(a) Where the proposed development conflicts with the zoning objectives for the area. This includes where the proposed development is "not permitted" under the relevant development plan;[68] or, is otherwise plainly inconsistent with the zoning for the area.[69]

(b) Where the planning authority has failed to disclose the proposed location for its proposed development. This includes where the planning authority has specified certain locations, but now chooses to develop at a different location;[70] or, where the Council has specified no locations at all.[71]

(c) Where a private developer would not be likely to receive permission for similar development. This includes where a hypothetical application for similar development by a private sector developer would be refused;[72] or, where there exists a history of refusals of permission for similar development, or dissimilar development with similar planning impacts.[73]

However, the prohibition under section 178 does not apply in certain contexts. For example, with respect to halting sites, the Housing (Traveller Accommodation) Act, 1998 provided an exception for acts done for the purpose of implementing a traveller accommodation programme.[74] Similar provision is made under section 22(10C) of the Waste Management Act, 1996 regarding local authority development that is consistent with and necessary for the proper implementation of the relevant waste management plan for the area.

At the same time, a planning authority remains under a general duty to secure the objectives under its development plan.[75] It has been argued[76] that this general duty should be separately enforceable and should apply to prohibit a material contravention.

With respect to both the prohibition and the general duty, there is no exception for emergency situations. The High Court has confirmed that the prohibition (and the general duty) still applies even where the development is intended to deal with an emergency situation.[77]

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[68] *O'Leary v. Dublin County Council* [1988] IR 150.

[69] *Roughan v. Clare Co. Co.*, unreported, High Court, 18th December 1996.

[70] *Keogh v. Galway County Council* [1995] 1 ILRM 141.

[71] *Wicklow Heritage Trust v. Wicklow County Council*, unreported, High Court, 5th February 1998.

[72] *O'Leary v. Dublin County Council* [1988] IR 150 and *Wilkinson v. Dublin County Council* [1991] ILRM 605.

[73] *Wicklow Heritage Trust v. Wicklow County Council*, unreported, High Court, 5th February 1998.

[74] This exception is limited in time to the period between adoption of a traveller accommodation programme and the adoption in the development plan of objectives regarding the provision of traveller accommodation.

[75] Section 15 of the 2000 Act.

[76] See Simons, *Planning and Development Law in Ireland*, (Thomson RondHall, 2004). Indeed, for example, the exceptions under the Housing (Traveller Accommodation) Act, 1998 and the Waste Management Act, 1996 (as amended) do not apply to this duty.

[77] *Byrne v. Fingal County Council* [2001] 4 IR 565.

addressed the conventional meaning and suggested that emergencies should be "sudden and unexpected", requiring an immediate accident.[65]

However, the relevant exception merely requires the relevant City or County Manager to form an opinion that there is an emergency situation calling for immediate action. It is likely (although not certain) that any such opinion would be recorded in some memorandum or note available from the Council, whether on a public file or through a freedom of information request.

While an emergency relating to water supply does not necessarily dictate the location at which relevant infrastructure must be located, the Supreme Court has suggested that once the planning authority is required to undertake particular works, the elected members cannot interfere with the choice of the executive as to location.[66]

Section 138 and 139 of the Local Government Act, 2001

If the public consultation procedure also does not apply, section 138 of the Local Government Act, 2001 might require the manager to provide information to the elected members of the local authority. This, in turn, allows the elected members by resolution to direct the manager not to proceed with those works, under section 139 of the Local Government Act, 2001. The power is for the elected members of the local authority to exercise.

A private entity might only seek to compel the manager to provide the relevant information, and then request the councillors to make the resolution. Also, the power is not available where the local authority is required by or under Statute to undertake the relevant works. Similar considerations to those described above apply.

Further, the manager does not have to provide the information where dealing "immediately with any situation which he or she considers is an emergency situation calling for immediate action". In this context, "emergency situation" has an artificial definition. It is deemed to exist where, in the opinion of the County Manager, the works are urgent and necessary in order to provide a reasonable standard of accommodation.[67]

Material Contravention

Section 178 of the 2000 Act prohibits each planning authority from effecting any development in its functional area in material contravention of its development plan. The equivalent provision under the old planning legislation (section 39 of the Local Government (Planning and Development) Act, 1963) had been interpreted by the courts to impose a significant control over local authority development.

