[2020] IEHC 292

THE HIGH COURT

JUDICAL REVIEW

[2018 No. 750 JR]

IN THE MATTER OF SS. 50, 50 A AND 50 B OF THE PLANNING AND DEVELOPMENT ACT 2000 AS AMENDED BY THE PLANNING AND DEVELOPMENT (STRATEGIC INFRASTRUCTURE) ACT 2006, THE PLANNING AND DEVELOPMENT (AMENDMENT) ACT 2010 AND THE ENVIRONMENT (MISCELLANEOUS) PROVISIONS ACT 2011

AND

IN THE MATTER OF SS. 5, 6 AND 7 OF THE URBAN REGENERATION AND HOUSING ACT 2015

BETWEEN

ALLAN J. NAVRATIL

APPLICANT

AND

AN BORD PLEANALA

RESPONDENT

AND

CORK COUNTY COUNCIL

NOTICE PARTY

JUDGMENT of Mr. Justice Michael MacGrath delivered on the 12th day of May, 2020.

The Urban Regeneration and Housing Act 2015

1. The Urban Regeneration and Housing Act 2015 ("*the Act*") was enacted to address concerns regarding the shortage of housing and of lands upon which to build them. The focus of the Act is on vacant sites as defined therein and concerns 'residential' and 'regeneration' lands. This case concerns lands zoned for residential purposes.

2. Local authorities are empowered by the Act to enter a vacant site on a vacant site register ("*the register*"). Before doing so the authority must be satisfied that certain statutory criteria are fulfilled. In summary, regarding residential land, first, the land must be a 'site' which is defined in the Act as an area of land exceeding 0.05 hectares identified by a planning authority in its functional area and does not include any structure that is a person's home. Second, the land must come within the definition of 'residential land', which is defined by reference to the zoning which it enjoys in a County Development Plan or a Local Area Plan. Third, the site must be situated in an area in which there is a need for housing. Fourth, the site must be suitable for the provision of housing. Fifth, the site, or the majority of the site, must be vacant or idle.

3. The planning authority, or the Board on appeal, is obliged by virtue of s. 6(5) of the Act to determine whether or not a site was suitable for the provision of housing by reference to a number of matters. These are (a) the core strategy, (b) whether the site was served by the public infrastructure and facilities (within the meaning of s. 48 of the Act of Planning and Development Act, 2000 ("*the Act of 2000*") necessary to enable housing to be provided and serviced, and (c) whether there was anything affecting the physical condition of the land comprising the site which might affect the provision of housing. Similarly, the planning authority, or the Board on appeal, is obliged by virtue of s. 6(4) of the Act to determine whether or not there was a need for housing by reference to certain

criteria which it is not necessary to consider as there is no issue in this case but that there is a need for housing in the area of the applicant's lands.

4. By virtue of the provisions of s. 6(2) of the Act, a planning authority must enter on the register a description, including a map, of any site in its functional area which was, in the opinion of the planning authority, a vacant site for the duration of the 12 months preceding the date of entry. The owner of the lands thereby becomes liable to pay an annual levy on the value of the lands. This is known as a vacant site levy and it remains a charge on the land until it is paid.

5. Prior to making an order for the entry of the lands on the register, by virtue of the provisions of s. 7(1) of the Act, the local authority must give the owner written notice setting out the reasons for the proposed entry. The owner may make representations in respect of the notice within 28 days. Having considered any such representations, if of the opinion that the site was a vacant site for the duration of the 12 months concerned and continues to be a vacant site, then in accordance with s. 7(2) of the Act, the planning authority must enter the site on the register. Under s. 7(3) the planning authority is obliged to give written notice to the owner when it is so entered and, under the provisions of s. 9 of the Act, the owner has twenty-eight days to appeal that decision to the respondent, An Bord Pleanála ("*the Board*"). The entry does not take effect until the appeal is finally determined.

6. In accordance with the provisions of s. 9(2) the appellant/owner of the site, on the appeal to the Board, bears the burden of proving that the site, or the majority of the site, was not vacant or idle for the duration of the requisite twelve-month period preceding the entry on the register. This is to be contrasted with appeals under ss. 11 (notices to owners of sites on the register) and 18 (appeals against demand for payment of levy), where the burden is on the land owner to show that the site, or a majority of the site, is no longer a vacant site. Although subject of some debate in written submissions, it is accepted that the provisions of s. 9(2) do not have the effect of reversing the onus of proof in respect of criteria other than that the land was vacant or idle for the twelve-month period.

7. The Act also provides that every planning authority shall, before 1st June, 2018, or such later date in that year as the Minister may specify by order, give a written notice to the owner of any vacant site that stands entered on the register on 1st January, 2018. The levy is assessed on the basis of market valuation which is to be determined in accordance with the provisions of the Act. In respect of 2018, an amount equal to 3% of the market value of the vacant site is payable. Thereafter, the amount rises to 7% determined in accordance with the provisions of s. 12 of the Act, or such other percentage not exceeding 7% as may stand prescribed for the time being by Regulations.

Background

8. The applicant is a farmer and resides at Ballinacurra House, Midleton, County Cork. He is the owner of lands comprised in Folio 37519, Co. Cork which are zoned 'residential' in the 2011 – 2017 Midleton Electoral Area Local Area Plan and in the 2017 – 2023 East Cork

Municipal District Local Area Plan (LAP). The local authority and notice party, Cork County Council, having inspected the lands, made a decision to enter them on the register, despite the lands being in use for agricultural purposes. Mr. Navratil's appeal to the Board against this decision was refused by Order made on 31st July, 2018. The decision of the respondent to refuse the appeal is challenged in these proceedings. The challenge centres on two areas:

(a) The applicant contends that the lands are and were not vacant or idle because they are in full use and production as a farm for agricultural purposes from which he derives his livelihood, and that the decision of the Board to the contrary is irrational, *ultra vires* and unlawful.

(b) The decision of the Board to accept that the lands were suitable for housing development for the requisite period is irrational, unlawful and *ultra vires*. It is contended that the lands are not suitable for housing because they are not, and were not, at the time of the decision, served by public infrastructure and facilities within the meaning of the s. 48 of the Act of 2000. In this regard it is contended that the lands were not adequately serviced by water/waste water and that there was during the relevant period a necessity to construct a link road to enable development of housing to take place. It is said that these issues had been highlighted in the LAP.

Reliefs Sought

9. By notice of motion dated the 8th October, 2018, the applicant sought the following orders: -

1) An order of *certiorari* quashing the decision made by the respondent on the 31st July, 2018 confirming the entry of the applicant's lands in Midleton, Co. Cork, into the vacant sites register for the planning area of Cork County Council.

2) A declaration that the decision of the respondent was *ultra vires* s. 5(1)(a)(ii) and s. 6(5)(b) of the Act, as there was no evidence before the respondent that the site was suitable for housing, as being served, at the time of the decision, by public infrastructure and facilities within the meaning of s. 48 of the Act of 2000.

3) A declaration that the respondent/inspector failed to provide any, or any adequate reasons for the conclusion that the site was suitable for housing within the meaning of s. 5(1)(a)(ii) and s. 6(5)(b) of the Act.

4) A declaration that the respondent misdirected itself in law as to the meaning and effect of the words "vacant or idle" in s. 5(1)(a)(iii) of the Act when determining that the lands at issue constituted a vacant site within the meaning of that section, such that the decision was *ultra vires* the respondent.

5) A declaration that the decision of the respondent was irrational and contrary to reason inasmuch as it adopted the conclusion of the inspector that the site was vacant [*or*] idle within the meaning of s. 5(1)(a)(iii) of the Act, notwithstanding the

conclusion by the notice party and its inspector, that the lands were in full and productive use for agriculture.

6) A declaration that the respondent erred in law and acted *ultra vires* in adopting the reasoning of its inspector who concluded that he was bound to interpret s. 5(1)(a)(iii) of the Act in accordance with Department Circular PI/2016 issued by the Department of Housing and Local Government ("*the Circular*").

10. The applicant also seeks damages, costs and an order restraining the notice party from raising a levy until the determination of these proceedings.

11. Humphreys J. made an order on the 18th September, 2018 granting the applicant leave to apply by way of judicial review for the above reliefs.

The pleaded basis of the challenge

12. The basis of the challenge as pleaded and as averred to by the applicant is as follows:

a. The respondent and its inspector, upon whose report the respondent relied, misdirected itself in law and acted *ultra vires* in concluding that the site was served by the public infrastructure and facilities; and was suitable for housing within the meaning of the Act in circumstances where the inspector concluded that it would be necessary to carry out infrastructural projects including extensive roadworks, before any residential development could be carried out. In his affidavit sworn on 22nd February, 2019, Mr. Navratil refers to clause 3.3.15 of the LAP which highlights such infrastructural deficit and which he states was acknowledged by the inspector. He makes complaint that notwithstanding such deficit, the reference by the inspector to the proposal to construct a road in the future is impermissible as the Act looks to the situation which pertained at the time of inspection.

b. The respondent failed to consider that the LAP stipulates that a new water supply network and sewage works are necessary to serve the Ballinacurra area and that this work would have to be carried out by Irish Water before any residential development is permitted in the area, including on the applicant's lands. The plans showed that a new water supply was needed in Ballinacurra, remedial works were necessary to the wastewater treatment plant in Midleton and in consequence there is limited capacity for development in the area. It is averred that the applicant's advisers' views on this is borne out by a decision of the Board in relation adjacent lands, that a proposed development be refused because infrastructural works were required. In its assessment and reporting, the notice party had made a bald statement to the contrary and the applicant contends that it is difficult to understand how the Board could rely on this. Alternatively, it is pleaded that the respondent failed to give adequate reasons for its decision in this regard.

c. The respondent misdirected itself in law and acted ultra vires in failing to adopt a literal interpretation of the words "*vacant or idle*" in s. 5(1)(a)(ii) of the Act and in failing to adopt an interpretation of those words which respects the rights of the

applicant to earn a livelihood and to his property rights as protected by Article 40.3.1 and Article 40.3.2 of the Constitution.

d. The respondent acted in an irrational manner in concluding that the site was vacant or idle within the meaning of the Act in circumstances where it is common case and accepted that the lands were in full productive agricultural use.

e. The respondent acted *ultra vires* in concluding that it was bound to apply the interpretation of s. 5(1)(a)(ii) of the Act, as mandated by Circular Letter 7/2016, rather than to apply a literal interpretation as prescribed by law.

13. The pleadings are verified by the applicant in an affidavit sworn on the 17th September, 2018.

The pleaded response

14. The respondent opposes the application and pleads:

a. The inspector was aware of and took into account the provisions of the LAP.

b. Neither the Board's decision of the 20th July, 2018 nor the order of the 31st July, 2018 record or states that the Board made its decision in reliance on the recommendation of its inspector. Rather, both simply record the report as one of a number of matters to which it had regard in making its decision. In deciding to confirm the entry of the site on the register, the Board reached the same substantive conclusion as that recommended by its inspector.

c. While the words "*vacant or idle*" are not in themselves the subject of definition in the Act, the Board construed the words "*vacant or idle*" having regard to the purpose of the Act as a whole. That the Board had determined that the applicant had not discharged the burden of proof under s. 9(2) of the Act, was a decision made within jurisdiction and it had sufficient materials before it upon which to do so. Further, as is clear from the terms of the Board's direction of the 20th July, 2018 it did not make its decision on the basis that it was bound by the Circular. Rather it considered whether the lands were vacant or idle within the meaning of the Act, having regard to "*the overall purpose and context of the Act*." It was an entirely appropriate and lawful approach to the construction of s. 5(1)(a)(iii) of the Act.

d. Lands in agricultural use may nevertheless be vacant or idle in circumstances where they are zoned for residential development but are devoid of any such development. It is not accepted that the literal interpretation of the words "*vacant or idle*" precludes such a conclusion. The Oireachtas clearly sought to pursue a legitimate and important social objective, namely the provision of housing, in circumstances where it is in short supply and it did not consider it disproportionate to that objective to impose a levy in respect of vacant sites including sites which are zoned for residential development, but which are not being used for that purpose.

e. Section 5(b) of the Act is not prescriptive as to the precise nature and extent of such infrastructure and facilities required, and the Board, on the basis of the material before it, was entitled to conclude that the site was suitable for the provision of housing within the meaning of the Act.

f. It is not accepted that the Board failed to give adequate reasons for its conclusion and it is pleaded that the inspector clearly recorded and took into account the provisions of the LAP with regard to future infrastructural requirements generally but also accepted the submission of the Council/notice party that "*this specific site*" is adequately served by public infrastructure to enable housing to be provided and serviced.

Respondent's affidavit

15. In his verifying affidavit sworn on 15th January, 2019, Mr. Gerard Egan, Director of Corporate Affairs of the Board avers that the Board first met to consider the appeal on 11th July, 2018 but decided to defer the appeal for further consideration to a Board meeting which took place on 19th July, 2018. The Board issued its direction on 20th July, 2018. It is recorded that the decision was taken by a majority of 5 to 3.

16. Mr. Egan avers that while the applicant placed certain material before the court, including the Council's notice of entry and his appeal to the Board, he had omitted the information placed before the Board by the notice party on the 21st February, 2018 and observations received by email on 7th March, 2018. Although not referred to in either the applicant's statement of grounds or the verifying affidavit, subsequent to the receipt by the Board of the Council's response to the appeal, the applicant submitted further information which was referred to by the inspector at section 5.3 of his report. This included documents dated 24th April, 2018, 10th May, 2018, 25th May, 2018, 6th June, 2018 and documentation received from the applicant during the site inspection on 17th May, 2018 which was subsequently placed on the Board's file.

17. Mr. Egan confirms that the applicant's appeal, the notice party's response, the further information submitted by the applicant and the inspector's report were before the Board when it made its decision.

Notice Party's pleaded response

18. The notice party's pleadings are verified by Mr. Lynch, Director of Services of Cork County Council. It responds as follows:

a. The decision of the Board is lawful and within jurisdiction.

b. The applicant failed to discharge the burden imposed on him under s. 9(2) of the Act.

c. The Board and its inspector had not acted irrationally in determining that the lands were vacant or idle, which in s. 5(1)(a)(iii), means vacant or idle for residential/housing purposes in circumstances where the lands were zoned for residential use. In the alternative, while the land may not have been idle due to

being in agricultural use, the lands were vacant for residential/houses purposes within the meaning of s. 5 (1)(a)(iii) of the Act.

d. The use of the land for agricultural purposes was a non-conformative use under the Development Plan and there was an obligation on the notice party under s. 15(1) of the Act of 2000, to take such steps within its power to secure the objectives of the Development Plan.

e. The respondent adopted the correct approach to the interpretation of the Act.

f. The Board's inspector did not consider himself bound by the Circular. He stated that he was bound by the Act and the supporting information issued by the Department. The interpretation in the Circular, in any event, constitutes the literal interpretation prescribed by law.

g. The Board's conclusion on the land's suitability for housing is a matter of planning judgment and there was sufficient available evidence that required infrastructure was in place.

h. The inspector did not conclude that it would be necessary to carry out infrastructural projects, including roadworks, before any residential development could be carried out. The site was adequately served by public infrastructure to enable housing to be provided and serviced. There was evidence before the Board that there was capacity in terms of water and waste water to accommodate the development of the lands.

i. Adequate reasons were given.

j. Under s. 5(1) of the Interpretation Act, 2005 the provisions of s. 5 of the Act is required to be given a construction that reflects the plain intention of the Oireachtas where the intention can be ascertained from the Act as a whole.

k. There has been material non-disclosure by the applicant in his pleadings and in his submissions concerning the zoning history of his lands such as to disentitle him to any relief. The alleged continuous use of the lands for agriculture was inaccurately stated by the applicant in his submissions to the notice party and on appeal to the Board. There was an absence of full disclosure because the applicant had actively sought the zoning of the farmlands for residential use. He also previously sold part of his farmland zoned residential and which was then developed for housing.

