst it was engaged in the process of making and adopting the Meath plan.

It is further contended that the officials and elected members of the respondent never developed a proper understanding of the principles underlining the guidelines and of its intended objectives and cannot be deemed to have "had regard to" something which they have fundamentally misunderstood.

The evidence adduced on behalf of the applicants established that both the first applicant and Mr. Grace have clear, deeply held and convincing views as to the meaning and intent of the guidelines and as to how they should be applied by the respondent in the Meath plan.

The views expressed in evidence by Messrs. Fahy and Horan on behalf of the respondent as to the meaning and intent of the guidelines and as to how they should be best applied for the purposes of the Meath plan were

less convincing and lacking somewhat in clarity but they were doubtless just as deeply held as those of the applicants and both men are experienced in planning matters as evidenced by their respective roles in the preparation of the guidelines and otherwise.

In dealing with applications of this kind for judicial review of decisions of administrative and other bodies, the court is not concerned with the merits of the decision. It is concerned with the manner in which the decision-maker has exercised the power, *i.e.*, the legality of the decision.

It is no part of my function in these proceedings to make any kind of determination in relation to conflicting views expressed by expert or other witnesses as to the meaning or effect of the guidelines or as to their appropriate application by means of a development plan or otherwise. I am required to discover whether the respondent, when making and adopting the Meath plan, informed itself fully of and gave reasonable consideration to the guidelines with a view to accommodating the objectives and policies contained in them.

On the evidence I am satisfied that the officials and elected members of the respondent were informed fully and repeatedly of the existence and nature of the guidelines and of their significance in the context of the making and adoption of the Meath plan. This information (as to the accuracy of which I express no view) was delivered by a number of different officials on a number of different occasions.

I now must consider whether the respondent gave reasonable consideration to the guidelines with a view to accommodating their objectives and policies.

The evidence adduced at the hearing of these proceedings strongly suggests that in a number of respects the Meath plan does not comply with the guidelines and indeed that in some of its provisions it has substantially departed from the guidelines' policies and objectives. Navan is the only "development centre" identified in the guidelines for which any growth other than that for "local needs" is recommended. Nonetheless elected members at electoral area meetings have decided to zone large amounts of land for residential purposes in dozens of small towns in a manner which appears to be quite inconsistent with the recommendations of the guidelines. As I have already indicated, none of these decisions appear to have been made in the context or against the background of any consideration of the guidelines. In many instances "local interests" appear to have overcome the concept of "local needs".

Overall, the Meath plan recommends that land sufficient to accommodate an enormous population increase should be zoned for residential purposes in the period up to 2011, notwithstanding the fact that the

guidelines (and indeed the plan itself) envisage a much more modest population increase during that period.

In other respects however, (notably in relation to the concept of "local needs" for rural housing), the Meath plan demonstrates an understanding of and is consistent with the policies and objectives of the guidelines.

Although the concept of "local needs" in towns other than "development centres" is fundamental to the zoning policies recommended in the guidelines, the concept has not, as yet, been properly identified and defined by reason of a "divergence of views across the hinterland in the interpretation of the terminology" (see above). The working group set up to develop a "common understanding" of the term has not yet reported. Until it does so, the guidelines must be said to be incomplete, because a central and pivotal part of the strategy which they recommend (the restriction of residential development in most towns to accommodate "local needs" only) cannot be achieved in any kind of satisfactory manner.

In evidence, Mr. Fahy suggested that the many decisions of the respondent to zone land for residential purposes in a manner which was seemingly inconsistent with the guidelines can be explained by the fact that the guidelines contained "long term" objectives (he referred to the recognition in the guidelines of "an unachievable target in the timescale") and that the objective in that regard in the Meath plan was to deal pragmatically with the "short term". That suggestion is not supported either by evidence or by examination of the minutes of the meetings at which the decisions were made. In those minutes no record exists of any discussion of the guidelines' concept of "local needs" for housing in towns other than Navan and indeed it has not been suggested, in evidence or otherwise, that it was ever considered during those meetings. However it cannot be said that the respondent gave no consideration to the concept because Mr. Fahy was specifically appointed to a special group charged with developing a "common understanding" of the concept and he has attended and contributed to a number of meetings which were exclusively concerned with that issue.

On the evidence, therefore I am satisfied that the respondent, in making and adopting the Meath plan, gave reasonable consideration to the recommendations of the guidelines relative to the zoning of land for rural housing and gave limited and somewhat unsatisfactory consideration to the guidelines in relation to the zoning of land for residential purposes in towns other than Navan.

Whilst I am conscious of the fact that, to a material extent the guidelines were intended to be implemented by such zoning decisions, I take the view that the guidelines are themselves flawed to an extent in that they are and remain incomplete in failing to identify and define the type of consid-

eration which they expect planning authorities to give to them. Accordingly, although the nature and extent of the consideration given by the elected members of the respondent to the guidelines in the zoning of land for residential purposes gives rise to concern (and indeed unease), I am not satisfied that the evidence adduced on behalf of the applicants has established that, when making and adopting the Meath plan, the respondent failed to "have regard to" the guidelines within the meaning of s. 27 of the Act of 2000.