It is not proposed to address this issue in any great detail. However, the three principal bases on which the water supply infrastructure could be considered a material contravention of the development plan are illustrated below:

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[65] The special modified definition of emergency situation for traveller accommodation under section 27 of the Housing Act, 1988 or section 138 of the Local Government Act, 2001 (discussed below) does not apply.

[66] See *East Wicklow Conservation Community Ltd. v. Wicklow County Council* [1996] 3 IR 175.

[67] Section 138(5) of the Local Government Act, 2001.

environmental impact assessment procedure. The approval process under section 175 of the 2000 Act comprises: (1) preparation of an EIS; (2) notification of EIS to certain prescribed bodies; (3) submission of the EIS to An Bord Pleanála for approval; and, (4) opportunity for third parties to make submissions or observations (including at any oral hearing); before, (5) a decision to approve (whether subject to conditions or not) or refuse is made.

Public consultation procedure

If the development is not subject to the environmental impact assessment procedures, it may be subject to a certain public consultation procedure.

Section 179 of the 2000 Act and Part 8 of the 2001 Regulations require a planning authority to submit to a public consultation procedure for certain prescribed classes of the development. The procedure requires public notice of the proposal, the preparation of a written report by the manager and an opportunity for the elected members of the planning authority to vary or veto the proposal.

For example, the most relevant prescribed classes for water supply infrastructure are:

(a) The construction of a bridge or tunnel (Article 80(1)(c));

(b) The construction or erection of pumping stations, treatment works, holding tanks or outfall facilities for waste water or storm water (Article 80(1)(d));

(c) The construction or erection of water intake or treatment works, overground aqueducts, or dams or other installations designed to hold water or to store it on a long-term basis (Article 80(1)(e));

(d) Drilling for water supplies (Article 80(1)(f)); and,

(e) Any development … the estimated cost of which exceeds EUR 126,000, not being development consisting of the laying underground of sewers, mains, pipes or other apparatus" (Article 80(1)(k)).

Exception for Emergency Situation

The procedure does not apply where the development is necessary for dealing urgently with any situation that the County Manager considers is an "emergency situation" calling for "immediate action" (section 179(6)(b)). A further exception is made for works that the Council is required by Statute to undertake (section 179(6)(c)).

In *O'Reilly v. O'Sullivan and Dun Laoghaire/Rathdown County Council*,[63] the Supreme Court considered the word "emergency" in the context of similar legislation.[64] There, section 27 of the Housing Act 1988 had given a special meaning to the word that altered its conventional meaning. However, the Supreme Court also

[63] Supreme Court, unreported, 26th February 1997.

[64] City and County Management (Amendment) Act, 1955.

Environmental impact assessment

Section 175 of the 2000 Act requires a planning authority to prepare an environmental impact statement ("EIS") for approval by An Bord Pleanála, where development of a class prescribed under Schedule 5 of the Planning and Development Regulations, 2001 is proposed to be carried out. These reflect the classes of development prescribed under the EU Directives on environmental impact assessment (85/335/EEC, 97/11/EC and 2003/35/EC).

For example, the most relevant classes for water supply infrastructure are:

(a) Works for the transfer of water resources between river basins, where this transfer aims at preventing possible shortages of water and where the amount of water transferred exceeds 100 million cubic metres per year (Class 12(a), Part 1).

(b) In all other cases, works for the transfer of water resources between river basins, where the multi-annual average flow of the basin of abstraction exceeds 2,000 million cubic metres per year and where the amount of water transferred exceeds 5 per cent of this flow (Class 12(b), Part 1).

(c) Dams and other installations designed for the holding back or permanent storage of water, where a new or additional amount of water held back or stored exceeds 10 million cubic metres (Class 15, Part 1).

(d) Dams and other installations not included in Part 1 of this Schedule which are designed to hold water or store it on a long-term basis, where the new or extended area of water impounded would be 30 hectares or more (Class 10(g), Part 2).

(e) Works for the transfer of water resources between river basins not included in Part 1 of this Schedule where the annual volume of water abstracted or recharged would exceed 2 million cubic metres (Class 10(m), Part 2).