Further affidavits

19. Mr. Lynch in an affidavit sworn on 21st March, 2019, addressed a number of further issues:

a. With regard to road infrastructure, a Part 8 application for planning approval of the N25 Lakeview Roundabout Slip Road Scheme was confirmed on 23rd July, 2018. These works are not an impediment to future works in the area.

b. A Part 8 application for the proposed foul pumping station and proposed pipeline layout was approved by the Council on 11th March, 2019. The proposed pumping station, as approved and progressed in partnership with Irish Water to meet with Irish Water design requirements, will facilitate the development of the Water Rock UEA and address capacity loading of the Midleton Waste Water Treatment Plant by conveying the foul waste water to the Carrigtwohill Waste Water Treatment Plant. It was the planning authority's view that this would address a recent reason for refusal relating to an application at Maplewood, something which had been referred to by the applicant. With regard to the planning application for the site at Ballinacurra, the Council had a solution agreed with Irish Water, of which the Board was aware. The Board were not satisfied to grant planning permission until the Part 8 process concluded. This was reflected in the reason given for refusal in its decision of 11th February, 2019, that: -

> *"there is a lack of certainty around the delivery of a pump station and rising main to divert wastewater from the Midleton Waste Water Treatment Plant to Carrigtwohill Waste Water Treatment Plant and reduce the loading at Midleton Waste Water Treatment Plant."*

The Board considered that proposed development to be premature. This had now been addressed and, in Mr. Lynch's view, there is now no uncertainty in this regard in the light of the subsequent approval of the pump station and rising main.

c. He avers that the impression created by the applicant is that he is simply a farmer, that he has no interest in or plan to develop the land and that the Council had "*unaccountably on its own initiative and against his desire*" zoned his lands residential. He reiterates his surprise that the applicant did not disclose either in submissions to the notice party, or to the Board, that he had actively sought changes in zoning from agricultural to residential or that parts of the land were previously not in agricultural use. In his view this is not consistent with an intention merely to use the land for agricultural purposes. The applicant had also previously engaged in the extraction of sand and gravel from the lands.

20. In a second affidavit sworn by Mr. Egan on 3rd May, 2019 he addressed a number of the applicant's contentions:

a. Section 6(5) of the Act provides that the planning authority, or the Board on appeal, shall determine whether or not the site was suitable for the provision of housing by reference, *inter alia*, to whether the site was served by public infrastructure and facilities (within the meaning of s. 48 of the Act of 2000) necessary to enable housing to be provided and serviced. He avers that the section refers to public infrastructure and facilities that is provided, "*or that it is intended will be provided"* by or on behalf of a local authority.

b. The notice party's evidence to the Board was that there was sufficient capacity in terms of water services to accommodate the development of the applicant's site.

The inspector, on the basis of all of the material before him, accepted that evidence.

c. That the Board made a decision based on the material before it in another case did not invalidate the decision it took in this case The lawfulness and rationality of a decision of the Board had to be assessed on the basis of the material that was before it. Referring to a decision of the Board in respect of another, later, appeal is not appropriate, nor should the decision in that matter be looked at in isolation. It was necessary to consider the inspector's report which summarised and addressed the materials that were before the Board.

d. The applicant had not discharged the burden of showing that the site, or the majority of the site, was not vacant or idle for the relevant period.

Relevant provisions of the Act

21. Sections 5 of the Act provides as follows: -

"Vacant site

(1) In this Part, a site is a vacant site if–

(a) in the case of a site consisting of residential land–

(i) the site is situated in an area in which there is a need for housing,
(ii) the site is suitable for the provision of housing, and
(iii) the site, or the majority of the site, is vacant or idle, and

(b) in the case of a site consisting of regeneration land-

(i) the site, or the majority of the site, is vacant or idle, and
(ii) the site being vacant or idle has adverse effects on existing amenities or reduces the amenity provided by existing public infrastructure and facilities (within the meaning of section 48 of the Act of 2000) in the area in which the site is situated or has adverse effects on the character of the area.

(2) In this section–

"site" means any area of land exceeding 0.05 hectares identified by a planning authority in its functional area but does not include any structure that is a person's home;

"home", in relation to a person, means a dwelling in which the person ordinarily resides (notwithstanding any periods during which the dwelling is vacant) and includes any garden or portion of ground attached to and usually occupied with the dwelling or otherwise required for the amenity or convenience of the dwelling."

22. Section 6 provides: -

"Register of vacant sites

(1) Every planning authority shall, beginning on 1 January 2017, establish and maintain a register to be known as the vacant sites register (referred to in this Part as "the register").

(2) A planning authority shall enter on the register a description, including a map, of any site in its functional area which was, in the opinion of the planning authority, a vacant site for the duration of the 12 months preceding the date of entry.

(3) The register shall be kept at the offices of the planning authority and shall be available for inspection at the offices of the planning authority during office hours and on the planning authority's website.

(4) A planning authority, or the Board on appeal, shall determine whether or not there was a need for housing in an area within the planning authority's functional area for the purposes of this Part by reference to–

(a) the housing strategy and the core strategy of the planning authority,

(b) house prices and the cost of renting houses in the area,

(c) the number of households qualified for social housing support in accordance with section 20 of the Housing (Miscellaneous Provisions) Act 2009 that have specified the area as an area of choice for the receipt of such support and any changes to that number since the adoption of the planning authority's development plan, and

(d) whether the number of habitable houses available for purchase or rent was less than 5 per cent of the total number of houses in the area.

(5) A planning authority, or the Board on appeal, shall determine whether or not a site was suitable for the provision of housing for the purposes of this Part by reference to–

(a) the core strategy,

(b) whether the site was served by the public infrastructure and facilities (within the meaning of section 48 of the Act of 2000) necessary to enable housing to be provided and serviced, and

(c) whether there was anything affecting the physical condition of the land comprising the site which might affect the provision of housing.

(6) A planning authority, or the Board on appeal, shall determine whether or not the site being vacant or idle has adverse effects on existing amenities or reduces the amenity provided by existing public infrastructure and facilities (within the meaning of section 48 of the Act of 2000) in the area in which the site is situated or has

adverse affects on the character of the area for the purposes of this Part by reference to whether–

(a) land or structures in the area were, or are, in a ruinous or neglected condition,

(b) anti-social behaviour was or is taking place in the area, or

(c) there has been a reduction in the number of habitable houses, or the number of people living, in the area,

and whether or not these matters were affected by the existence of such vacant or idle land.

(7) In determining for the purposes of this Part whether a site was vacant or idle for the duration of the 12 months concerned a planning authority, or the Board on appeal, shall not have regard to any unauthorised development or unauthorised use."

Planning and Development (Amendment) Act, 2018

23. Section 5 of the Act was amended by the Planning and Development (Amendment) Act, 2018 ("*the Act of 2018*"). The Board's decision was made on the 31st July, 2018, and the amending Act came into operation on the 19th July, 2018, when the appeal process was already in being. It is accepted that the Act of 2018 does not apply in this case. Given that it has been referred to in argument, and for the sake of completeness, s. 63 of the Act of 2018 provides: -

"Section 5 of the Act of 2015 is amended, in paragraph (a) of subsection (1), by substituting the following subparagraph for subparagraph (iii):

"(iii) the site, or the majority of the site is—

vacant or idle, or

(II) being used for a purpose that does not consist solely or primarily of the provision of housing or the development of the site for the purpose of such provision, provided that the most recent purchase of the site occurred—

(A) after it became residential land, and

(B) before, on or after the commencement of section 63 of the Planning and Development (Amendment) Act 2018."

24. The respondent and notice party maintain that the amendment does not, in any event, affect the applicant's position because they were not purchased after being zoned residential.

The Circular - July, 2016

25. While residential land is expressly defined in s. 3 of the Act, the words vacant or idle are not. On 1st July, 2016, the Department of the Environment, Community and Local

Government issued to local authorities a Circular on the implementation of the vacant site levy. It was therein recognised that sustainable urban development was becoming an increasingly important policy objective at both national and local level and that appropriate mechanisms should be put in place to ensure that land, particularly in urban areas, is used in the most efficient and effective manner possible. Concern was expressed at the number of vacant sites in urban areas which were lying dormant and undeveloped, some of which were unsightly and lowered the tone of the area. It was also stated that, in accordance with good governance, local authorities and their elected members should make appropriate use of all relevant tools to facilitate sustainable urban development in their functional area. One such enabling tool is the vacant site levy. The purpose of the introduction of the levy is stated in the Circular as being, *inter alia*, to incentivise development of vacant sites in urban areas. It is noted that as a result of reforms brought about by the Planning and Development (Amendment) Act 2010, the amount of land zoned for housing nationally was being gradually reduced on an ongoing basis as new development plans were being adopted in accordance with the mandatory statutory cyclical review process. Notwithstanding the reduction in land for zoning, it was pointed out that there may be situations where landowners with land zoned for development hold back the release of key sites to the detriment of the progression of the wider development plan objectives, thus the introduction of the levy. On the identification of vacant sites, the Circular continues: -

> *"….it should be noted that the levy provisions can be applied for regeneration and residential development purposes to both vacant sites in designated areas in central urban areas (largely "brownfield sites") identified in development plans or local area plans, as well as to vacant sites in designated areas which are in outer urban areas (largely "green field sites") and which have the potential to provide housing to meet local housing need and demand. In the case of the latter, it should be noted that the levy can potentially be applied to land designated as "residential land" for the purposes of the levy and in respect of which there is a current planning permission or planning permission was previously granted but which has not yet activated."*

26. Appendix 3 to the Circular is entitled "Practical Matters to Note" and further addresses the issue of "*Identifying Vacant Sites*" at p. 16: -

> *"Sites may be in areas where the land is zoned for a particular purpose, e.g. residential. However, pending development appropriate to its zoning, the land may currently or on an interim basis have an agricultural use. Given the purpose of the levy, particularly in the context of the provision of housing, in such cases the levy may be applied, as the site concerned is not being used for the purpose for which it was zoned."*

The Local Area Plan ("LAP")

27. The applicant's lands are zoned residential in the LAP. They are identified at objective number MD-R-07 (Medium Density – Residential) as follows: -

"Residential Medium A density residential development and provision of individual serviced sites, subject to ground conditions. Provision of a new purpose built primary school can also be accommodated on this site, subject to agreement with the Department of Education and Science. Development proposals must provide for sufficient stormwater attenuation and may require the provision of an ecological impact assessment report (Natura Impact Statement) in accordance with the requirements of the Habitats Directive may only proceed where it can be shown that they would not have significant negative impact on the SAC and SPA."

Medium A Density zoning is identified in the Cork County Development Plan as medium density developments in the range of 20 to 50 dwellings per hectare. The County Development Plan notes that this zoning is applicable in city suburbs, larger towns over 5,000 population and rail corridor locations. Apartment development is permissible where appropriate but there is no requirement to include an apartment element in development proposals. It also provides *"[m]ust connect to public water and waste¬water services*".

28. The LAP addresses development in the environs of Midleton, including Ballinacurra. At para. 3.3.10, under the heading "*Population and Housing*", having addressed the issue of population growth and the requirement for additional housing, it is stated that the majority of residential development planned for Midleton would occur at Waterock, located to the north west of the town centre, where approximately 2,500 residential units were proposed in addition to new schools, a neighbourhood centre, parks and a second railway station. At para. 3.3.15, reference is made to lands being available south of the N25 at Ballinacurra. These are the applicant's lands. It is stated that short term improvements can be made to the local road network to accommodate some development in Ballinacurra, including a left hand slip lane at the Lakeview Roundabout to the N25. It was recognised that this would significantly reduce traffic congestion on the R630 approaching the roundabout and was described as essential prior to any further development in the Ballinacurra area.

29. Water and waste water are addressed at paras. 3.3.54 to 3.3.56 of the LAP. It is recognised that the existing drinking water supply in Midleton is close to its limit but that there is limited spare capacity in the Whitegate regional water scheme and that a new reservoir is required at Broomfield. Reference is made to discussions with Irish Water which indicated that the most advantageous solution to the problem will involve the extension of a trunk water main from Carrigtwohill to connect with a new reservoir and the town's existing supply network. A new supply network to serve Ballinacurra will be required and it is acknowledged that Irish Water will need to commit to this investment before significant elements of the development proposed in this plan can proceed. Relevant extracts from the plan are reproduced at para. 129 below.

Planning and Zoning history

30. Documents relating to historical planning and zoning have been exhibited by Mr. Lynch and he states that the applicant has actively sought to have the lands zoned residential. This shall be addressed in more detail below.

The Notice of Proposed Entry on the Register - 21st November, 2017

31. The site was visited on 17th November, 2016 by Ms. Catherine Buckley Gough, an executive planner employed by the notice party. In her first, undated report, having noted that the land was residential, she reported that an initial assessment carried out by the planning policy unit of the notice party determined the site to be adequately serviced for housing development. Whether the majority of the site was vacant or idle for the necessary twelve-month period was to be confirmed. She acknowledged that the site was likely to be used for agricultural purposes. Reference was made to a flood risk and, in accordance with the then draft LAP, she also noted that development proposals were required to provide for sufficient saltwater attenuation and that there may be a requirement for the provision of an ecological impact assessment report.

32. A subsequent site inspection by her was conducted on 21st November, 2017. In her report dated 7th December, 2017 Ms. Buckley Gough recorded that the land *"still remains a mix of green fields and agricultural land*." She repeated that development proposals must provide for sufficient stormwater attenuation and may require the provision of an ecological impact assessment in accordance with the provisions of the Habitats Directive. Photographs were attached to her report.

33. On 21st November, 2017, pursuant to s. 7(1) of the Act, the notice party issued a notice of proposed entry of the lands on the register. This notice stated, *inter alia*, that the purpose of the Act as a site activation measure. The applicant was informed that his site had been identified as a vacant site by reference to ss. 5(1)(a), 5(2), 6(4) and 6(5) of the Act for the following reasons:

    (i) The site consists of residential land, as identified in the 2011-2017 Electoral Area Local Area Plan and the 2017-2023 Municipal District Local Area Plan.

    (ii) The site is situated in the County Metropolitan Cork Strategic Planning Area as identified in the Cork County Development Plan 2014, in which there is a need for housing by reference to s. 6(4) of the Act.

34. The applicant was also informed that the site is suitable for the provision of housing by reference to s. 6(5) of the Act, was consistent with the core strategy requirements, was served by the public infrastructure and facilities (within the meaning of s. 48 of the Act of 2000) necessary to enable housing to be provided and serviced and that there were no impediments affecting the physical condition of the land which might affect the provision of housing. It was also stated that the site or that the majority of the site was vacant or idle. The applicant was notified that the Council intended to enter the particulars of the site on the register in accordance with the provisions of s. 6(1) of the Act and that as the owner of the property he was entitled to make submissions to the notice party within 28 days. He was also informed of his right to appeal in the event of the lands being entered on the register following the consideration of such submissions.

The Applicant's submissions to the Notice Party

35. Messrs Fehily Timoney & Company, Consultants in Engineering and Environmental Science who were retained by the applicant outlined his objections in submissions made

by letter dated 18th December, 2017. Many of the points raised in those submissions have been repeated in argument before this Court, including:

(i) The land is being farmed by a *bona fide* farmer in a *bona fide* manner, is not vacant or idle within the meaning of s. 5(1)(a)(iii) of the Act and is in full annual productive agricultural use notwithstanding its zoning. The land is adjacent to his residence and part of a working farm, has always has been in agricultural use and provide a livelihood for the applicant and employment to farm staff and contractors. The farm is classified as a commercial farm registered with the Department of Agriculture, Food and the Marine. The farm has a herd number and is included in the EU's basic payments scheme. In respect of part of the land, since 2015, the applicant has been under contract in accordance with the green low carbon agri-environment scheme and any development of the land would breach that contract.

(ii) While zoned residential, the applicant had not requested such zoning, either in the 2011 LAP or the more recent 2017 LAP.

(iii) There are no pending planning applications or extant planning permissions for development on the land and no plans are in place to develop it.

(iv) The lands were not appropriately serviced with public infrastructure within the meaning of s. 6(5) of the Act in circumstances where the LAP recognised and mandated at paras 3.3.54 and 3.3.56 that a new water supply network and sewage works be constructed before residential development occurred and that Irish Water needed to upgrade the existing waste water treatment plant. Coupled with the fact that the existing use of land is agricultural, which by virtue of s. 4(1) of the Act of 2000 constituted a development, it followed that the test set out in s. 6(5) of the Act could not be met.

The slip/lane roadway was not raised at this time but emerged as an issue on appeal to the Board.

Service of Notice of Entry on the Register

36. Having considered the applicant's submissions, members of the notice party's planning department recommended that the lands be considered vacant for the purposes of the Act and that they be included on the vacant site register as and from 1st January, 2018. The land was determined to be vacant for the purposes of the Act on the date of both inspections by Ms. Buckley Gough. The recommendation was jointly signed by Ms. Maeve Dooley, executive planner, Mr. Pio Condon, senior executive planner and was agreed by Mr. Michael Lynch, senior planner, on 28th December, 2017. They also confirmed that *"as per the local authority's own records, the land is deemed serviceable."*

37. On the 9th January, 2018, the notice party served a notice of entry on the register and the applicant was informed of the appeal procedure. The notice of entry was signed by Mr. Lynch.