The principle of unreasonableness and irrationality was considered by the Supreme Court (Finlay J.) in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39. The court held, *inter alia*, at p. 71 that:-

> "Under the provisions of the Planning Acts the legislature has unequivocally and firmly placed questions of planning, questions of the balance between development and the environment and the proper convenience and amenities of an area within the jurisdiction of the planning authorities and the Board which are expected to have special skill, competence and experience in planning questions. The court is not vested with that jurisdiction, nor is it expected to, nor can it, exercise discretion with regard to planning matters.
>
> I am satisfied that in order for an applicant for judicial review to satisfy a court that the decision-making authority has acted irrationally in the sense which I have outlined above so that the court can intervene and quash its decision, it is necessary that the applicant should establish to the satisfaction of the court that the decision-making authority had before it no relevant material which would support its decision."

The applicants seek, in these proceedings to impugn the Meath plan on the grounds of irrationality. On the evidence there are a number of inconsistencies and errors within the plan which are difficult to reconcile with reason. For instance, the Meath plan envisages the zoning of sufficient land to accommodate a future population far greater than the plan's own estimates (which are themselves inconsistent with one another) of future population. However these are errors and inconsistencies affecting particular aspects of the Meath plan (notably compliance with the guidelines). Taken as a whole, the plan comprises a coherent statement of the planning objectives and strategies envisaged for the county of Meath in the six years to 2007 and the methods of implementation which will be adopted to achieve them. It is likely to have many critics and detractors throughout its lifespan.

In considering the issue of irrationality the court is not concerned with the merits of the plan. In order to succeed in their claim on this ground the applicants must discharge the onus of establishing that the respondent "had before it no relevant material which would support its decision" (*O'Keeffe*

v. An Bord Pleanála [1993] 1 I.R. 39). I am not satisfied that the applicants have discharged that onus.

It follows that the relief sought is refused.

The High Court (Quirke J.) heard submissions in relation to costs on the 8th November, 2002.

Quirke J. 24th January, 2003

Having delivered judgment in this case on the 2nd September, 2002, I heard applications from the parties relative to costs on the 8th November, 2002, which, in summary, comprised an application by the applicants for an order for costs against the respondent and a corresponding application by the respondent for an order for costs against the applicants.

In *O'Shiel v. Minister for Education* [1999] 2 I.R. 321 the exercise of this court's discretion pursuant to O. 99 of the Rules of the Superior Courts 1986 to award costs was considered and, in particular, the "special category of case in which the court will award costs to an unsuccessful plaintiff."

Six different cases in which costs were awarded to unsuccessful litigants were reviewed by the court which noted, *inter alia*, that at the time of judgment there appeared "to be no statement or record from which the principle which should govern an application for costs by an unsuccessful plaintiff in a constitutional action can be deduced."

In that case, the unsuccessful plaintiffs were awarded the full costs of the action on grounds, *inter alia*, that the proceedings had significance which extended beyond the sectional interests of the plaintiffs, that it was in the broader public interests that the extent of various obligations and rights created by Article 42 of the Constitution should be clarified and that the primary beneficiaries of the proceedings would have been children who relied upon their parents to invoke the court's jurisdiction to vindicate their constitutional rights.

In *O'Connor v. Nenagh Urban District Council* (Unreported, Supreme Court, 16th May, 2002) the discretion of this court in the matter of costs was again considered with particular reference to O. 99, r. 1(1) and (4) where an applicant was refused relief by way of judicial review of a decision of a planning authority. The court refused to interfere with the exercise by the trial judge of his discretion to make no order as to costs in respect of the respondent and to award to a notice party its costs against the

applicant. The court found at p. 7 that whilst "there is an element of public interest in this case … it does not involve issues of considerable public importance".

In *R. v. Lord Chancellor, ex parte Child Poverty Action Group* [1999] 1 W.L.R. 347, Dyson J., dealing with the jurisdiction to make a pre-emptive costs order acknowledged that there was a distinction to be made between ordinary private law litigation, on the one hand, and what he called "public interest challenges" on the other hand. He explained his understanding of the concept of a public interest challenge in the following terms at p. 353:-

> "The essential characteristics of a public law challenge are that it raises public law issues which are of general importance, where the applicant has no private interest in the outcome of the case. It is obvious that many, indeed most judicial review challenges, do not fall into the category of public interest challenges so defined. This is because, even if they do raise issues of general importance, they are cases in which the applicant is seeking to protect some private interest of his or her own."