Even if the development does not fall precisely within these classes (e.g., if it does not exceed the specified threshold), an EIS must still be prepared for approval where the local authority consider that the development is likely to have significant effects on the environment.[59]

If the development would be located on or in a European site (i.e., a site protected under either the Habitats Directive[60] or the Birds Directive),[61] natural heritage area, nature reserve or refuge, the Council must make a formal decision on this matter and that decision must be available to the general public.[62]

If the development should have been subject to these requirements, a complaint can be made to the Council or to An Bord Pleanála to request compliance with this

[59] Article 120(1) of the Planning and Development Regulations, 2001.

[60] Directive 92/43/EEC.

[61] Directive 79/409/EEC (as amended).

[62] *Ibid.,* Article 120(2).

With respect to pipelines, sections 18 and 64 of the Public Health (Ireland) Act 1878 give a sanitary authority the power to carry any water pipe through or over land. Section 271 of that Act provides that an application can be made to the District Court to secure access to land in order to lay the pipe. If the sanitary authority can show that it is necessary to enter the land in order to carry out the works, then the District Court will make an order permitting a local authority to enter onto the lands on 24-hour's notice.[54]

Section 182 of the Planning and Development Act, 2000 gives a local authority the power to place, construct or lay pipelines (including water pipes, sewers or drains) on, under or over land that does not form part of a public road. Although consent of the owner and occupier is required, where such consent is unreasonably withheld, the local authority may appeal to An Bord Pleanála. If the Board determines that consent was in fact unreasonably withheld, it shall be treated as given.

Part 7 of the Water Services Bill 2003 provides further express ancillary powers for land acquisition that will be read together with the powers under sections 182 and Part XIV of the Planning and Development Act, 2000.

3. Development Consent

In general, any local authority project of significance will include acts of works or material changes in use that comprise "development" within the meaning of the Planning and Development Act, 2000. For example, the infrastructure required to exploit any source of water will include acts of excavation of land, erection of structures and transfers of water resources, each of which comprises development.

Notwithstanding this, where a planning authority[55] carries out development within its own functional area, no planning permission is required – development at this location is exempted development.[56] Where the development is to be carried on outside that functional area, a planning authority must either: (1) obtain planning permission from the planning authority within whose functional area the development will be carried out; or, (2) carry out the development jointly or in partnership with that planning authority.[57] Only the construction of a new road or the maintenance or improvement of an existing road remain exempted, even when carried on outside the relevant functional area.[58]

Development by the Council is instead subject to three other forms of control under the Planning and Development Act, 2000 and one form of control under the Local Government Act, 2001. Each is considered in turn below.

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[54] These powers are due for repeal under the Water Services Bill, 2003.

[55] County and City Councils, Borough Councils and Town Councils (excluding former Town Commissioners).

[56] Sections 4(1)(b), (c) and (d) of the 2000 Act.

[57] Section 4(1)(f) of the 2000 Act provides a special exemption for "development carried out on behalf of, or jointly or in partnership with, a local authority that is a planning authority, pursuant to a contract entered into by the local authority concerned". Curiously, there is no geographical limitation whatsoever on this exemption.

[58] Section 4(1)(e) of the 2000 Act.

Water Supply

Quite apart from the express power to acquire any water-right or other right over or in respect of any water, described in section 213(2) of the 2000 Act, there exist specific statutory provisions relevant to the acquisition of rights for the provision of water services.

The Water Supplies Act, 1942 permits a sanitary authority to take a supply of drinking water from a "source of water" under and in accordance with a provisional order that has been made and confirmed under that Act. The expression "source of water" is defined to mean "any lake, river, stream, well, or spring", i.e., all existing sources of water.[53] This limited definition for sources of water has the effect that proposals to abstract water from groundwater resources are not subjected to the 1942 Act procedures.

The relevant procedures require that:

(a) A proposal to take a supply of water is made.

(b) A book of reference is prepared listing the persons to whom damage may be caused by the taking of water.

(c) Extensive public notice is required.

(d) Where objections are made to the proposal, an application for a provisional order must be made to An Bord Pleanála. Where no objections are received, the proposal is deemed to have been agreed to and the proposal can be brought into force by the publication of certain notices.

(e) Assuming a decision in favour of granting the provisional order, further public notice is required.

(f) Objectors are entitled to petition the Circuit Court to require "further inquiry" into the matter.

(g) After the provisional order is has been confirmed, whether by the Board, the Circuit Court or the High Court (on appeal), the proposal must be brought into force by public notice before it is lawful for the sanitary authority to abstract the water.