The Appeal to the Board

38. On 2nd February, 2018, the applicant, through Messrs Fehily Timoney appealed the decision to the Board. The grounds of appeal largely mirror the submissions which were made to the notice party in their letter of 18th December, 2017. It was stressed that the land was not suitable for the provision of housing because of infrastructural deficiency and on this occasion, reliance was also placed on para. 3.3.15 of the LAP, that a left hand slip lane at the Lakeview Roundabout would significantly reduce traffic congestion on the R630 approaching the roundabout "*which was considered essential prior to any further development in the Ballinacurra area.*" It was stated that this was confirmed by the local authority's unsuccessful request to have upgrade works included in the local infrastructure housing activation fund. It was submitted that the local authority/notice party did not have regard to its own planning policy objectives for the area in determining whether the site was adequately serviced or not. The planner's report of the 7th December, 2017 was stated to be incorrect and ill-informed and that there was no justification for qualifying its agricultural use with the word "*remains*". Again, it was reiterated that the land had existing site use as agriculture under s. 4 of the Act of 2000 and therefore could not be vacant or idle. Reference was made in support to s. 6(7) of the Act which provides that in determining whether a site was vacant or idle for the duration of the twelve months concerned, regard shall not be had to any unauthorised development or unauthorised use, and therefore the existing use of land is a material factor in determining if a site is vacant or idle. It was used as a farm and there were no extant permissions or current plans to develop the site.

39. On 20th February, 2018, the notice party wrote to the Board enclosing, *inter alia,* copies of all documents that informed its decision, including the site reports, the LAP, the recommendation for entry signed on the 28th December, 2017 and the submissions received from Messrs Fehily Timoney in December, 2017. The notice party also enclosed Appendix I of "*Implementation of the Vacant Site Register and Levy*" (December, 2016), outlining the local authority's compliance with s. 5 of the Act and stated that *"it should be noted that as per the local authority's own records this land is deemed serviceable*". Paragraph 2 of the site report was referenced i.e. that the initial assessment carried out by the Planning Policy Unit A/SCE determined the site to be adequately serviced for housing development.

40. On 7th March, 2018, the notice party submitted its observations and acknowledged that the subject lands were in agricultural use, but, highlighting the contents of the Circular and the purpose of the levy, stated as that the site was not being used for the purpose for which is was zoned the levy could be applied. The notice party also stated that it was satisfied that "... *these zoned lands can be serviced, subject to a detailed design being undertaken at planning stage"*. With specific reference to the Lakeview roundabout, it was stated that the notice party had prepared a Part 8 application with a view to advancing the upgrade works identified. The issue of waste water was addressed and while recognising the contents of the LAP that capacity is required to be increased, it was submitted, "*at present, there is currently sufficient capacity to accommodate development on the land the subject of this appeal."*

41. Following application under the Freedom of Information Act, 2014, further supplemental submissions were made by the applicant's legal adviser, Mr. Nolan on the 24th April, 2018. Emphasis was placed on a statement adopted by the notice party as to how it would implement the Act, having regard to the Circular, and in particular where it stated as follows: -

> *"The Department Circular (appendix 3) recommends lands in agricultural use are considered 'vacant' for the purposes of the register, as they are not in use for the purpose for which they are zoned. However, a question might arise as to whether a site located on lands actively in use for agriculture could legitimately be considered vacant or idle. It might be prudent to exclude such sites from the register if there is evidence of the active use of such land for such purposes."* (emphasis supplied)

Mr. Nolan submitted that it was sufficiently clear from this statement, on the local authority's own interpretation of the Act and the Circular, that lands which are actively in use for agriculture are capable of being treated differently from inert lands which are simply zoned for agricultural use in a relevant development plan and that the notice party's own statement recommended that it might be prudent to exclude lands in active use for agriculture from the register. He contended that there was a failure by the notice party to follow its own guidance, resulting in an irrational and legally flawed decision-making process.

42. Representations had also been made to the local authority on behalf of the applicant on the 17th April, 2018 by another firm of advisers, Messrs McCourt, Mullane & Company. These were also enclosed in Mr. Nolan's letter to the Board. Messrs McCourt, Mullane submitted to the notice party that the Council had failed to establish that the land was a vacant site for the entire of the twelve-month period between 30th December, 2016 and ending 29th December, 2017. Objection was taken to the extent of the investigation carried out on the site visit on the 21st November, 2017. It was protested that photographs portrayed only a portion of the lands on a single day out of the 365 days in the test period and that as the lands were used for tillage they would appear unused in the middle of winter in any year unless the ground was planted with an overwinter crop. Messrs McCourt, Mullane also made complaint that no other area of the land was sampled during the test period and submitted that the local authority had failed to comply with the requirements of the Act.

43. Mr. Nolan again wrote to the Board on the 10th May, 2018, outlining, in a more formal manner, the applicant's legal objections. He submitted that the Circular was beyond the legal powers of the Minister. In support he enclosed a copy letter dated 1st May, 2018 from Kilkenny County Council to a landowner whose agricultural land was placed on the register and where the Director of Services of Kilkenny County Council stated that they had sought legal advice on the interpretation of *vacant or idle*. The advice was that those words should be interpreted narrowly, irrespective of the advice in the Circular. Kilkenny County Council indicated its willingness to cancel an entry on the basis of the legal advice

which it had received and which on the face of it conflicted with the contents of the Circular.

44. A further letter was written by the applicant to the inspector appointed by the Board, Mr. Rhys Thomas, on 25th May, 2018 in which he stated that it had come to light that Cork County Council had chosen not to list other nearby sites held by developers, but which did not have current activity. This letter was written following a site visit by the inspector on 17th May, 2018. The applicant reiterated that while the lands were zoned, the rate at which residential land had been consumed for housing in the area was very low, *"of the order of a couple of acres per annum over the past three decades"*; and that they lacked infrastructure. In addition, he stated that the land contained unexploited sand and gravel deposits and the 36 zoned acres were not appropriate for housing until such time as the sand and gravel has been extracted or at the very least "*first very carefully considered*." He repeated that the second site inspection took place on 21st November, 2017 which was outside the twelve-month period.

The Inspector's Report

45. Following his consideration of the submissions, Mr. Rhys Thomas prepared a report dated 25th June 2018 for submission to the respondent. He recounted the submissions and arguments of the parties. He also acknowledged that the notice party had prepared a detailed implementation document that provided the information and research carried out in order to establish the register. The 2015 research included data of house prices, rental prices, social housing support and the percentage of housing stock for sale, which led the notice party to conclude that there is a need for housing in the area. Having considered the notice party's core strategy Mr. Rhys Thomas accepted that it had satisfactorily demonstrated that there was housing need in the area. Any argument by the applicant to the contrary was not backed up by evidence.

46. In so far as infrastructural deficiencies are concerned, the inspector acknowledged the notice party's position that the site can be serviced subject to detailed design proposals at application stage; that there are no water service infrastructural and capacity constraints in the area at present such that a development could not be progressed, and that road infrastructure deficiencies, primarily in relation to the Lakeview roundabout, had been addressed by a Part 8 planning proposal and objectives in the LAP. He recorded that, according to the planning authority there are no infrastructural hold ups to development of this site and stated that while the appellant had raised issues in terms of infrastructural deficiencies, in his view these issues can or will be addressed.

47. Noting the issues raised regarding the Circular and press reports, nevertheless, he expressed the view that the use of the fields for agricultural purposes did not necessarily protect the overall site from entry on the register. He referred to the planning authority's observation that the majority of the site was used for agriculture but nevertheless it had included the lands on the register without offering an explanation for that inclusion. He considered that this cast doubt on the approach and transparency of the implementation policy devised by the notice party regarding agricultural lands. At p. 13 of his report he continued: -

"Neither the Board nor Local Authorities have received new advice from the Department of Housing, Planning and Local Government that concerns amendments to the 2015 Act with reference to farmland and the vacant site register. In the absence of any new information in this regard, I am bound by the Act and any supporting information issued by the Department. Even though the site is in agricultural use, this may not necessarily be a factor to restrict inclusion on the register. In accordance with the circular letter, the ongoing agricultural use has no part to play in this instance."

48. The inspector concluded that given that the majority of the site was not in use for the purpose of which it was zoned, it was vacant or idle for the purposes of the Act. He was satisfied that the entry of the site on the vacant site register should be confirmed and so recommended to the Board. His report was placed before the Board and his stated "*Reasons and Considerations*" are reproduced almost word for word in the decision of the Board, to which I now turn.

The Board's Decision and Order

49. The respondent's Direction dated 11th July, 2018 states that the submissions on file and the inspector's report were considered at a Board meeting on 11th July, 2018. It was decided to defer the case for consideration at a further Board meeting. The respondent's second Direction dated 20th July, 2018, records that it had determined by a majority of 5 to 3, that the site was vacant or idle within the meaning of the Act and that: -

"In reaching its decision, the Board had regard to the overall purpose and content of the Act and was satisfied that the lands in question would satisfy the requirements of the Act in relation to the site being vacant and idle."

50. Although the respondent had employed the words "*vacant and idle*" in the above extract, under the heading "*Reasons and Considerations*" in the Direction it records that it was satisfied that the site was vacant or idle for the relevant period.

51. On 31st July, 2018, in accordance with s. 9(3) of the Act and based on the reasons and considerations set out in its order, the respondent determined that the site is a vacant site within the meaning of the Act. In making its decision, the Board records that it had regard to those matters to which it was required by virtue of the Planning and Development Acts and Regulations made thereunder. Such matters included any submissions and observations received by it in accordance with statutory provisions. The "*Reasons and Considerations*" are stated as follows: -

"Having regard to:

(a) the information submitted to the Board by the planning authority in relation to the entry of the site on the Vacant Sites Register;

(b) the grounds of appeal submitted by the appellant, and

(c) the report of the Inspector,

(d) the need for housing in the area, the suitability of the site for housing and the insufficient reason put forward to cancel the entry on the Vacant Sites Register,

the Board is satisfied that the site was vacant or idle for the relevant period. The Board considered that it is appropriate that a notice be issued to the planning authority to confirm the entry on the Vacant Sites Register."

The applicant's submission

52. The applicant accepts that a housing need has been established and that his lands constitute a site for the purposes of the Act.

53. Counsel also accepts that the meaning of vacant or idle is a matter of statutory interpretation for the court to decide. He further submits that the Act operates in a significant way in infringing private constitutional property rights and must be construed strictly.

54. In so far as suitability for housing is concerned, he submits that in line with dicta of Henchy J., the *State (Holland) v. Kennedy* [1997] I.R. 193, that an illegality may arise if a decision making body fails to stay within the bounds of a jurisdiction conferred on it by statute. A statutory body charged with considering whether a statutory precondition has been met must conduct an appropriate inquiry to satisfy itself that the precondition has been satisfied. It is submitted that it is incumbent on the Board to identify the correct question or test and then to conduct the inquiry mandated by that test. Reliance is also placed on the decision of Hogan J. in *Cunningham v. An Bord Pleanála* [2013] IEHC 234. While a decision maker may have a degree of latitude in arriving at a decision, what it cannot do is to depart from the above obligations.

55. The applicant submits that the lands were not suitable for housing development for the requisite twelve-month period and in its approach to this issue, the respondent either adopted the incorrect test (as in the case of the slip road) or having adopted the correct test, failed to conduct the appropriate inquiry (as in the case of the water/waste water).

56. While an argument may be made that the period during which, or the time at which the question of infrastructure has to be assessed and addressed, may differ as between the time the Council makes a decision and when the Board makes its decision, it is not significantly in issue in this case and is not required to be addressed because infrastructure facilities were not in place for the relevant duration at either time. The inspector and thus the Board failed to adopt the correct legal approach by speaking to the future and not to the previous twelve-month period. The Act is unconcerned with future provision. For the inspector to state that the issues *can or will be addressed* does not satisfy the statutory requirements. The evidence is that prior to any further housing development taking place in the area where the applicant's lands are situated, the roundabout must be upgraded to include a slip road. As this road infrastructure was not in place for a period of twelve months prior to January, 2018, accordingly, the lands were not serviced by the necessary public infrastructure and facilities to provide and service

housing such as to make it permissible for the Board to conclude that the applicant's lands were suitable for housing within the meaning of s. 5(1)(a)(ii) of the Act. It is insufficient for the respondent to rely upon the fact that a Part 8 application has been submitted. Nowhere in in previous submissions or pleadings has the case ever been made that the zoning matrix in MD-R-07 relieved the inspector of his obligation to consider the necessity for the upgrading of the Lakeview Roundabout.

57. There is a deficiency in water and waste water infrastructure. While the Board identified the correct test, it proceeded to misapply it. Given that planning authorities and the Board normally address proposals for future development, such misapplication is understandable. In this instance they were required to address a past situation. What is contemplated by the zoning is housing of the order of 20 to 50 units per hectare. The LAP identifies a deficiency and also identifies the fact that Irish Water must be contacted to ensure that connections may be provided in the light of the deficiency. None of the three matters are addressed by either the Council in its submission or commentary, or by the inspector in his report. The inspector failed to satisfy himself regarding those facilities.

58. The Board's inspector accepted without analysis or appropriate inquiry a brief statement by the notice party of its assessment of how water and the connection thereto might be dealt with. It was necessary for the inspector to pose to himself the question of whether it was possible to build residential development on the entire of the 36 acres at a medium density of 20 to 50 houses per hectare, that could be serviced by the water and waste water infrastructure in place, consistent with its zoning. No such detailed inquiry was conducted. Nowhere in the material before the Board is it recorded what housing is possible across the 36 acres and at what density, given the limits on capacity in the area. No regard was had to the consequences of the limitation regarding water and waste water supply. Thus, there was an insufficient evidential basis on which to form a conclusion that the condition specified in s. 6(5)(b) of the Act is satisfied. Mr. McNamara B.L. submits that the genesis of the conclusion that the site can be serviced *"subject to detailed design proposals at the planning stage"* is a single line in the recommendation of December, 2017 with those words being added in the notice party's response to the appeal. No further details are supplied, and no examination of the LAP has been conducted relative to the applicant's lands. There is no evidence of contact having been made with Irish Water to confirm that a water connection might be available, and no explanation has been advanced as to how the development envisaged by the zoning can be carried out, as opposed to the development of a once-off house. Counsel contrasts the detail with which the issue of *housing need* was analysed by reference to relevant material with the manner in which the issue of infrastructure, particularly water, has been addressed. It is not accidental that the Act only permits the inclusion of lands on the vacant site register that are immediately ripe for development. Once a site is placed on the register it becomes liable to what is described as a punitive tax, designed to force the land to be developed or to be sold to be developed.

59. The applicant disputes the respondent's contention that s. 6(5) of the Act is not overly prescriptive and that a large measure of discretion should be afforded to the Board.

Absent infrastructure at the time of entry on the register, there is no rational connection between the provisions of the Act and its objective and this leads to a potentially unconstitutional application. If one cannot develop the lands at the time they are entered on the register, the question is posed - how is it possible to achieve the purpose of the Act which is to encourage the development of lands? If the Act is applied in such circumstances it would operate in a penal manner. There must be a connection between the purpose of the Act, the measures imposed and the terms of s. 6(5) of the Act which must be seen as entirely prescriptive.

60. On the 19th February, 2019, the respondent refused planning permission for the construction of 176 houses on a 12-acre site immediately adjacent to the applicant's lands at Ballinacurra. This was because of lack of capacity in the waste water facility and certainty regarding a pump station. It was decided that, having regard to the existing deficiency in the provision of adequate sewerage, the development would be premature. This underscores the deficiencies in the reasoning of the inspector and the Board. Those lands are immediately adjacent to the applicant's and the density of housing was consistent with that which the applicant was supposed to be able to achieve in accordance with the zoning which his lands enjoy. The deficiency would have become apparent had the appropriate inquiry been conducted. While it is accepted that, in principle, whether the Board acted lawfully can only be assessed on the basis of the material that was before it and that it is not appropriate for the decision to be assessed in the context of a subsequent decisions, nevertheless, counsel for the applicant submits that they are relevant, not so much as to the decision arrived at, rather the process adopted and the identification of the issues. In contrast to the case under consideration, the correct issues were identified and addressed.

61. It is also submitted that insufficient reasons have been advanced by the Board and its inspector particularly in light of the contents of the LAP.

62. On the question of statutory interpretation, it is submitted the words are clear and it is impermissible to read into the s. 5(1) the words vacant or idle "*of housing."* The words must be given their natural and ordinary meaning. Before a court departs from a literal interpretation of the legislation, it must firstly identify that there is a mistake in the provisions under consideration and thereafter determine whether it is possible to prefer an alternative construction which reflects the plain intention of the Act and which does not involve the court in electing as between policy preferences. It is not permissible to imply an alternative solution into an Act. A limited and focused approach is warranted, and the court cannot engage in choosing policy preferences when interpreting a statute. This is evident from the decisions of the Supreme Court in *CC v. Ireland* [2006] 4 I.R. 1 and *P v. Judges of the Circuit Court* [2019] IESC 26.