In *Lancefort Ltd. v. An Bord Pleanála (No. 2)* [1999] 2 I.R. 270, Denham J., considering the *locus standi* of a plaintiff, observed at p. 296 that:-

> "I am satisfied that the applicant is acting *bona fide*. That alone does not give it standing. However, other facts in addition establish that fact. These include the participation by members of the applicant in the prior planning and development procedures. This establishes a connection. I agree with the trial judges that these are sincere and serious people who have been involved with the development. Also, there is no doubt that they have evinced a public interest. While not every person who declares a public interest may be considered to be acting in and for the public interest such aspiration must be analysed also in the circumstances of each case. I am satisfied in this case on the facts the applicant has expressed a valid public interest in the environment. The issue of the environment presents unique problems, not only in the courts. In much litigation on *e.g.* personal injuries or as to individual constitutional rights, the party is obvious. In litigation on the environment, however, there are unique considerations in that often the issues affect a whole community as a community rather than an individual *per se*."

The instant proceedings comprise a challenge by way of judicial review to the making and adopting of a development plan for County Meath.

The first applicant is an elected member of Kildare County Council and the second applicant is chairman of An Taisce. Neither of the applicants is seeking, in these proceedings, to protect some private interest of

his own. As Denham J. declared in *Lancefort Ltd. v. An Bord Pleanála* (No. 2) [1999] 2 I.R. 270, an aspiration by an applicant in proceedings such as these to act in the public interest "must be analysed also in the circumstances of each case." I am satisfied in the circumstances of the instant case that the applicants have acted solely by way of furtherance of a valid public interest in the environment and in particular in the interests of those communities who are affected by the planning considerations applicable to the greater Dublin area.

I am conscious of the provisions of O. 99, r. 1(4) which provides:-

> "The costs of every issue of fact or law raised upon a claim or counterclaim shall, unless otherwise ordered, follow the event."

I am, however, also satisfied that the proceedings herein have raised public law issues which are of general importance where the applicants have no private interest in the outcome of the proceedings and that they therefore comprise a "public interest challenge" of the kind described by Dyson J. in the context of the jurisdiction as to pre-emptive costs orders.

I am also satisfied that in exercising my discretion as to costs in this case I am entitled to take into account some findings of fact which I have made and I believe that it is appropriate that I should do so having regard to the fact that I have concluded that these proceedings comprise a *bona fide* public interest challenge.

These proceedings were vigorously contested throughout on all issues and were correspondingly lengthy in terms of court time. Having heard and considered all of the evidence, I concluded on the 2nd September, 2002 at pp. 225 to 226, that:-

> "… in a number of respects the Meath plan does not comply with the guidelines and indeed ... in some of its provisions it has substantially departed from the guidelines' policies and objectives. Navan is the only 'development centre' identified in the guidelines for which any growth other than that for 'local needs' is recommended. Nonetheless elected members at electoral area meetings have decided to zone large amounts of land for residential purposes in dozens of small towns in a manner which appears to be quite inconsistent with the recommendations of the guidelines. As I have already indicated none of these decisions appear to have been made in the context or against the background of any consideration of the guidelines. In many instances, 'local interests' appear to have overcome the concept of 'local needs'.
>
> Overall the Meath plan recommends that land sufficient to accommodate an enormous population increase should be zoned for residential purposes in the period up to 2011 notwithstanding the fact that the guidelines (and indeed the plan itself) envisage a much more modest population increase during that period."

During the course of the trial, it became necessary to identify and examine the minutes of more than 70 meetings attended by elected representatives and officials of the respondent between the 20th October, 1999 and the 5th March, 2001.

An analysis of the minutes of the meetings disclosed that no land zoning application, amongst a very large number considered at more than 50 meetings, was determined (or even considered) in the context or against the background of the guidelines.

I am satisfied that the trial of these proceedings was unnecessarily prolonged by reason of the fact that a vast amount of documentation had to be analysed and considered in order to determine questions of fact which could have been readily determined by agreement between the parties. The overwhelming majority of those issues of fact were determined in favour of the applicants and more particularly, it was established on behalf of the applicants at p. 227 that:-

> "the nature and the extent of the consideration given by the elected members of the respondent to the guidelines in the zoning of land for residential purposes gives rise to concern (and indeed unease)"

Furthermore, the contention on behalf of the respondent, that zoning decisions which were inconsistent with the guidelines could be explained by the fact that the guidelines contained "long term" objectives, was not supported by any credible evidence and required a complete examination of the minutes of the various meetings at which decisions were made. This examination disclosed no record which would support that contention.

In all of the circumstances, I am satisfied that the appropriate exercise of my discretion requires that the respondent should pay 100% of the costs of and associated with the daily transcript of the proceedings and 50% of the applicants' costs of and incidental to the proceedings.

Solicitors for the applicants: *Michael Campion & Co.*

Solicitors for the respondent: *M.A. Regan, McEntee & Partners*.

Conor Gallagher, Barrister