(h) From this time "it shall be lawful" to abstract and use water in accordance with the proposal and to execute any ancillary operations. This power may be exercised "notwithstanding any right of any person to prevent or restrict the exercise of such powers" and "notwithstanding that such sanitary authority has not acquired the right of any person to the use of the water in the relevant source of water or to the uninterrupted flow of water from such source of water into or through any watercourse, whether natural or artificial".

[53] The Water Services Bill, 2003 defines "source" (for different purposes) to exclude "well" and include "impoundment" and "aquifer".

was the case for both section 213(2) and 213(3)(a), the latter of which refers to acquisition for a "particular purpose". The expression does not refer to "a particular scheme of development intended to be pursued"; this was distinguished as relating to the manner in which a statutory purpose will be achieved. The applicant also complained that a more specific or particular purpose in the nature of a specific development should be described to allow the Board to properly balance the common good with the conflicting property rights. This was dismissed, as Finnegan P. accepted that the Board had in fact carried out the relevant balancing exercise. As a statutory purpose had been identified, the provisions of section 213(3)(b) did not apply.

(d) The Board failed to provide any or any adequate reasons for the decision to confirm the order.

The evidence was that the recommendation of the report of the Board Inspector was (marginally) different to that of the Board. The Inspector recommended confirmation, to secure early development of the lands (implicitly recognising that the applicant would in time develop the site). The Board state the acquisition was necessary and that the objections could not be sustained. Finnegan P. accepted that the reasons actually given by both the Inspector and the Board were the same in substance and that both are justified by the assessment of the Inspector. The Board was entitled to draw the conclusion it did.

(e) The compulsory purchase order was confirmed without evidence adduced to test the manner in which the statutory purpose was to be achieved.[52]

Having dismissed the means by which the order was to be achieved as irrelevant to the enquiry, Finnegan P. responds to this issue with reference to the abundant evidence on the "manner in which the general statutory purposes identified … were to be achieved". The reference to abundance should probably be understood to mean "sufficient for current limited purposes" as he concludes "it is unnecessary that the means by which that statutory purpose will be achieved be determined in advance of the making of the compulsory purchase order".

(f) The constitutional issue was reduced to a complaint that the statutory provisions did not permit the applicant a meaningful opportunity to make submissions at the oral hearing; with reference made to the right to reasons in support of the acquisition and the right to the discovery and production of documents.

Accepting the relevant legal proposition, Finnegan P. stated that he was satisfied the scheme meets all these requirements. With respect to the different matter of the application of that scheme, any denial of justice could have been remedied by way of judicial review at the appropriate time.

[52] I understand the applicant to complain that this does not fairly represent this head of complaint, which more properly related to the absence of evidence on what specific or particular purpose had been identified.

respect of almost all of the lands covered by this permission. An Bord Pleanála confirmed this order on 17th January 2003.

In his proceedings, the applicant was permitted to raise five non-constitutional grounds for complaint[51] and one issue based on the constitutional protection for property rights. These complaints are considered in turn below:

(a) The Board failed to determine the application for a contribution to costs that was made under section 219.

The evidence was that the Board's practice was to defer any decision until after judicial review proceedings had been determined. Finnegan P. accepted that section 219 did not expressly authorise the Board to defer or adjourn the exercise of its discretion in relation to costs. It is a discretion that must be exercised judicially and in relation to reasons connected with the case. To defer the matter on the basis of some matter unconnected with the hearing would be an improper exercise of the power. The applicant succeeded on this ground and the terms of an order await further debate.

(b) The Board failed to require the City Council provide any and all relevant documents.

Finnegan P. determined that the focus of the applicant's request for documents was to ascertain whether or not the City Council had discussions or meetings with other developers about the site. He was not satisfied that these materials were relevant to the hearing. Finnegan P. stated "the means by which the Acquiring Authority proposes to achieve the statutory purpose for which it has made a Compulsory Purchase Order are not relevant to the enquiry". Further, as the power to direct production of documents is available to the Board (not the Inspector), the fact that no evidence was produced of a request to the Board (rather than the Inspector) was likewise fatal to the applicant's complaint.

(c) The compulsory purchase order fails to state fully or accurately the purposes for which it is being made.