63. The literal interpretation of the Act does not reveal a mistake on the part of the legislature and even if it could be demonstrated that a literal interpretation illustrated that the Oireachtas had made a mistake in not assigning a special meaning to the words "*vacant or idle*", it is not possible to identify one alternative interpretation to a literal

interpretation that can be said to reflect the true intention of the Oireachtas. The Act is designed to capture land banks and degenerate lands that are not in use. The applicant's lands are in full time use as a farm. Any other interpretation would have the potential to have wide effect on lands other than those used for agriculture such as, for example, car parks in residentially zoned areas.

64. Relying on *dicta* of Denham C.J. in *D.B. v. Minister for Health* [2003] 3 I.R. 12 it is submitted that the words are precise and unambiguous and no more is required than to give them their ordinary sense. Reliance is also placed on the two step approach adopted by Clarke J. with regard to the application of s. 5 of the Interpretation Act, 2005 in *Kadri v. the Governor of Wheatfield Prison* [2012] IESC 27. First, does a literal interpretation reveal a mistake that has failed to reflect the plain intention of the Oireachtas, and, if so, is it then possible to identify one alternative that reflects such intention? This is a limited and focussed test, as is evident from *Irish Life and Permanent plc v. Dunne* [2016] 1 I.R. 92, and the question must be asked is whether there could be any possible or conceivable basis on which the Oireachtas might have chosen to legislate in the manner which a literal construction of the relevant provisions would require. Clarke J. there observed that even allowing for the scope of s. 5 of the Interpretation Act, 2005 there are limits as to the extent to which a court can be expected to correct errors in legislation.

65. In the event that the court is persuaded that there is an ambiguity, the statute must be interpreted in a manner which is consistent with the Constitution: *per East Donegal Co-Operative Livestock Mart Ltd v Attorney General* [1970] I.R. 317. To the extent that *Colgan v. IRTC* [2000] 2 I.R. 490 is relied on by the respondent, O'Sullivan J. was satisfied that there was no ambiguity.

66. The inspector was bound to apply a literal interpretation of the statute rather than to bind himself by the terms of the Circular and by so doing, he operated in a manner which had the effect of violating the exclusive legislative function of the Oireachtas under the Constitution. If, as established in *Frescati Estates v. Walker* [1975] I.R. 177, it is impermissible to use secondary legislation to interpret primary legislation, then a *fortiori*, there is less justification to contend that the interpretation of primary legislation can be fixed by a Circular. It is accepted, however, that if the court concludes that the inspector's interpretation of the Act is nevertheless correct, then any illegality of approach by the inspector by considering himself bound to interpret in accordance with the Circular, may be of little benefit to the applicant.

67. In *Re Planning and Development Bill 1999* [2000] 2 I.R. 321 the Supreme Court observed that when assessing a legislative provision which infringes constitutionally protected rights, the court is obliged to review whether the infringement meets a threshold test for proportionality. The Act applies to property which was zoned at any stage prior to purchase. It introduced a novel regime which applies equally to those who acquired land before and after the Act was introduced. If the respondent's interpretation is accepted, such distinction, which was considered to be of importance in In *Re Planning and Development* [1999] would be undermined. This is now recognised by the amendment

brought about by the Act of 2018. While the applicant accepts that he cannot call this later legislation in aid, nevertheless, it is submitted that it highlights the more constitutional interpretation brought about by the literal interpretation which the applicant advances.

68. As to the respondent's reliance on *Cronin (Readymix) Limited v. An Bord Pleanála* [2017] 2 I.R. 658, the applicant in that case had sought to isolate the word "*alteration*" from the words surrounding it, something which Mr. Navratil does not seek to do. Section 3 of the Act defines "*regeneration land*" as including "*structures on land".* It is impossible to read *vacant or idle* as having a specific definition tied to residential land in s. 5(1)(a) because to do so confines the meaning vacant or idle has for the balance of the Act, particularly in s. 5(1)(b), and creates what counsel describes as an impossible tension. In dealing with regeneration land, the concern is not with the delivery of housing to address an acute shortage but regeneration of disused spaces in urban areas. Thus, if the *words vacant or idle* are to be read as vacant or idle of housing then s. 5(1)(b) is difficult to understand and has a contorted meaning. To give the expression "*vacant or idle*" its literal meaning avoids this tension. Reliance is placed on the decision of the Supreme Court in *Hegarty v. O'Loughran* [1991] 1 I.R. 148 in this regard.

69. The applicant also disagrees with the notice party that it is sufficient that one could have applied for and obtained planning permission; rather than it being possible to construct housing without the impediment of the lack of infrastructure or that it be contingent on the provision of infrastructure at some time in the future. Where something is outside the control of the owner of land in relation to its development, such as the provision of necessary future infrastructure, to impose a levy would be to impose a penalty and would be divorced from the true purpose of the Act.

70. With regard to the issue of candour, the applicant submits that it is clear from its response to the applicant's submissions to the Board that the notice party was not exercised about the planning history and were aware of it at the time. Zoning in previous years is not relevant to the issues in this case which address the position at a particular point in time; and within the previous twelve months. Any lack of disclosure is not material to those issues.

The respondent's submissions

71. Counsel for the respondent, Mr. Valentine B.L., submits that the two different limbs to the case attract two different standards of review. The meaning of vacant or idle is an issue of statutory interpretation for the court. The suitability of lands for the provision of housing involves a planning assessment and the exercise of a planning judgment and curial deference applies in respect of decisions made by experts. The rationality of the Board's decision falls to be determined on the basis of the material that was before the Board. To this extent it is submitted that s. 6(5) of the Act is much less prescriptive than the applicant's case portrays.

72. The applicant does not question the constitutionality of the Act, rather his challenge is against the decision of the Board. It was accepted in oral submissions that the onus on

the applicant on appeal to the Board relates only to the issue of whether the site is *vacant or idle*, but that the court ought, nevertheless have regard to the reversal of this particular burden when considering whether the respondent has erred in arriving at its conclusion.

73. The respondent also refers to other provisions of the Act such as ss. 10, 11 and 18 of the Act which highlight the ongoing role of planning authorities and the Board in ensuring that only sites which continue to be vacant sites within the meaning of the Act remain on the register.

74. That a subsequent decision may have been made on a refusal for different lands is not relevant and cannot now be introduced: *Hennessy v. An Bord Pleanála* [2018] IEHC 678. Notwithstanding this, if the court were to consider this later decision, the applicant only relies on the decision rather than the material which was before the Board which ought not be allowed.

75. With regard to the claim that a statement of reasons was not given by the Board, and to the extent that this ground is pursued, it is clear from *Connolly v. An Bord Pleanála* [2016] IEHC 624 that reasons can be succinct and can incorporate the reasons found in the inspector's report and the material referred to either in the decision or the inspector's report, which include in this case the submissions of the parties and the LAP. When read in that light, it is submitted that the reasons have been adequately stated.

76. On the issue of statutory interpretation, the applicant, who advances a literal interpretation, does not say what vacant or idle mean rather he concentrates on what they do not mean. This results in a meaning which applies to land which is not used or occupied in any shape or form. This is incorrect because one cannot construe words in isolation. The applicant seeks to create what counsel describes as a "*false dichotomy"* between a strict, narrow and literal interpretation of the words vacant or idle when read in isolation, and the invocation of a more purposive approach under s. 5 of the Interpretation Act 2005, which refers to the construction of a *provision* and not of a *particular word* or words in any provision. Thus, words cannot be construed in isolation.

77. In *East Donegal Co-Operative Livestock Mart Ltd v. Attorney General* [1970] I.R. 317, Walsh J. observed at p. 340 that "[*U]ntil each part of the Act is examined in relation to the whole it would not be possible to say that any particular part of the Act was either clear or unambiguous*." This is particularly applicable to the argument made by the applicant that because the word vacant could readily be understood when read in isolation as being empty, nevertheless, when read in the context of the Act as a whole, its meaning becomes more nuanced.

78. The respondent places particular reliance on the provisions of s. 1(2) of the Act and on *dicta* of O'Malley J. in *Cronin (Readymix).* It was there held that the provisions under consideration in that case, s. 4(1)(h) of the Act of 2000 as amended, were not obscure or ambiguous, did not lead to an absurd result and therefore the provisions of s. 5 of the Interpretation Act, 2005 were not applicable. In order to ascertain the intention of the

Oireachtas, O'Malley J. looked at the overall framework, scheme, policies and purposes of the Act, notwithstanding that there was nothing obscure or ambiguous about s. 4(1)(h). There was, she observed, no single definition of the word "*alteration*" for the purposes of the Act. Counsel submits that to say that a word must be given the same meaning throughout the Act is incorrect and therefore the attempt to suggest a meaning by reference to regeneration lands is to adopt an incorrect approach.

79. Consistent with the appropriate principles of construction, the terms *vacant or idle*, as they apply to the applicant's site, were considered by the Board in the context of the overall framework scheme, policy and purpose of the Act, which is clear from the contents of its direction of the 20th July, 2018.

80. To the extent that ambiguity arises as to the meaning of vacant or idle, even then, however, the double construction rule only applies in order to favour a construction which is consistent with the Constitution, over one which is not. There is no such concept of one interpretation being more constitutional than another. In *Colgan*, O'Sullivan J. stated the court is obliged to apply the double construction rule and adopt a constitutional interpretation only in cases where there is a doubt as to the constitutional validity of another meaning. Thus, it is contended that to deploy the double construction rule, the court would have to be satisfied that the Board's interpretation is unconstitutional or, there is, at minimum, a doubt about that construction. Such considerations do not arise in this case and the applicant does not meet that test. Given that the applicant has not impugned the constitutionality of the Act, it is unclear how it can be contended by the applicant that his interpretation of the relevant provisions is consistent with the Constitution but that the Board's is not. The applicant has not identified a construction which would allow the purpose of the Act to be achieved, while also not applying to him. He has not identified a "*more proportionate*" or less intrusive means of achieving the legitimate social objective of the Act.

81. There is nothing in the direction or the reasons and considerations on the face of the Board's decision which suggests that it considered itself bound to the Circular. The Board expressly recorded that it had reached its decision by reference only to the requirements of the Act and the overall purpose and content of that legislation. It did not mention the Circular. Although the inspector referred to the Circular, the Board did not expressly adopt its inspector's assessment and report as is often done. Even if the Circular could not change the law or bind the Board, it did not mean that the inspector was wrong to consider it at all in his interpretation of what vacant or idle meant. The Circular represents the policy of the Government and the Board was required to have regard to it pursuant to s. 143 of the Act of 2000. Further, the Circular is correct in its construction of what vacant or idle means by reference to the use and purpose for which the land is zoned.

82. The Act employs a disjunctive, rather than the conjunctive expression – vacant or idle. Vacant, by reference to the Oxford English Dictionary, is defined as not filled or occupied, empty. Thus, the question arises: empty of what? Counsel submits that when one construes this term in the context of the overall framework of the Act, vacant must mean

empty of the type of development for which it is zoned. It is submitted that the respondent's view is further supported by the fact that the Act deems the land to be residential because of its zoning; and if it is devoid of development, it is vacant or idle for the purposes of the Act.

83. The contention of the applicant that the purpose of the Act was directed towards land banks rather than lands in agricultural use, is not a distinction which the Act permits. If the applicant's interpretation of the Act is correct, *i.e*. that lands are not vacant if they are actively farmed, then all that was required for a developer is to farm the lands, even for a temporary period, in order to avoid the imposition of the levy while gaining the benefit from any increase in the value and price of development land. The respondent queries how the applicant says that respect that can be given to that purpose on his interpretation that his lands are not caught but a developer using a landbank on a temporary basis will be captured. There is nothing in the section that allows such a distinction to be made. The applicant would have to read in to the section qualifications which do not exist.

84. The applicant's historical communications and submissions regarding zoning and planning illustrate a somewhat different point from that of lack of candour and assist in statutory interpretation. The applicant has accepted that the purpose of the Act is the incentivisation of the release of land banks for housing. The history of the applicant's submissions in relation to zoning illustrates that it is not a simple matter of saying that one person is a farmer and the other a developer.

85. On the issue of infrastructure, it is submitted that the Board did address the correct test, being whether the specific site was adequately served by public infrastructure, subject to detailed design being undertaken. Section 6(5) of the Act, it is submitted, is clear in its terms, and is not prescriptive as to the precise nature and extent of the infrastructure and facilities required in order for the Board to be satisfied that housing on the site could be provided and serviced. A margin of discretion is afforded to the Board under s. 6(5). The section refers to "*in the opinion of the Board*" which implies assessment of fact and degree and the exercise of planning judgment, a decision which ought not to be easily disturbed or interfered with by this Court. In *Dunnes Stores (Limerick) Ltd v. Limerick City and County* Council [2019] IEHC 59, Ní Raifeartaigh J. held that an appeal to the Board should be stayed pending a judicial review of the local authority's decision. Counsel draws attention to the acceptance by the court that while the issues on the judicial review application, being bad faith and lack of notice, were matters for judicial review, the courts accepted that the Board had expertise on the substantive appeal. The applicant must establish that the relevant terms of the LAP on which reliance is placed are so definitive as to the unsuitability of the site for the provision of housing that the Board could not rationally have accepted the Council's statement to the contrary.

86. The question is not whether the lands could be occupied today, rather whether they are suitable for the provision of housing and that there is no reason in principle why planning permission might be refused. The Board was not required to conduct its own separate and

independent inquiry. The Board, as an expert decision maker, was engaged in a factual and planning assessment such that its conclusions may only be attacked on grounds of irrationality. The court must review the rationality of the Board's decision by reference only to the material that was actually placed before it and which provided more than sufficient evidence to enable it to arrive at its conclusion.

87. On his appeal the applicant's case depended on the provisions of the LAP. When considering its contents, the position is far more nuanced than the applicant's case suggests. The LAP states that there is some capacity both in terms of water and waste water to accommodate new development, although it is acknowledged that in the LAP that infrastructural improvements will be required before significant parts, or all, of the development envisaged in the plan can be built. This position was consistent with what the notice party had said to the Board in its submission that: -

> *"With regard to waste water and water supply, the 2017 East Cork Municipal District local area plan recognised the capacities required to be increased in order to facilitate all of the future growth identified for Midleton. However, at present, there is currently sufficient capacity to accommodate developments on the lands the subject of this appeal."*

On this basis the Board was entitled to come to the conclusion that it did and that no irrationality arises.

88. The reference in the LAP to the extension of a trunk water main by Irish Water before significant development takes place does not mean that this must occur before any development can take place. The plan recognises that some development can be accommodated within the existing capacity.

89. The respondent submits that the inevitable conclusion of the applicant's argument regarding the traffic management issue is that unless the slip road is already constructed and in place for the duration of a period of twelve months before the entry of his site on the register, the Board could not rationally and lawfully have concluded that the site was suitable for the provision of housing. This is to accord to the Act a degree of prescription which is not there. Section 6(5) leaves a large margin of discretion to the Board in the exercise of its discretion and planning judgment, it was entitled to take into account the fact that commuting traffic only becomes an issue upon the occupation of the residential development, something which does not arise at planning or construction phases and therefore regard could be had to extant road upgrade plans which would be implemented in time to service completed development. This is not unusual as almost all applications for planning permission for residential development incorporate an element of detailed provision for or refinement of an infrastructural requirement to serve it. It is submitted that if the applicant is correct then all public infrastructure must, at the date of the entry on the register, be such as to permit of occupation of houses not yet built. That is not what the Act provides. There are always nuances in relation to infrastructure which may be addressed in a condition attached to a planning permission or in parallel to it. Conditions concerning contributions frequently relate to infrastructure and must be paid in

advance of development. To require every bit of infrastructure to be in place is to be too prescriptive. The purpose of the Act is to get lands into the development stage. The inspector referred to *"subject to detailed design at planning stage*". The requirements are met if, in principle, the lands are ones in respect for which permission may be given subject to detailed design at planning stage and there is no glaring infrastructural problem where the planning application would be deemed to be premature.

90. The provision of the slip lane was seen in the LAP as an improvement that could be done in the short term. In so far as there is reference to the improvement being essential to any further development in the Ballinacurra area, to that extent that reference is made to the applicant's lands it makes development contingent on a habitat's assessment. Although the narrative at 3.3.15 of the LAP refers to the Lakeview roundabout and the slip road, the specific objective for the applicant's lands at MD-R-07 does not. While the interpretation of the plan is a matter for the courts, reconciling the different strands of different policies is a matter of planning judgment. All of this was taken into consideration by the inspector in his conclusion which he was entitled to arrive at in the exercise of planning judgment.

The Notice Party's Submissions

91. Mr. Bradley S.C. on behalf of the notice party is largely supportive of the submissions made by the respondent. He submits that the policy of the Act and the levy is to incentivise the development of zoned lands and that the provisions under scrutiny must be seen against the statutory framework as a whole, including that the Act brought about amendments to Part 5 of the Act of 2000, regarding planning contribution.

92. The decision of the Board enjoys a presumption of validity. This is of particular importance in the context of the applicant's challenge relating to suitability for housing which is essentially a question of fact and must be set against a backdrop of the onus of proof which is on the applicant under s. 9(2) of the Act when before the Board.

93. The applicant has not identified any form of legal error or misinterpretation to ground an application for judicial review. It is not open to the applicant to seek to advance grounds of appeal on the merits: see *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 as developed in *Meadows v. Minister for Justice* [2010] 2 I.R. 701. The Board is a body which has special knowledge and competence and is a skilled decision maker. In accordance with the principles outlined by Denham J., the court should be slow to intervene in such a technical area.

94. Unlike in *Dunnes Stores,* the applicant did not seek to challenge the assessment by the Council, rather it seeks to do it now in the context of the appeal having been heard. It is submitted that this is impermissible.

95. When viewed in the context of the provision as a whole, the correct literal interpretation of the provision is that the applicant's lands are vacant or idle within the meaning of s. 5(1)(a)(iii) of the Act. To this end importance is attached to the long title and the definition of "*residential land*" in s. 3. It is clear that the intention of the Act was that the

vacant site levy would apply to lands such as the applicants. The words *vacant or idle* are required to be interpreted by reference to *land* in view of the contents of s. 3 and must be interpreted by reference to residential zoning. Agricultural use does not involve any residential use and must therefore be vacant or idle for such residential purposes. The correct literal interpretation of the provision is that the applicant's lands are vacant or idle within the meaning of s. 5(1)(a)(iii) of the Act.

96. However, in the alternative, insofar as such an interpretation would fail to reflect the plain interpretation of the provision, it is appropriate, in accordance with s. 5 of the Interpretation Act, that the provision is given a construction that reflects the plain intention of the Oireachtas where that intention can be ascertained from the Act as a whole. It is not appropriate to consider the phrase *vacant or idle* in isolation from the section in which it appears and the principle of *noscitur a sociis* should be observed. The word vacant is closely allied with that of occupation. It is permissible to take into account the wording of the entire section which is aimed at incentivising the development of vacant or underutilised sites in regeneration or *residential* land, as defined which is of key importance.

97. The phrase vacant or idle must be understood in a proper statutory context which relates to incentivising the development of vacant or underutilised sites in residential land or regulation land. It is a well – established canon of statutory construction that it is presumed that the words are not used in a statute without meaning and that effect must be given to all words used. It therefore follows that to submit, as the applicant has, that because there is some active use such as agriculture, lands cannot be vacant or idle, is not correct as a matter of statutory construction. This is particularly so in the context of the statutory objective of the legislation. No unconstitutionality arises on such interpretation. The planning code involves a balancing of the interests of the common good with property rights; that the applicant's lands are zoned residential and not agricultural confers an enhanced value to the applicant and that the vacant site levy can be justified as pursuing a legitimate social justice purpose, as discussed *in Re: Planning and Development Bill 1999.* By analogy, counsel draws the court's attention to the Derelict Sites Act 1990 which has never been the subject of a challenge and imposes a levy in similar terms to that which is imposed by the Act.

98. The word "*site*" which appears in s. 5(1)(a) of the Act is also used in Part V of the Act of 2000 dealing with housing supply, s. 96(9). The word "*site*" under Part 4 of the Act of 2000 is employed in connection with housing supply and site can include lands on which there are no buildings such as in the case of agricultural land. In the Oxford English Dictionary, site is defined as "*an area of ground on which a town, building or monument is constructed*."

99. The applicant's contention that the use of land for agricultural purposes constitutes development for the purposes of the Planning Act and so therefore it cannot be vacant or idle is misconceived. First, there is nothing in the Act which suggests that because there is development on the lands, that the land cannot constitute a "*vacant site*". Second the

use of lands for agriculture does not in any case constitute "*development*" for the purposes of the Act of 2000. Under s. 3 of the Act of 2000, development comprises works or a material change of use – use does not *per se* constitute development.

100. The provisions of s. 6(7) of the Act which provide that a planning authority, or the Board on appeal, shall not have regard to any unauthorised development or unauthorised use are of assistance in the interpretation of the words vacant or idle. The principal of nonconforming use is a concept which is familiar in the planning code. Thus, a nonconforming use is to be disregarded. The implication is that there is a difference between the use to which land is being put, particularly if it is unauthorised, and whether it is vacant or idle. The use of the lands for agricultural purposes constitutes a nonconforming use under the applicable development plan and/or the LAP, and there is an obligation on the notice party pursuant to s. 15(1) of the Act of 2000, to take such steps within its power as may be necessary for securing the objectives of the development plan.

101. Even though the applicant's land may be used as a farm, the evidence clearly establishes that he actively sought and encouraged a zoning for residential purposes. The applicant has derived an enhanced value as a result of the *residential* as opposed to an *agricultural* zoning – a matter which he actively sought. At no stage did he seek to have the zoning changed from residential to agriculture. In that time, the applicant had not advanced plans for them. The vacant site levy was specifically designed for this type of situation. Therefore, there is no merit to his complaints that a levy based on the enhanced value of such residential zoning is required to be ceded as part of the vacant site levy.

102. While the Circular does not have the status of law and is not binding, nonetheless insofar as it advances a legal interpretation, it is a matter to which the court may give weight.

103. Whether the site was served by the public infrastructure facilities necessary to enable housing to be provided and serviced involves an exercise in planning judgment of a technical nature and that this is fortified by the use of the words "*in the opinion of the planning authority*" in s. 6(2). This must mean that there is a discretion afforded to the planning authority. That this is so is emphasised by the use of the word suitable in s. 5, a concept which necessarily involves an exercise of judgment. This is particularly evident from the provisions of s. 6(5) of the Act which provides that a planning authority, or the Board on appeal, shall determine whether or not a site was suitable for the provision of housing for the purposes of this Part by reference to certain stated matters which is not an expression in prescriptive terms.

104. The LAP does not stipulate that a new water supply network and sewerage works are necessary to serve the Ballinacurra area and that such work must be carried out by Irish Water before any residential development is permitted in the area. The inspector did not conclude that it would be necessary to carry out infrastructural projects including extensive roadworks before any residential development could be carried out.

105. The LAP specifically states that there is some capacity to accommodate part flows arising from part of the development proposed in the plan. The upgrade was required to accommodate the entire development proposal and it was not necessary to accommodate any particular development in the LAP. Much therefore is dependent on the specific lands and the timing of any application as to whether there was capacity to accommodate certain development. The evidence placed before the Board was that there was capacity to accommodate the development of the applicant's site. The inspector did not conclude that it would be necessary to carry out infrastructural projects including extensive roadworks before any residential development could be carried out.

106. The zoning matrix in the LAP is paramount because it is the link between residential land and the actual assessment that takes place. The zoning matrix for the applicant's site MD-R-07 as set out in the specific objectives in the LAP does not make reference to the requirement for the slip road or the Lakeview roundabout and to the extent that the narrative in 3.3.15 does, it is general in its terms and must yield to the more specific provisions of the zoning matrix. In this regard, counsel refers to the level of specificity that may be evident in development plans and relies on dicta of Clarke J. in *Maye v. Sligo Borough Council* [2007] IEHC 146 at para. 6.4 that: -

> *"6.4 The way in which development plans are set out vary. Certain aspects of the plan may have a high level of specificity. For example, the zoning attached to certain lands may preclude development of a particular type in express terms. Where development of a particular type is permitted, specific parameters, such as plot ratios, building heights or the like may be specified. In those cases, it may not be at all difficult to determine whether what is proposed is in contravention of the plan. In those circumstances it would only remain to exercise a judgment as to the materiality of any such contravention.*
>
> *6.5 However at the other end of the spectrum, it is not uncommon to find in a development plan, objectives which may, to a greater or lesser extent, be properly described as aspirational. Such objectives may be expressed in general terms. In such cases a much greater degree of judgment may need to be exercised as to whether the development proposed amounts to a material contravention of the development plan."*

107. The notice party's inquiry spanned a period of twelve months. The reports of the Council inspectors indicate that all requisite inquiries had been made. They addressed this particular site with reference to the statutory requirements. There is a specific reference to the applicant's lands in the LAP and draft LAP. The site is "*ready to go*" from an application perspective, although certain matters may require to be addressed in more detail. The detailed response of the Council to the appeal included the assessment that the applicant's zoned lands can be serviced, subject to a detailed design being undertaken at planning stage.

108. To the extent that the applicant relies on planning applications in respect of other sites, each application is site specific and no reliance can be placed from one to the other. In

any event, there were good and clearly explained reasons for the refusal of planning permission in respect of the other proposed developments. In that case (*Maplewood v. ABP* – 302780) the Part 8 planning approval process had been deferred, the Board had become aware of the deferral and were not happy to proceed to grant planning permission until the process concluded.

109. It is well established that material non-disclosure or lack of candour on the part of an applicant can be ground for declining to grant relief as an exercise of discretion. Reliance is placed on *The State (Vozza) v. Ó Floinn* [1957] I.R. 227*, Cocks v. Thanet District Council* [1982] 3 All ER 1135 and *Brink's Mat Ltd v. Elcombe* [1988] 3 All ER 188. The applicant lacked candour. Zoning is of importance to the issues in the case; and as to how the court should exercise its discretion. In his submissions to the notice party and the respondent and also in these judicial review proceedings, the applicant failed to disclose his full involvement in applications to zone the lands or that he subsequently sold part of his landholding to a purchaser who developed the lands as a large residential development. The impression was sought to be created by the applicant that he was simply a farmer and that he has no interest nor plans to develop the lands himself and that the notice party had unaccountably on its own initiative and against his desire, zoned the lands residential. Apart from the issue of candour it also illustrates that the applicant's lands are precisely the type of lands which the vacant site levy is designed to address: in this case a landowner who has residentially zoned lands which he sought and welcomed, notwithstanding their ongoing agricultural use. The applicant also inaccurately stated in his submission that the lands were always in agricultural use. He has engaged in quarrying activities on the lands.

Discussion and Decision

110. It is accepted that the meaning of the words vacant or idle in s. 5 of the Act involves a question of statutory interpretation and is a matter of law for the court to determine. The court is free to come to its own conclusions without being in any way constrained by the views of the Board or the contents of the Circular. While it has been argued that it was unlawful for the Board to consider itself bound by the terms of the Circular, in my view, however, analysis of the Board's decision does not lead to the conclusion that it considered itself so bound. Nevertheless, the Circular was relied on by the inspector. Having addressed its contents, appendix 3 thereto and the notice party's document entitled *"Implementation of the vacant sites register and levy"*, the inspector stated that in the absence of any new information he was bound by the Act and any supporting information issued by the Department. He expressed the view that even though the site is in agricultural use, this may not necessarily be a factor to restrict inclusion on the register and concluded that in accordance with the Circular the ongoing agricultural use had no part to play in this instance.

111. On the face of it, therefore, it appears that the inspector considered himself, *inter alia*, bound by the terms of the Circular, although he questioned the approach and transparency of the implementation policy devised by the notice party. It seems to me, however, that even if the inspector incorrectly concluded that he was so bound, ultimately

it is a matter for the court to determine the meaning of the provision. That the Board may have taken the contents of the Circular into account does not, in my view, result in an illegality.

112. I also accept the proposition that the court ought not take into account a later decision of the Board when considering the issues in this challenge. In *Hennessy*, Murphy J. rejected an attempt to rely on fresh evidence which became available after the impugned decision was given. She adopted the following passage from Lewis, *Judicial Remedies in Public Law* (5th Ed., Sweet and Maxwell, 2015) at p. 368: -

> "*In a claim for judicial review, a court is concerned with reviewing the decision of a public body to ensure that the decision is not ultra vires. The courts will usually only look at the material before the decision-maker at the time that he took the decision in order to determine whether he has made a reviewable error. The courts do not consider fresh evidence, that is evidence which, if it had been put before the decision maker, might have influenced his decision. The court cannot, therefore, admit in evidence material that became available after the decision in order to determine whether the decision-maker erred in coming to his decision. Nor can the courts have regard to material which existed before the decision was taken and which, if it had been drawn to the decision-maker's attention and been considered by him, might have influenced his decision."* (emphasis added)

113. Apart from being fresh evidence, even if admissible, it seems to me that a later decision isolated from a consideration of the material upon which the decision was based is of little evidential value.

114. The suitability of the land for the provision of housing concerns issues which, it is argued, more properly relate to the exercise by the Board of planning judgment. By virtue of the provisions of s. 6(5) of the Act the planning authority or the Board on appeal have the responsibility under statute to determine whether a site was *suitable* for the provision of housing. Section 6(2) of the Act provides that a planning authority shall enter on the register a description, including a map, of any site in its functional area which was*, in the opinion of the planning authority*, a vacant site for the duration of the twelve months preceding the date of entry. I am satisfied that in the overall consideration of the Act, and its framework, a degree of planning judgment is required and due deference should be afforded to the Board in respect of its decision on these issues. This has consequences for the standard of proof which the applicant bears and where irrationality is alleged. The jurisprudence of the courts as pronounced in *O'Keeffe* as developed in *Meadows* applies. This is not an appeal on the merits. As was observed by Finlay C.J. in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 at para. 101: -

> *"The Court can not interfere with the decision of an administrative decision-making authority merely on the grounds that (a) it is satisfied that on the facts as found it would have raised different inferences and conclusions, or (b) it is satisfied that the case against the decision made by the authority was much stronger than the case for it."*

Finlay C.J. also stated that the court must be satisfied that there was no relevant material before the Board upon which it could come to the conclusion which it did at p. 72: -

> *"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."*

115. Section 9(2) of the Act imposes on the appellant/applicant the burden of establishing that the lands were not vacant or idle for the duration of the twelve-month period. No specific ground is raised that the burden of proof imposed by s. 9(2) was misapplied or misunderstood by the Board. Further, whatever of the respective burdens on the parties before the Board, the applicant bears the burden of proof on this application for judicial review and there is a presumption that the decision of the Board is valid.

116. In *Lancefort Ltd. v. An Bord Pleanála* (unreported, High Court, 12th March, 1998) McGuinness J. stated that: -

> *"The onus of proof in establishing that An Bord Pleanála did not consider the question of environmental impact assessment…and thereby rebutting the presumption of validity of the Bord's decision, lies squarely on the Applicant."*

This was adopted by Haughton J. in *Ratheniska v. An Bord Pleanála* [2015] IEHC 18.

117. The court is not concerned with a challenge to the notice party's decision. Counsel for the notice party submits that this has ramifications for the applicant, that he is now bound by the decision and opinion of the planning authority on the question of the suitability of the site for housing development and the expression of this view is sufficient to warrant the court in concluding that the decision could not therefore be irrational. Whatever the force of this argument, it seems to me that it cannot detract from the Board's independent obligation on appeal to consider the material before it and to direct its mind to the correct test or question in accordance with the provisions of the legislation under consideration.

118. The issue of the slip road and the Lakeview roundabout was not raised in submissions to the planning authority. It was first raised on appeal to the Board. It has not been suggested, however, that the applicant was confined on his appeal to the Board to matters in respect of which submissions were made to the notice party under s. 7 (1) of the Act; nor was such a view taken by the respondent or its inspector.

119. The material which was before the Board and to which it stated it had regard, included:

(a) The inspectors report, in which the terms of the Circular were discussed as were the submissions and observations of the parties.

(b) The submission including reports prepared by consultants engaged by the applicant and the notice party. The material illustrated, inter alia, the applicant's stated position that there were no pending planning applications or extant planning permissions for development on the land, that he had no plans to otherwise develop what is a working farm; and that the land remained in full annual productive agricultural use, notwithstanding its zoning.

Suitable for the provision of housing – infrastructural deficiencies

120. Before considering the issue of the rationality of the Board's decision and the extent of the applicant's pleadings in this regard, it seems to me, in the first instance, that it is necessary to consider whether the Board addressed the correct question in accordance with its statutory mandate and if so, whether, it applied the correct approach to the determination of that question. The alleged failure by the respondent to do so is central to the applicant's case.

121. In *Cunningham v. An Bord Pleanála* [2013] IEHC 234, the Board was requested to consider whether a shed was an exempted development within the meaning of s. 4(1)(a) of the Act of 2000, as amended. In deciding that it was not, it based its conclusions on the fact that the shed presented a traffic hazard within the meaning of Article 9(1)(a)(iii) of the Planning and Development Regulations (S.I. 600/2001). As to the manner in which the Board addressed this issue, Hogan J. stated: -

"30. But here lies the conundrum. Article 9(1)(iii) does not permit the disapplication of the exemption simply by reference to considerations of road safety in the abstract. Instead, as the language of that provision shows, it is rather the "carrying out" of the development which must pose the threat to public safety by reason of the presence of a traffic hazard or the obstruction of road users.