The evidence was that the Order of the Board that was under challenge referred to an acquisition "necessary for the purposes of facilitating the implementation of the Dublin City Development Plan", but the order itself gave as its purpose "development purposes". Finnegan P. determined that the only purposes to which the order must refer are "statutory purposes". This

[51] As the pleadings did not address the issue with sufficient clarity, Finnegan P. ruled out any challenge based on the difference in purposes described by the acquiring authority and the Board. The statutory purpose was described by the acquiring authority as being for development purpose (an apparent reference to section 212) and by An Bord Pleanála as being for the purposes of facilitating the implementation of the development plan (a clear reference to section 213). Notwithstanding this ruling, he goes on to analyse the matter in reasonable detail, concluding that the purpose was in fact the same – when considered in conjunction with the Report of the Board Inspector. In reliance on authority from the United Kingdom (*Mearvale Builders Limited* (1978) 36 P&CR 87; *Proctor & Gamble Limited* 63 P&CR 317), the Court looked behind the express purpose to identify the "actual purpose". Reference was made to sections 212(1)(d) & (e) and 213(2)(a) for this "statutory purpose".

> "the Minister when deciding whether or not to confirm a compulsory purchase order did not make a determination that the public good to be achieved by the confirmation of the compulsory purchase order should prevail over the plaintiff's property rights".

As such, it was not the Minister who determined whether the public good outweighed the private property rights. It was the enabling legislation that restricted the protected right in accordance with the public good.

However, in *An Blascaod Mór v. Commissioners for Public Works (No. 3)*[45] the High Court would appear to have reached a different conclusion: determining that the balancing of the constitutional property right and the exigencies of the common good is in fact a matter for An Bord Pleanála.[46] The approach that An Bord Pleanála should take in considered a compulsory purchase order was summarised:

> "The word "exigencies" has a connotation of more than useful and, "reasonable" or "desirable"; it means "necessary" and implies the existence of a pressing social need. A measure cannot be regarded as necessary in a democratic society, based on tolerance and broad mindedness, unless it is proportionate to the legitimate aim being pursued."[47]

The High Court decision in the *An Blascaod Mór (No. 3)* case was approved by the Supreme Court on the grounds of constitutional equality.[48]

The most recent analysis of the decision making process on whether to grant a compulsory purchase orders relates to the Carlton cinema site: *Clinton v. An Bord Pleanála & ors.*[49] This decision dated 15th March 2005 confirms the central distinction at issue in the *Crosbie* case: that statutory purposes are different to the means of achieving that purpose.

The case relates to an extensive site at the northern end of O'Connell Street, extending to Moore Street, O'Rahilly Parade and Henry Place; all within the administrative area of Dublin City Council (formerly Dublin Corporation). In February 1998 the Corporation published an Integrated Area Plan for O'Connell Street, which affected the whole of the relevant site in issue.[50]

Together with a number of others, Mr Clinton assembled a site of some forty properties and secured planning permission for their development in August 1999. On 11th December 2001, Dublin City Council made a compulsory purchase order in

[45] Unreported, High Court, Budd J., 27th February 1998.

[46] This reasoning was accepted by Finnegan P. in *Clinton*.

[47] In *Clinton*, Finnegan P. was satisfied that An Bord Pleanála carried out this exercise.

[48] [2000] 1 IR 6. The legislation was based on the principle of pedigree, which appeared to have no place in a democratic society committed to the principle of equality. Accordingly, there was no legitimate legislative purpose for the unfair treatment of the plaintiffs as compared with persons who owned or occupied and resided on the island prior to 1953 and their descendants.

[49] Unreported, High Court, Finnegan P., 15th March 2005.

[50] The Integrated Area Plan ("IAP") was central to the statutory purpose and the dispute regarding whether the IAP was properly incorporated into development policy (and thereby the reason and purpose for the Order of the Board) does not appear to have been addressed by Finnegan P.

Although predating the transfer of functions to the Board, *Crosbie v Custom House Docks Development Authority*[43] provides guidance for what should be considered by the relevant decision-maker in the context of a compulsory purchase hearing. In *Crosbie*, the High Court accepted that it was appropriate for the Minister to consider whether it was necessary for the authority to acquire the land for the purpose of carrying out its function, but that the Minister could not consider whether the proposed development was desirable, or whether a proposed alternative was more desirable.

> "In each of the situations above referred to objectors may claim (and the Minister may adjudicate on such a claim) that the acquisition of his lands are not necessary to enable the authority to carry out its statutory function and duties, but the Minister cannot consider an objection based on the alleged public benefit to be derived from alternative proposals which objectors may propound or on the merits of any development proposed by the authority."