31. In other words, while the Board (correctly) identified the nature of the traffic hazard (recital (b) of the decision), it did not demonstrate that there was any connection between this finding and the ultimate conclusion (recital (c)) that the exemption was disapplied by Article 9(1)(iii). In the present case, it would accordingly have been necessary for the Board to go further and thereby identify how the carrying out of the development (i.e., in this instance, the construction of the shed) would endanger public safety. It is true that the Inspector had endeavoured to make this connection - by positing a direct connection between the construction of the shed and the future projected vehicular use of the access point to the N59 road - but the nature of the changes made by the Board to the draft order which had been prepared by its Inspector leads ineluctably to the conclusion that this particular reasoning had been disavowed by the Board.

Conclusions on the Article 9(1)(iii) exemption

32. For the reasons stated, the Board's decision really proceeds on the basis that the access point simply presented a traffic hazard. That, however, is in itself insufficient to justify the disapplication of the exemption, since Article 9(1)(iii) requires that not

simply the Board identify the presence of a traffic hazard, but rather that "the carrying out of such development would ....endanger public safety by reason of traffic hazard." This latter test represents an altogether different test from that actually posed by the Board.

33. It is clear, therefore, that the Board asked itself the wrong question and applied the wrong test so far as the application of Article 9(1)(iii) is concerned and this fact alone is fatal to the validity of the decision: see, e.g., the comments of Henchy J. in The State (Holland) v. Kennedy [1977] I.R. 193, 201-202 and those of Keane J. in Killeen v. Director of Public Prosecutions [1997] 3 I.R. 218, 229.

34. In these circumstances, the Board's decision cannot therefore stand and must be quashed. I would accordingly propose to remit the matter to the Board pursuant to O. 84, r. 27(4) for further consideration of this question."

122. Thus, it follows that if it is established that the Board asked itself the wrong question or applied the wrong test, then this will be fatal to the validity of the decision.

123. Section 6(5) of the Act provides that the planning authority, or the Board on appeal, shall determine whether or not the site was suitable for the provision of housing *by reference, inter alia*, to whether the site was served by public infrastructure and facilities (within the meaning of s. 48 of the Act of 2000) necessary to enable housing to be provided and serviced. Section 48 of the Act of 2000 provides: -

"48.(1) A planning authority may, when granting a permission under section 34, include conditions for requiring the payment of a contribution in respect of public infrastructure and facilities benefiting development in the area of the planning authority and that is provided, or that it is intended will be provided, by or on behalf of a local authority (regardless of other sources of funding for the infrastructure and facilities)."

124. In his affidavit sworn on 3rd May, 2019 Mr. Egan averred that s. 48(1) of the Act of 2000 refers to public infrastructure and facilities benefiting development in the area of the planning *authority "that is provided, or that it is intended will be provided, by or on behalf of a local authority."* (emphasis added) Counsel for the applicant submits that the reference to s. 48(1) in this context is misplaced and that the relevant subsection of s. 48 to which reference is made in s. 5 of the Act, is s. 48(17) which, prior to its amendment by the Act of 2018, provided: -

"(17) In this section —

"public infrastructure and facilities" means —

(a) the acquisition of land,
(b) the provision of open spaces, recreational and community facilities and amenities and landscaping works,

(c) the provision of roads, car parks, car parking places, surface water sewers and flood relief work, and ancillary infrastructure,

(d) the provision of bus corridors and lanes, bus interchange facilities (including car parks for those facilities), infrastructure to facilitate public transport, cycle and pedestrian facilities, and traffic calming measures,

(e) the refurbishment, upgrading, enlargement or replacement of roads, car parks, car parking places, surface water sewers, flood relief work and ancillary infrastructure,

(f) any matters ancillary to paragraphs (a) to (e).

"scheme" means a development contribution scheme made under this section;

"special contribution" means a special contribution referred to in subsection (2)(c)"

Counsel emphasises that s. 48(17) does not speak of an "*intention to provide"* or future provision; rather defines public infrastructure and facilities by reference, *inter alia,* to the *provision* of those facilities. These facilities include roads.

125. While there is merit in counsel for the applicant's submission that the appropriate sub-section of the Act of 2000 to which reference is made in s. 6(5) of the Act is s. 4(17) and not s. 48(1), nevertheless, I also accept the respondent's contention that the provisions of s. 6(5) of the Act should not be construed in an overly prescriptive manner. Section 48(1) of the Act empowers a planning authority when granting a permission, to levy a contribution in respect of such facilities as are provided or as are intended to be provided in the future. Thus, the section when considered in its entirety addresses both present and future infrastructure. When read in this way it seems to me that there is force in Mr. Bradley S. C's submission that future infrastructure is brought into the picture and the planning authority and the Board is entitled to have regard to future works in its overall assessment; and more particularly in determining whether the site was suitable for the provision of housing during the relevant period. It is also clear, as Mr. Valentine B.L. submits, that there are occasions where decisions on planning issues are made with the proviso that works may have to be undertaken. The inspector took this into account.

126. In my view, therefore, it does not necessarily follow that all infrastructural works must be in place during the relevant period of twelve months. In my view the assessment of such facilities is a matter of planning judgment. While latitude and deference on a matter of planning judgment must be afforded to the assessment of what constitutes public infrastructure and facilities, however, such latitude and impreciseness of prescription cannot detract from the fundamental statutory obligation of a planning authority, or the Board on appeal.

127. On the issue of suitability for housing, the inspector reported: -

" the core strategy of the planning authority has identified the suitability of the site for housing by the residential development land use zoning in the local area plan

and a target housing yield of 5,255 units over 186 Hectare. The LAP states that short term road improvements can be made to accommodate local growth and these are essential prior to further development in the area. In addition, as pointed out by the applicant there are extant planning permissions in the wider area. The planning authority have stated that the site can be serviced subject to detailed design proposals at an application stage. There are no water service infrastructural and capacity constraints in the area at present, such that a development could not be progressed. Finally, road infrastructure deficiencies, primarily in relation to the Lakeview roundabout have been noted and addressed by a Part 8 planning proposal and objectives in the local area plan."

He then concluded: -

"The appellant has raised issues in terms of infrastructural deficiencies, however, in my view all of these issues can or will be addressed. According to the planning authority there are no infrastructural hold ups to development of this site. However, I do note that the LAP warns that infrastructural upgrades must be complete to achieve the target population growth for the area. This specific site is in my mind adequately served by public infrastructure to enable housing to be provided and serviced, as the planning authority put it 'subject to detailed design being undertaken at the planning stage'. Interestingly and at a macro level, the appellant has highlighted the significant mineral resource below ground, i.e. sand and gravel. Though this may be the case, the existence or otherwise of sand and gravel deposits would not by itself comprise a thing that might affect the provision of housing. In the absence of information to the contrary I am satisfied that the subject lands are suitable for housing within the meaning of section 6 (5) of the 2015 Act."

128. With the above in mind, I now turn to address separately the specific issues of the water/waste water and the slip road.

Wastewater/water

129. The inspector considered the contents of the 2017 LAP which spoke of the position prior to the entry of the lands on the register. He accepted that the planning authority's view was that the site can be serviced subject to detailed design proposals at an application stage. He wrote of '*this specific site'*. The LAP addressed the issue of deficiency in water supply at paragraphs 3.3.53 to 3.3.56: -

"3.3.53 In Midleton the existing drinking water supply is close to its limit. There is limited spare capacity in Whitegate Regional Water Scheme and a new reservoir at Broomfield is required.

3.3.54 Discussions with Irish Water indicate that the most advantageous solution to the problem will involve the extension of a trunk water main from Carrigtwohill to connect with a new reservoir and the town's existing supply network. A new supply network to serve Ballinacurra will also be required.

3.3.55 Irish Water will need to commit to this investment before significant elements of the development proposed in this plan can proceed. Intending developers will need to secure a connection agreement with Irish Water before new development can proceed.

3.3.56 The Midleton Wastewater Treatment Plant which is located in Garryduff south of the N25, has a current capacity of 15,000p.e. Further remedial works in relation to infiltration issues are required in order to increase this capacity. Whilst there is some capacity to accommodate part flows arising from part of the development proposed in this plan, upgrading of capacity by Irish Water is required to accommodate the development proposed in this plan."

130. Thus, it was recognised that there is (and was at the time of the preparation of the plan) some capacity to accommodate part flows arising from part of the development proposed in the LAP. While it was acknowledged in the LAP that a new water supply was needed in Ballinacurra and that remedial works were necessary to the wastewater treatment plant in Midleton, nevertheless, it was also stated that there is limited capacity for development in the area. That this limited capacity was sufficient or adequate for the suitability of the development of the applicant's land for housing development over the relevant period was a matter for assessment by the competent authority and even if this court might have a different view on this issue, it is not one that the court has jurisdiction to interfere with on this application for judicial review.

131. In summary, I am satisfied that the inspector and the Board addressed the correct question on this issue namely whether the land was suitable for housing development during the period of twelve months prior to entry on the register because of issues relating to the provision of wastewater and water supplies. Nor was the decision irrational. On the material before it, in my view, the Board was entitled to reach the conclusion that water capacity was available for the development of the applicant's site and that in so doing was engaged an exercise of planning judgment, with which the court ought not interfere.

The Sliproad

132. The LAP addressed this at para. 3.3.15: -

"Lands are also available south of the N25 at Ballinacurra. Short term improvements can be made to the local road network to accommodate some development in Ballinacurra including a left hand slip lane at the Lakeview Roundabout to the N25. This would significantly reduce traffic congestion on the R630 approaching the roundabout and this is considered essential prior to any further development in the Ballinacurra area. In addition, where appropriate flood risk assessments will be completed in order to ensure that future development does not create a worsening flooding situation particularly along the Balick road."

133. The inspector acknowledged that such deficiency had been addressed by a Part 8 planning proposal and objectives in the local area plan. In his affidavit of 21st March, 2019, Mr.

Lynch avers that Part 8 planning approval for the N25 Lakeview roundabout sliproad scheme was confirmed on 23rd July, 2018 and that these works are not an impediment to future works in the area.

134. The respondent submits that the inevitable conclusion of the argument made by the applicant is that unless the slip road is already constructed and in place for the duration of a period of twelve months before the entry of his site on the register, the Board could not rationally and lawfully have concluded that the site was suitable for the provision of housing and that this is to accord to the Act a degree of prescription which is not there. The Board in the exercise of its discretion and planning judgment, it is submitted, was entitled to take into account the fact that commuting traffic only becomes an issue upon occupation of the residential development, something which does not arise at planning or construction phases and therefore it could have regard to extant road upgrade plans which would be implemented in time to service completed development.

135. While in general, this is a proposition which is attractive when considered from the perspective of works of construction, particularly where a further statutory process is not required, in my view, the argument has less force where statutory processes are required to be undertaken.

136. The issue of the road infrastructure was not raised until the appeal to the Board and was therefore not expressly addressed in the notice party's *"Recommendation of Entry of Site onto Vacant Sites Register Report*" in December, 2017, when the emphasis was on the water/waste water issue. The submission of the applicant on the issue of suitability for housing was summarised in the recommendation of 28th December, 2017 as follows: *"Land not suitable for housing given infrastructural deficiencies – water and wastewater specifically."*

137. The issue of the road, therefore, was first expressly responded to by the notice party in its letter to the Board of the 7th March, 2018, where it was stated: -

> *"The Council is satisfied that these zoned lands can be serviced, subject to a detailed design being undertaken at planning stage.*
>
> *With specific reference to the Lakeview roundabout, the Council has prepared a Part 8 application with a view to advancing upgrade works identified in the 2017 East Cork Municipal District Local Area Plan."*

138. Counsel for the respondent submitted that when one looks at the LAP in its entirety, rather than simply looking at what is written at para. 3.3.15, the situation regarding the provision of a road infrastructure becomes somewhat more nuanced. Thus, for example, when one examines the specific planning objectives in the environs of Midleton at p. 65, para. 100 of the LAP the specific objectives at MD-R-01, MD-R-04 and MD-R-06 refer to traffic issues with MD-R-04 referring to the Lakeview Roundabout. Regarding the applicant's lands at MD-R-07, the specific objective in the plan does not refer to the Lakeview Roundabout and expressly states: -

"Medium A density residential development and provision of individual serviced sites, subject to ground conditions. Provision of a new purpose built primary school can also be accommodated on this site, subject to agreement with the Department of Education and Science. Development proposals must provide for sufficient stormwater attenuation and may require the provision of an ecological impact assessment report (Natura Impact Statement) in accordance with the requirements of the Habitats Directive and may only proceed where it can be shown that they will not have significant negative impact on the SAC and SPA."

For the sake of completeness, the entry also contains two symbols, one of which suggests that both a Traffic Impact Assessment ("*TIA*") and Road Safety Audit ("*RSA*") are required.

139. It is submitted by Mr. Valentine B.L. that the reports prepared in respect of the applicant's lands make specific reference to the Habitat's Directive and not to road improvements being *essential* and that while the interpretation of the plan is a matter for the courts, reconciling the different strands of different policies is a matter of planning judgment.

140. This is also supported by the respondent. Mr. Bradley S.C. highlights that '*residential land'* in s. 3 of the Act is defined by reference to the zoning/zoning matrix of the land. The zoning matrix at entry MD-R-07, which is specific and solely refers to the applicant's lands, was fully referenced and accounted for in the notice party's inspector's reports. It is submitted that to belatedly introduce a suggested requirement for the development of a slip road at the roundabout is without substance and not in accordance with any requirement stated in the zoning matrix of MD-R-07. He also submits that it is incorrect to read into the zoning matrix a narrative regarding the Lakeview roundabout which appears at para. 3.3.15 and that such recital does not have paramountcy over the zoning matrix in the LAP.

141. Counsel for the applicant points out that para. 3.3.15, of the LAP is also site specific to the applicant's lands. He submits that the above case was never made to the respondent by the notice party and is nowhere contained on affidavit. He argues that it is not pleaded that the zoning matrix relieved the inspector of his obligation to consider the necessity for the upgrading of the Lakeview roundabout and the inspector does not himself address this issue.

142. While reference is not expressly made to the requirement for a Part 8 application in the LAP, it appears to be correct that no case was ever made by the notice party to the respondent that the works at the Lakeview Roundabout were not necessary or that the narrative in para. 3.3.15 was incorrect in this regard. The respondent was dealing with an appeal which was referable to the applicant's site only. In its submission to the Board of the 7th March, 2018 the notice party referred to the Lakeview roundabout issue and replied by expressly stating that the council had prepared a Part 8 application with a view to advancing the upgrade works identified in the LAP. It was not suggested that the works referred to in para 3.3.15 of the LAP were not required or that the applicant had misread

the LAP. The inspector acknowledged that *"[t]he lands can be serviced, there are Part 8 plans to upgrade the Lakeview roundabout and there is water services capacity in the area."* (see para. 6.4 of his report). His conclusion on this issue (at para. 6.7) is that *"...road infrastructure deficiencies, primarily in relation to the Lakeview roundabout have been noted and addressed by a Part 8 planning proposal and objectives in the local area plan*" is consistent with this understanding. There is nothing to indicate that a distinction was drawn, or a comparison made, by any party between the contents of para. 3.3.15 and the site objectives. In the circumstances, given the positions adopted by the parties on the appeal, I do not believe that the analogy drawn with *Maye* by the notice party assists on this issue.

143. While expressing the view that this was one of the issues which "*can or will be addressed"*, the inspector did not expressly consider the statutory nature of the Part 8 application. Nothing suggests that either he or the Board addressed the fact that approval of an application under Part 8 of the Planning and Development Regulations 2001 (S.I. 600/2001) (and s. 179 of the Act of 2000 as amended) involves a statutory process which must be adhered to. While the procedure is such that one might reasonably anticipate approval for such works, in my view, however, to make an assumption that it will occur is to understate the legal requirements of the process and its mandatory statutory nature. One need only ask what the position would be if the elected members of the local authority, for whatever reason, had taken a different view to that of the chief executive. That the notice party confirmed this process on 23rd July, 2018 does not, in my view, alter the situation. It was not so completed or confirmed at the time of entry of the site on the register, or for a twelve-month period beforehand. In the circumstances, I do not believe it necessary to consider a more nuanced point which was broached in argument as to whether the applicable time might differ depending on whether the matter is being considered by the planning authority or the Board on appeal.

144. I must therefore, on this point, accept the submission of the applicant that the Board and the inspector addressed the incorrect question by looking to a future event, the completion of a statutory process, rather than the question which it was required to address of whether the site was served by the public infrastructure necessary to enable housing to be provided and serviced and fell into legal error in so doing. Without the approval of the Part 8 application, it is difficult to see how the case could be otherwise.

145. Although unnecessary to express a definitive view, I do not believe that it follows from this conclusion that works proposed pursuant to an approved Part 8 application must themselves be in *place* during the twelve-month period. Such matter of state of construction come within the scope of the exercise of planning judgment to be assessed accordingly. The requirement for the completion of a statutory process, in my view, however, is a different matter.

146. In summary, I am satisfied, in accordance with the decision of Hogan J. in Cunningham, that the Board addressed the wrong question and applied the wrong test on this issue and that this is fatal to its decision.

147. In normal course, and subject to the question of candour and the exercise of discretion by the court, this would be sufficient to determine this challenge. I am conscious, however, that if the applicant is ultimately successful in this challenge the matter may require to be remitted to the Board for its further consideration. The Board may once again have to consider the meaning of vacant or idle. This has been the subject of full argument before this court. For this reason, I believe that it is appropriate to consider the meaning of the words "*vacant or idle*".

Statutory interpretation- the meaning of "*vacant or idle*"

148. It has been stated on many occasions that the aim of statutory interpretation is to ascertain the will or intention of the legislature. However, in so doing the court is required to adopt an objective approach. In *DPP v. Brown* [2018] IESC 67, McKechnie J., while in the minority as to the result, helpfully expressed the appropriate approach at para. 92 as follows: -

> ""*Ascertaining the intention of the legislature" may be somewhat of a misleading or even a confusing description, for what is meant by it in this jurisdiction is a purely objective task: what matters is not what was subjectively in the minds of those who passed the legislation, but rather what intention can be gathered from an interpretation of the words used in the Act (People (Attorney General) v. Dwyer [1972] I.R. 416). As stated by Henchy J. in DPP v. Flanagan [1979] I.R. 265, "the province of the Courts in interpreting a statute is not to divine what intention parliament had when passing the particular statute but, by the application of the relevant canons of interpretation, to ascertain what intention is evinced by the actual statutory words used" (p. 282). It is assumed, in this process, that the legislature is fully aware of and proficient in the use and application of all relevant law, language and grammar, and the interpretive criteria used by the courts (see further Dodd, Statutory Interpretation in Ireland (Tottel Publishing, Dublin, 2008), Chapter 2)."*

149. It is also a fundamental principle of statutory interpretation that it is to be presumed that the legislature did not use unnecessary words and that each word and expression in a piece of legislation must have a meaning and that meaning must, if possible, be given effect. This was stated by Egan J. in *Cork County Council v. Whillock* [1993] 1 I.R. 231, at p. 239: -

> *"There is abundant authority for the presumption that words are not used in a statute without a meaning and are not tautologous or superfluous, and so effect must be given, if possible, to all the words used, for the legislature must be deemed not to waste its words or say anything in vain."*

150. While in argument certain emphasis was placed on the disjunctive nature of the provision, it cannot be said that any such emphasis is evident from the report of the inspector or the decision of the Board. The Board's decision records that it was satisfied that the lands were vacant or idle for the relevant period, without distinguishing one from the other, or without concluding that it was both. A similar conclusion was arrived at by

the inspector. The applicant submits, in any event, that his lands do not satisfy either requirement and that they are neither vacant nor idle.

151. The primary route by which the intention of the legislature is ascertained is by ascribing to the words used in the statute their ordinary and natural meaning. McKechnie J. continued: -

> *"Thus it is this "literal approach" which is first in line when it comes to statutory interpretation. It stands to reason that in construing the text chosen by the legislator, the first consideration is to give the words used their natural meaning. Provided that they are clear and unambiguous, the judge's role is at an end, and the words should be given their plain meaning."*

152. I should therefore first consider the provision by reference to its natural and ordinary meaning. This does not mean, however, that the court should ascertain the meaning of the text chosen without reference to the context and statutory framework in which the words or provisions appear. It is a well-established principle of statutory construction that words ought not be considered in isolation. It is also particularly important to recall when considering the provision in issue that s. 1(2) of the Act provides that the Planning and Development Acts 2000 and 2014 and the Act (of 2015) are to be cited and construed together as one.

153. Counsel for the notice party submits, by reference to the principle *noscitur a sociis,* that words must be understood in the context of the provision in which they appear and in the context of the Act as a whole. This was also addressed in *Brown* by McKechnie J. as follows: -

> *"95. Of course, the task of ascribing ordinary meaning is not as simple as it first appears. What is meant by the "ordinary" or "natural" meaning of a word may differ depending on whether one consults a dictionary or the man on the street. Words may have legal meanings but also "ordinary" meanings. The natural meaning of a word can also vary greatly depending on the context in which it appears. "Context" in this regard may require the one interpreting the legislation to consider the immediate context of the sentence within which the word is used; the other sub-sections of the provision in question; other sections within the relevant Part of the Act; the Act as a whole; any legislative antecedents to the statute/the legislative history of the Act, including on occasion Law Reform Commission or other reports; and perhaps even the mischief which the Act sought to remedy. With each avenue of remove, the natural meaning of the word may, or may not, begin to shift. As eloquently put by Black J. in People (Attorney General) v. Kennedy [1946] I.R. 517 ("People (AG) v. Kennedy"):*
>
> > *"A small section of a picture, if looked at close-up, may indicate something quite clearly; but when one stands back and views the whole canvas, the close-up view of the small section is often found to have given a wholly wrong view of what it really represented.*

If one could pick out a single word or phrase and, finding it perfectly clear in itself, refuse to check its apparent meaning in the light thrown upon it by the context or by other provisions, the result would be to render the principle of ejusdem generis and noscitur a sociis utterly meaningless; for this principle requires frequently that a word or phrase or even a whole provision which, standing alone, has a clear meaning must be given a quite different meaning when viewed in the light of its context." (p. 536)"

154. In addition, as we are here concerned with a provision of the Planning and Development Acts, of considerable importance to proper contextual approach to the interpretation of provisions of those Acts is the decision of the Supreme Court in *Cronin (Readymix).* The Supreme Court was there concerned with a challenge to a ruling of the Board under s. 5 of the Act of 2000 as to whether certain works constituted a development and were not exempt from the requirement to obtain planning permission. The works involved the replacement and extension of an old yard for the purpose of drying and storing concrete blocks prior to dispatch to customers. The court was required to consider whether this came within the meaning of "*alteration*" or "*improvement*" which affected only the interior of the structure and did not materially affect its external appearance so as to render its appearance inconsistent with the character of the structure.

155. The court accepted that no single definition of the word "*alteration*" applied throughout the Act. For at least some purposes of the Act, an "*alteration*" may involve something that changes the external appearance in a way that is inconsistent with the character of the structure in question, or with the character of neighbouring structure. For the purpose of exemption, however, an alteration must not have that effect. O'Malley J. observed that given the different ways in which the word was used, it was best taken as simply bearing its ordinary meaning of '*change'*. The court found that the provisions of s. 4(1)(h) of the Act of 2000 were not obscure or ambiguous, did not lead to an absurd result and therefore the provisions of s. 5 of the Interpretation Act, 2005 had no application. The issue, the court observed, was whether the plain intention of the Oireachtas could be ascertained; and it could.

156. The following observations of O'Malley J. at para. 47 are as applicable to the interpretation of s. 5 of the Act under consideration as they are to any piece of planning legislation: -

"One must bear in mind the overall framework and scheme of the 2000 Act, with the many considerations that come into play in the planning process, and look at the context of the provision in question within that framework"

157. As the respondent points out, the court ascertained the meaning of s. 4(1)(h) by bearing in mind the overall framework and scheme of the Act, *notwithstanding* its conclusion that there was nothing obscure or ambiguous about s. 4(1)(h).

158. The approach of O'Malley J. was referred to more recently by the Supreme Court in *An Taisce v. McTigue Quarries Ltd*. [2018] IESC 54 where Mac Menamin J. observed at para. 72:-

> *"72. In interpreting s.177O, and the PD(A)A 2010 as a whole, a court should have regard to the overall framework and scheme of the Act. (cf. the recent judgment of O'Malley J., for this Court, in Cronin (Readymix) Ltd. v. An Bord Pleanála and Ors. [2017] IESC 36; [2017] 2 I.R. 658, para. 47). What does that framework and scheme tell the reader? The words are consistent only with a legislative intention to comply with the EIA Directive. It is not consistent with a literal interpretation which would permit the quarry continuing in operation without appropriate conditions as to that operation for perhaps years to come. The Interpretation Act, 2005 makes clear the approach a court should adopt."*

159. The long title of the Act refers to both vacant and idle. It is described as: -

> *"An Act to make provision with respect to land in areas in which housing is required and in areas which are in need of renewal to prevent it lying idle or remaining vacant, to establish a register of vacant sites in those areas, to provide for a vacant sites levy, to amend the Derelict Sites Act 1990 , to amend Parts II, III and V of the Planning and Development Act 2000 , to amend the Housing (Miscellaneous Provisions) Act 2009 and to provide for related matters."*

160. The Act thus concerns land in areas in which housing is required and it is to be observed that reference is made to "*idle*" in the context of "*lying idle*" and "*vacant*" in the context of "*remaining vacant*".

161. The Act does not define vacant or idle and thus there is no single definition of what those words mean. The court has been referred to numerous factors in support of the respective but opposing interpretations of the provision advanced by the parties, and which it is suggested are evident from the literal approach to the interpretation of the provision. I now consider these factors in order to determine whether it is possible, on a literal approach to interpretation, to come to a particular view.

162. To the extent that dictionary definitions may assist, it has been suggested and accepted by the applicant, that vacant means *empty* and idle *not in use.* The Oxford dictionary definition suggests vacant may also mean not occupied. Synonyms for the word vacant include unfilled, unused or empty. Counsel for the notice party has referred the court to Black's Law Dictionary, (10th ed.) which defines vacant as: -

> *"adj, 1 Empty; unoccupied <a vacant office.*
>
> *Courts have sometimes distinguished vacant from unoccupied holding that vacant means completely empty while unoccupied means not routinely characterised by the presence of human beings*
>
> *2. Absolutely free, unclaimed, and unoccupied, <vacant land>"*

163. The notice party also draws the court's attention to the use of the word vacant in its legal meaning such as for example "*vacant possession*" and '*vacant'* in the context of the rating of land.

164. The word 'idle' may also have a different meaning in different contexts. It may mean *"not in use*". Dictionary definitions of idle also include '*time spent doing nothing', 'not working', 'unemployed'* or *'being inactive'*. Counsel for the respondent suggests that at first glance it may be more difficult to view the word idle as applying to actively farmed lands than the term vacant. All of this emphasises the need for context.

165. The words must also be viewed in the context of words with which they are '*associated'. 'Vacant site*' is defined by reference to the criteria set out in s. 5 of the Act. The definition of residential land, a term which appears in s. 5(1) of the Act, is provided in s. 3. Both sections are contained in Part 2 of the Act. Thus, an essential link is created between the provisions of ss. 5 and 3. Section 5 (1)(a) makes it clear that the levy only applies where the site is residential land. Section 3 provides as follows: -

> *"'residential land' means land included by a planning authority in its development plan or local area plan in accordance with section 10(2)(a) of the Act of 2000 with the objective of zoning for use solely or primarily for residential purposes, and includes any structures on such land."*

166. Thus, lands which are included in a County Development Plan or LAP, where the objective of the zoning is *"for use solely or primarily for residential purposes*", are captured by the Act. It is clear, therefore, that the applicant's lands, given their zoning, are residential lands within the meaning of the Act. It is also accepted by the parties that the applicant's land is a site within the meaning of s. 5(2) of the Act. '*Site'* is defined as meaning any area of land exceeding 0.05 ha *"identified by a planning authority in its functional area"* but does not include any structure that is a person's home. Home is also defined.

167. The words residential lands are employed in s. 5(1)(a) of the Act, and it is within that subsection the words *vacant or idle* appear. Therefore, the words '*vacant or idle'* in s. 5(1)(a)(iii) ought to be considered as being '*associated with'* the words '*residential land'* in s. 5(1)(a). Viewed in this manner there is a necessary association between vacant or idle and land zoning.

168. Further, when one considers the other subsections of s. 5 (1)(a) i.e. the criteria to be fulfilled at s. 5(1)(a)(i) and (ii), each refers to the word '*site'* which also suggests a connection or association between the words under consideration and housing, in particular the need for and suitability of the site therefor.

169. The definition of '*residential land'* in s. 3 of the Act speaks of land in an LAP or development plan with the objective of *zoning for use,* not use to which lands zoned have been or are being put. On the face of it, this would seem lend support to a construction that, provided all other criteria are complied with, zoning will be determinative and unless the use is in accordance with the zoning, it may attract the levy.

170. In terms of overall statutory context, reference has been made in argument to s. 6(7) of the Act which provides that in determining for the purposes of Part 2 of the Act whether a site was vacant or idle for the duration of the 12 months concerned a planning authority, or the Board on appeal, shall not have regard to any unauthorised development or unauthorised use. The respondent lays emphasis on the principle of non-conforming use; that using the lands for agricultural purposes constitutes a nonconforming use under the applicable development plan and/or the LAP, and there is an obligation on the notice party pursuant to s. 15(1) of the Act of 2000, to take such steps within its power as may be necessary to secure the objectives of the development plan. Perhaps another view of s. 6(7) is that it addresses a situation where a development which has taken place conforms with the zoning but for which requisite planning permission has not been obtained.

171. Unauthorised development and unauthorised use however, are defined in s. 2 of the Planning and Development Act 2000, as amended. Unauthorised use as defined excludes exempted developments within the meaning of s. 4 of that Act. Exempted development includes, *inter alia*, development consisting of the use of any land for the purpose of agriculture. In considering whether a site is vacant or idle for the duration of the 12 months concerned a planning authority, or the Board on appeal, cannot have regard to an unauthorised use. It seems to me that, as a corollary, it is open to argument that the Board may have regard to land use which is not unauthorised, as opposed to non-conforming, which may include the use of lands for agricultural purposes.

172. While we are not here concerned with regeneration lands it is submitted by the applicant that, in the overall context of the Act, the court should consider the definition of regeneration when considering the proper interpretation of the Act as a whole. It is submitted that one cannot favour an interpretation that will cause difficulty in the interpretation of the balance of the legislation and this is what the respondent's interpretation of vacant or idle of the type of development for which the land is zoned would result in. Reliance is placed on the decision of the Supreme Court in *Hegarty v. O'Loughran*, which preceded the enactment of the Statute of Limitations (Amendment) Act, 1991. There it was contended that in determining when time begins to run in personal injuries actions, a discoverability date applied. In deciding that it did not, Finlay C.J. also rejected the contention that two or more alternative constructions of s. 11(2)(a) of the Statute of Limitations were open. He found such conclusion impossible because it would mean that s. 71 (which provides for an extension of time in respect of fraud or concealment) and s. 48 (disability) would be superfluous.

173. The applicant argues that it is impossible to read vacant or idle as having a specific definition tied to residential land in s. 5(1)(a). It would mean vacant or idle *of housing* and this confines the meaning vacant or idle has for the balance of the Act, particularly in s. 5(1)(b), thus creating what is described as an impossible tension. It is submitted that with regeneration land, the concern is not with the delivery of housing to address an acute shortage but regeneration of disused spaces in urban areas. Thus, it is submitted that if the words vacant or idle are to be read as vacant or idle *of housing* then s. 5(1)(b)

becomes difficult to understand and would have a contorted meaning. Counsel for the applicant submits that to give the expression "*vacant or idle*" its literal meaning avoids this tension. The respondent submits, however, as is apparent from *Cronin (Readymix*), that it does not follow that a word must be given the same meaning throughout the Act.

174. It seems to me that, on this issue, *Cronin (Readymix)* is more on point than *Hegarty*. In Hegarty the court was not directly concerned with the use of the same words or expression in different sections of the Act, rather it was concerned with ascribing a meaning to the expression "*date on which the cause of action accrued*" in s. 11(1) of the Act of 1957 which potentially rendered otiose other sections of the Act and where those words or expression did not appear.

175. In *People (Attorney General) v. Kennedy,* Black J. acknowledged the general principle that the same words in different parts of a statute, and *a fortiori*, in different parts of the same section, should be given the same meaning. McKechnie J. noted in *Brown*, that this principle of construction now has an express statutory basis in s. 20 of the Interpretation Act, 2005. In *State (McGroddy) v. Carr* [1975] I.R. 275 Henchy J. commented that it was a "*fundamental rule of interpretation that when expressions are repeated in the same instrument, and more especially in a particular part of the same instrument, they should be given a common force and effect unless the context requires otherwise*". (emphasis added).

176. The words '*vacant or idle'* appear, however, in different contexts in s 5(1)(a) and s. 5(1)(b). The subsections address differently defined sites which are ascribed entirely different meanings under the Act and have different zoning objectives. Thus, that vacant or idle may have a different meaning in different sub-sections, even within the same section, while relevant, is not fundamental.