As such, this illustrates the classic distinction between the statutory purpose for which the acquisition is made and the mechanism by which that purposes is achieved (i.e., the manner in which it is to be carried out). Here, the statutory purpose was for the renewal of the Docklands, but the means was allegedly for the construction of a national sports centre. Although the proposed national sports centre failed, Mr Crosbie was not entitled to the return of his lands, as the compulsory purchase order was valid – having been made for the necessary statutory purpose.

> "The Authority did not choose to limit the purpose of the acquisition to a particular proposed development. It had good reasons (as events eloquently proved) for not doing so and it was not required by statute so to do. Planning schemes may be amended, and proposals for development made before a planning scheme is adopted may be changed and so the Authority's decision was that it would acquire the lands for its general statutory purposes and not for the particular development which at that time was the means by which it intended to carry out its statutory obligations."

As the compulsory acquisition of land comprises an interference with constitutionally protected property rights, any interference must be "justified by the exigencies of the common good". In *ESB v. Gormley*,[44] Finlay CJ stated in relation to the provision of electricity:

> "Having regard to the social benefits of electricity and its contribution to the economic welfare of the State, the uncontradicted evidence adduced in this case of the necessity for and value of this transmission line to the national supply system leads to an inescapable conclusion that the power to lay it compulsorily is a requirement of the common good."

In *Crosbie*, the Court analysed the compulsory purchase procedures under the Urban Renewal Acts and, in rejecting an argument that these were unconstitutional, concluded that:

[43] [1996] 2 IR 531

[44] [1985] IR 129.

Jurisdiction to confirm

Section 214 of the Planning & Development Act, 2000 transfers from the Minister for the Environment, Heritage and Local Government to An Bord Pleanála each function of the Minister regarding the compulsory acquisition of land by local authorities under certain specified legislation. As a result, the compulsory purchase orders for most local authority projects are now submitted to An Bord Pleanála for confirmation. Certain important time-limits regarding submission and publication are prescribed under section 217. For example, where an objection is made to a proposal by a sanitary authority to abstract water under the Water Supplies Act, 1942, an application to the Board for a provisional order under that Act must be made within six weeks.

For the first time, section 216 of the 2000 Act introduced the prospect that an acquiring authority could confirm its own compulsory purchase order. In particular, where the Board receives no objections; or, all objections are withdrawn before the Board makes a decision; or, the Board forms the opinion that any objections relate exclusively to matters for the property arbitrator (i.e., compensation value) the Board must inform the local authority. In turn, the local authority is required to confirm the order with or without modifications (or, indeed, to refuse the order). The fact that acquiring authorities may now confirm an order themselves under the provisions of the 2000 Act appears likely to present issues where certain powers arising after the confirmation of an order only apply to orders "made and confirmed" under the Housing Act. This omission is certainly regrettable.

Decision on a compulsory purchase order

Where there are objections to the confirmation of a compulsory purchase order, An Bord Pleanála must hold an oral hearing in order to determine whether to confirm the order.[40]

Section 135,[41] 143 and 146[42] of the Planning and Development Act 2000 apply in relation to such a hearing. Section 143(1) provides the only statutory indication of what must be considered by the Board in such a hearing:

> "The Board shall, in performing its functions, have regard to the policies and objectives for the time being of the Government, a State authority, the Minister, planning authorities and any other body which is a public authority whose functions have, or may have, a bearing on the proper planning and sustainable development of cities, towns or other areas, whether urban or rural."

Although section 220 of the 2000 Act permits the oral hearing into the compulsory acquisition to run in parallel (at the same hearing) of any hearing for the environmental impact assessment of the project. Sometimes the relevant development consent will already be secured, the planning and environmental issues will have been addressed. This will reduce further the function of the Board in assessing the order.

[40] Unless, of course, it is of the opinion that the objection relates to a matter which can be dealt with by a property arbitrator.

[41] Procedure at the oral hearing.

[42] The appointment of an Inspector to report etc.