177. The respondent submits that residential land is not defined by reference to whether it is owned by a developer or a farmer or by reference to the intention of the owner, rather by reference to the objective criteria of its zoning. It may also be that if one were to take the interpretation as urged by the applicant *i.e.* that once land is being used for a purpose such as agriculture, it cannot be a vacant site, it would follow that lands farmed by a developer on a temporary basis, or used for other purposes, would not be vacant or idle and would not attract the levy. While there is merit in the respondent's submission that the Act does not speak to intention, nevertheless, if the proper interpretation of the section leads to the scenario outlined above it is not for this court to address any such shortcoming, perceived or real.

178. Adopting the approach outlined in *Cronin (Readymix),* the court must bear in mind the overall framework and scheme of the Act, with the many considerations that come into play in the planning process, and also look at the context of the provisions in question within that framework. O'Malley J described the scheme and framework of the Planning and Development Act at para. 40 of her judgment as follows: -

"…The purpose and scheme of the Act is to create a regulatory regime within an administrative framework which, in the interests of the common good, places limits on the right of landowners to develop their land as they might wish. The principal objectives of the regime are proper planning and sustainable development, and the chief method of ensuring the attainment of those objectives is the planning permission process. It is based on the principle that developments that might have some significant impact, having regard to the range of factors encompassed within the concepts of proper planning and sustainable development, should go through the assessment process necessary for the grant of planning permission. The primary roles in that process are given to the planning authorities and the Board…"

179. What then of the context of the provisions of the Act of 2015 within that framework? Reference to the role played by the planning permission process would not, on the face of it, appear to be entirely germane to the provisions of the Act when considered within the overall framework of the Planning and Development Acts. The existence or absence of planning permission for a site may or may not be relevant. Zoning clearly is. The levy has been described as a site activation measure. It may be said that the Act of 2015, within the scheme and framework of the Planning and Development Acts as a whole, places a limitation on the right of landowners to develop their land as they might wish, with particular reference to the time at which they might wish to develop it. The scheme and framework of the Act dictates that it is the need for housing at any given time and the suitability of the site for the provision of housing that will determine the timing of the imposition of the levy, regardless of when the lands became zoned residential.

180. It seems to me that the respective approaches adopted by the parties to the literal interpretation of the provision yields no clear result. To construe the words vacant or idle as the applicant contends as being empty or not in use might be said not to afford appropriate emphasis to the context of the section in which the words appear and with which they are associated, including 'site' and 'residential lands' and the importance of the zoning of the lands. On the other hand, the practical effect of the respondent and notice party's submissions, would result in reading into the Act words which do not appear, being (vacant or idle, or empty) '*of the type of development for which the land has been zoned*.' Is this a leap too far and thus impermissible?

181. In *Cronin (Readymix)* the Supreme Court was not requested to read words *into the Act* which were not there. It was concerned with the meaning of the word "*alteration*" and found that it could have a different meaning in two different contexts. It ascribed to it the meaning "*change*". This is not what might be considered a radical departure from its commonly understood meaning and far short of the reading into the legislation of several additional words, expressly or by implication.

182. I am satisfied, therefore, on the application of the literal approach, taking into account the purpose and scheme of the Act and the arguments of the parties, that ambiguity arises as to the meaning of vacant or idle. It is therefore necessary in order to attempt to resolve this ambiguity to turn to the provisions of s. 5 of the Interpretation Act, 2005 and

to give the provision a construction that reflects the plain intention of the Oireachtas, where that intention can be ascertained from the Act as a whole.

183. Section 5 (1) of the Interpretation Act, 2005 provides: -

> *(1)In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction)—*
>
> *(a) that is obscure or ambiguous, or*
>
> *(b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of—*
>
> *(i) in the case of an Act to which paragraph (a) of the definition of "Act" in section 2 (1) relates, the Oireachtas, or*
> *(ii) in the case of an Act to which paragraph (b) of that definition relates, the parliament concerned,*
>
> *the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole".*

184. It is of perhaps some interest that in *Brown*, McKechnie J. queried whether there remained a clear definitive and easily understood demarcation line between the literal approach and the purposive method: -

> *"Such an interpretive technique permits the Court to go beyond the pure text of the statute and to consider the intended objective of the Oireachtas and the reason for the statute's enactment. In most cases, the same meaning will be arrived at using the purposive method as it would by using the literal approach; thus the former can function as a useful cross-check for the latter. Occasionally it may be necessary to depart from the literal approach where to apply it would defeat the clear object and purpose of the legislation: see section 5 of the Interpretation Act 2005 and Irish Life and Permanent plc v. Dunne [2016] 1 I.R. 92 at pp. 106-107). In my judgment in C.M. v. Minister for Health and Children [2017] IESC 76, I queried whether, given the modern tendency to treat matters such as legislative history, overall context, the long title and preamble of the Act etc. all as part of the literal approach, there still remains a clear, definitive and easily understood demarcation line between that approach and the purposive method (see paras. 55 to 59 of that judgment). This is certainly not a question that I will attempt to answer in this judgment; perhaps it is simply that these approaches have elided somewhat as the overall practice of statutory construction continues to evolve."*

185. In *Kadri v. Governor of Wheatfield Prison* [2012] IESC 27, and *Irish Life and Permanent v. Dunne* [2016] 1 I.R. 92, Clarke J. recognised that there were limits to which the court can be expected to go in the application of s. 5 of the Interpretation Act, 2005.

186. In *Kadri* Clarke J. observed at para. 3.6 when referring to s. 5 of the Interpretation Act, 2005: -

> *"It is important to note that the construction which that section requires is one that "reflects the plain intention of (the legislature) where that intention can be ascertained from the Act as a whole" it is clear, therefore, that it not only is necessary that it be obvious that there was a mistake in the sense that a literal reading of the legislation would give rise to an absurdity or would be contrary to the obvious intention of the legislation in question, but also that the true legislative intention can be ascertained. There may well be cases where it may be obvious enough that the legislature has made a mistake but it may not be at all so easy to ascertain what the legislature might have done in the event that the mistake had not occurred."*

187. Similarly, in *Dunne*, he observed that the question which had to be asked is whether there could be any possible conceivable basis on which the Oireachtas might have chosen to legislate in the manner which a literal construction of the relevant provisions would require. The identification of an error is not enough on its own, it must also be possible to tell, from the Act as a whole, what the true legislative intention actually is.

188. It is not disputed that the purpose of the Act is to prevent land in areas in need of housing and lands in need of renewal, from lying idle or remaining vacant. It has also been described as a site activation measure. The Department, through its Circular, considers that the legislation entitles the planning authority to impose a levy on lands which are not being used for the purposes for which they have been zoned. The court ought to and does have regard to this. Nevertheless, one must question why, if such is the proper interpretation, the Act did not expressly make provision for such eventuality. Was a mistake made in this regard?

189. But even if the court is satisfied that a mistake has been made, it is necessary to go further and find that the true legislative intention leads to the conclusion that land, or site, in use for a purpose other than that for which it is zoned is to be considered vacant or idle; in this case meaning that land in full time use for agricultural purposes as a working farm, albeit zoned for residential purposes, was intended by the legislature to be captured by the words vacant or idle. In my view such conclusion is far from clear and one at which, despite the impressive arguments of the respondent and the notice party, I am unable to arrive.

190. I have come to the conclusion that vacant or idle within s. 5 (1)(a)(iii) and any ambiguity which surrounds the provision must be determined and resolved in accordance with the meaning as contended for by the applicant, vacant being empty or unoccupied and idle not in use. The meaning contended for by the respondent and the notice party seem to me to be a matter for legislation, rather than judicial innovation. I must therefore conclude that the Board fell into error in its interpretation of the Act.

191. Whether a site is vacant or idle, in the sense of being unoccupied, idle or not in use, will be a matter for assessment by the planning authority or the Board against the factual background and circumstances of any given case. Whether the applicant's lands are vacant or idle within the meaning of the legislation is a matter for assessment by the Board in accordance with the court's determination of the meaning of the provision.

192. While there is no challenge to the constitutionality of the Act, the applicant submits that to impose a levy on lands which are in full time use as a farm amounts to a punitive and disproportionate measure and thus leads to an unconstitutional construction, whereas if one adopted his interpretation it would not lead to a potential infringement of such rights. On the other hand, the Act is one which applies only where it has been established that there is a need for housing, a social necessity and where the lands are suitable for the provision of housing. It follows that the levy may apply only where all of those criteria are fulfilled. Nevertheless, in light of the court's conclusions on the proper interpretation of the Act, it is not necessary to further consider this issue.

Candour

193. The notice party submits that there has been a lack of candour on the part of the applicant and that if the court is disposed to grant the reliefs sought, it should, by reason of this, decline to do so in the exercise of its discretion. It is claimed that the applicant incorrectly pleads that he never initiated an application to have the land zoned for residential development. This was verified by him in his grounding affidavit sworn on 17th September, 2018 and was also stated in correspondence with the Board. It is also contended that the applicant failed to disclose that he made submissions in relation to the 1999 variation to the Development Plan. He submitted a detailed masterplan for the residential development of the entire farmland on the 26th April, 2002, in the context of the 2003 County Development Plan. Submissions were also made in respect of the 2005 LAP whereby he sought to have his farmlands zoned residential. It is contended that he failed to disclose that he subsequently sold part of his landholding to a purchaser who then developed the lands as a large residential development incorporating 210 two storey residential units, 18 apartments and duplexes, and that as part of the planning application for such development, the planning report acknowledged that the applicant had retained the remainder of the holding with the intention of developing it for housing.

194. Mr. Lynch avers that it is not the case, as submitted by the applicant, that the lands have always been in agricultural use. He has engaged in quarrying activities and he made a number of applications relating to the extraction of sand and gravel. Further applications were made by the applicant in relation to permission for an entrance to a quarry, three applications in respect of other lands, not the subject matter of these proceedings, for change of use of farm building to dwelling houses; outline permission for two bungalows which was granted; and for outline permission for industrial/commercial development. Subsequent to the 2003 County Development Plan, the applicant sold part of the farmlands zoned residential and they were developed by a third party purchaser. Mr. Lynch also points out that under the 2005 Special Local Area Plan the applicant made submissions seeking an additional 42 acres to be zoned for residential use. He avers that

as zoning in the 2011 and 2017 LAPs continued the previous residential zoning which the applicant sought to promote there was no requirement to make submissions as the land was already zoned residential; and that it was disingenuous for him to submit to the notice party and the Board on appeal that he did not request the lands to be so zoned in the 2011 or 2017 LAPs. Further, no submission was made by the applicant, in respect of the 2011 or 2017 LAPs, to have his lands removed from such zoning.

195. In an affidavit sworn by the applicant on 22nd February, 2019, dealing with this issue he avers that lands were transferred to him by his father in 1970. They included the 36 acres at issue in these proceedings. In 1995, he sold the freehold interest in the lands to Tilney Investments Ltd but retained a life interest and continued to farm them. He contracted to repurchase the freehold interest in 2000. Mr. Navratil takes no issue with Mr. Lynch's recording of the zoning history of the site since 1996, nor does he dispute that once the Council proposed to zone his lands for residential purposes that he participated in the zoning process. He avers, however, that he only canvassed for the inclusion of 40 acres to the west. The decision of the Council was to zone 60 acres as was their original intention. Mr. Navratil questions the emphasis placed by Mr. Lynch on this history given that the issue, based on the established and undisputed facts before the inspector and Board, is whether the Board was correct in law in concluding that the lands could be classified as a vacant site within the meaning of the governing legislation. He did not understand that this turned on his previous involvement in the zoning process or previous commercial decisions.

196. The applicant submits that it was correct to say that he had not initiated an application to the have his lands zoned for residential purposes. He also submits that it is evident from the papers placed before the Board by the respondent that they had available to it the full planning history of his land and that in any event the planning history is irrelevant – what is relevant is the zoning for the twelve-month period.

197. The notice party relies on *The State (Vozza) v. Ó Floinn* [1957] I.R. 227 and *Cocks v. Thanet District Council* [1982] 3 All ER 1135. Counsel, in written submissions also refers to *Brink's Mat Ltd v. Elcombe* [1988] 3 All ER 188, where the court identified a number of factors to be taken into account in considering the consequences of material non-disclosure. These included: -

"(1) The duty of the applicant is to make 'a full and frank disclosure of all the material facts:' see Rex v Kensington Income Tax Commissioners, Ex parte Princess Edmond de Polignac [1917] 1 KB 486, 514, per Scutton LJ"

(2)The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see Rex v Kensington Income Tax Commissioners, per Lord Cozens-Hardy MR, at p 504, citing Dalglish v Jartvie (1850) 2 Mac & G 231, 238, and Browne-Wilkinson J in Thermax Ltd v Schott Industrial Glass Ltd [1981] FSR 289, 295.

(6)Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented."

198. The exercise of the discretion of the court in the face of lack of candour was also considered by Hogan J. in Oboh v. Minister for Justice [2011] IEHC 102 at para 12: -

> *"…the lack of candour must be relevant to the question of relief. In other words, the mere fact that a litigant has been guilty of lack of candour cannot in itself disentitle an applicant to relief. Discretionary relief is not withheld on this ground as a form of punishment or because judges are personally offended or feel slighted by such contumelious behaviour on the part of the litigant in question. It is rather that the court, being desirous to uphold the integrity of the system of administration of justice may withhold relief where it is satisfied that the litigant has told an untruth which, if it had been otherwise accepted by the court, would have materially influenced the disposition of the proceedings."*

199. The applicant has not pleaded that he never sold lands for development and therefore it is difficult to see the relevance of the alleged failure to disclose the sale of part of his lands. While he did not make representations in respect of the zoning in the current LAP, however, and has attempted to clarify these matters in a subsequent affidavit, the evidence is that he did make representations in 2002 and 2005.

200. The evidence indicates that the applicant's lands were first zoned for agricultural use with an option for low/medium density housing in the 1996 County Development Plan. At that time the property was owned by Tilney Investments Limited who had been registered as owners on 13th March, 1996. It appears to be the case therefore that the applicant did not initiate the zoning process in 1996. It was Tilney Investments who did so. The applicant is not a director of that company but on 10th May, 1999, there was a variation in the zoning resulting in the entire of the lands, the subject matter of these proceedings being rezoned as AH2 *i.e*. agriculture with the option for low/medium density housing. The applicant made written and oral submissions regarding the zoning. Representations were also made by him on 25th April, 2002 on the Draft County Development Plan (which came into operation in 2003). He stated that his farm of 111 acres was zoned for housing in the Plan "*which is welcome*" and he sought an additional 42.312 acres of land to the west to be zoned for housing. Mr. Lynch refers to the submission made by or on his behalf at that time which contemplated a phased development of residential housing. Further submissions were made in 2007.

201. The central issue is whether there were failures and inaccuracies which are material to the claim being made and, if so, are they of such a nature as to warrant the exercise by the

court of its discretion to refuse the relief sought. It seems to me that what is material is the zoning of the land during the relevant twelve-month period and not how that zoning came about. The owner of land zoned residential is susceptible to the levy regardless of whether he participated in the zoning process. It seems to me that if the intention of the landowner regarding the alternative use to which he has put his land ought not be a factor in determining whether land is vacant or idle, then equally it is not of material relevance to the issues in the case.

202. Further to the extent that there has been a failure to fully plead his involvement in the zoning process, I am not satisfied that it is sufficiently material to justify the court in exercising its discretion to refuse relief. Once the applicant chose to raise the issue of his involvement in the zoning of the lands, while it is clearly arguable that he ought to have made a more complete and accurate disclosure, I am not satisfied that any failure to do so amounts to a lack of candour in the legal sense. If it does, I am nevertheless satisfied that these matters are, at most, of peripheral relevance to the materiality of the issues in the case. To exercise the court's discretion to refuse the relief sought would not be in accordance with principle and would be a disproportionate exercise of the court's jurisdiction.

Summary and conclusion

203. The Board (and the inspector) when considering the requirements of s. 6(5) of the Act addressed the incorrect question by looking to the future and in particular to the future completion of a statutory process, rather than the question which it was required to address of whether the site was served by the public infrastructure (in this case the slip road at the Lakeview roundabout) necessary to enable housing to be provided and serviced and fell into legal error in so doing.

204. A site is vacant or idle for the purposes of s.5(1)(a)(iii) of the Act, if it is unoccupied, idle or not in use. Whether the applicant's lands are vacant or idle within the meaning of the legislation is a matter for assessment by the Board in accordance with the court's determination of the meaning of the provision.

205. I am not satisfied that lack of candour has been established, but even if I am incorrect in this, it is not material to the issues to be determined. To exercise the court's discretion to refuse the relief sought would not be in accordance with principle and would be a disproportionate exercise of such jurisdiction.

206. For the above reasons the applicant is entitled to succeed. It would appear that the appropriate reliefs which ought to be granted are those sought in the Statement of Grounds at D, paras. (2), (3) and (5) but the parties are invited to communicate with the court in relation to the form of order.