This reference to other "purposes" in section 10 of the Local Government (No. 2) Act, 1960, pursuant to which the greatest number of compulsory acquisitions (for non-Housing Act purposes) is effected, must now "be construed as including the purposes referred to in [section 213(2)]". This must be taken to refer to the local authority's:

> "functions (whether conferred by or under this Act, or any other enactment passed before or after the passing of this Act), including giving effect to or facilitating the implementation of its development plan or its housing strategy under section 94".[36]

Acquisition for future purposes

Section 213(3), which applies and has effect in relation to any power to acquire land under the 2000 Act or any other enactment, whether before or after the 2000 Act provides that:

(a) Lands that are "not immediately required for a particular purpose" may be acquired through compulsory or voluntary acquisition provided that the local authority has formed the opinion that the land will be required for that purpose in the future. As such, the relevant "particular purpose" should have been identified, even where it may not be delivered upon for some time. It is clear that the expression "particular purpose" means particular "statutory purpose" and not any particular scheme of development.[37] This is a feature of the distinction between the statutory purpose and the means or mechanism by which they statutory purpose is to be achieved.[38]

(b) However, if the local authority has merely formed an opinion that it will require the land in the future "for the purposes of any of its functions", without determining "the manner in which or the purpose for which it will use the land", the acquisition must be voluntary. Compulsory acquisition powers are not available in this circumstance.[39]

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[36] An argument could be made that the purposes are the functions listed at subparagraphs (i) through (iii) of section 213(2). However, these are more properly understood as ancillary powers and not statutory purposes for which land may be compulsorily acquired. This would be consistent with the reasoning in *Clinton v. An Bord Pleanála & ors*, unreported, High Court, Finnegan P., 15th March 2005. As noted, it is clear that the expression does not refer to a "particular scheme of development": see the *Clinton* case.

[37] See *Crosbie v. Custom House Docks Development Authority* [1996] 2 IR 531; and, *Clinton v. An Bord Pleanála & ors*, unreported, High Court, Finnegan P., 15th March 2005.

[38] In *Crosbie*, the statutory purpose was for the renewal of the Docklands, but the means was allegedly for the construction of a national sports centre. Although the proposed national sports centre failed, Mr Crosbie was not entitled to the return of his lands as the compulsory purchase order was valid – having been made for the necessary statutory purpose. In *Clinton*, the statutory purpose was described by the acquiring authority as being for development purpose and by An Bord Pleanála as being for the purposes of facilitating the implementation of the development plan. The means was not clear. Finnegan P. ruled out any challenge based on the difference in purposes described by the acquiring authority and the Board (but subsequently analyses the matter in detail, concluding that the "purpose" was the same. He also determined that the means was not relevant to the enquiry of the Board.

[39] It would appear from *Clinton* that the reference to "the manner in which … [the acquiring authority] will use the land" is otiose.

available for the purpose of a water treatment works. If the lands had been acquired compulsorily, no second claim for compensation arises from this "appropriation".

Acquisition of lands

If the local authority does not own the necessary lands, section 213 of the Planning and Development Act, 2000[33] permits a local authority, "for the purposes of performing any of its functions", to:

(a) "Acquire land, permanently or temporarily, by agreement or compulsorily";

(b) "Acquire, permanently or temporarily, by agreement or compulsorily any easement, way-leave, water-right or other right over or in respect of any land or water or any substratum of land"; and,

(c) "Restrict or otherwise interfere with, permanently or temporarily, by agreement or compulsorily, any easement, way-leave, water-right or other right over or in respect of any land or water or any substratum of land".

Section 213(4) makes clear that a local authority may be authorised by compulsory purchase order to acquire land "for any of the purposes referred to in [section 213(2)]".[34]

With respect to the power to effect a compulsory acquisition, the effect of the 2000 Act is regrettably not as clear as it might be. At first blush, it could be argued that subsections 213(2) and (4) alone constitute a power to acquire lands by compulsory purchase order. However, there is nothing in the 2000 Act regarding the appropriate procedures for publication and confirmation nor is there provision for the necessary payment of compensation for such an order.

Accordingly, the better view is that the 2000 Act merely supplements the acquisition powers that were already in existence. Therefore:

(a) Where the acquisition is for Housing Act 1966 purposes, section 76 of the Housing Act, 1966 permits the making of a compulsory acquisition order. The procedures for publication, confirmation and compensation outlined in that Act apply; but,

(b) Where the acquisition is for any other purposes, section 10 of the Local Government (No. 2) Act, 1960[35] permits the making of a compulsory acquisition order. Section 10(3) makes clear that the relevant procedures under the Housing Act 1966 apply to such an order made under the 1960 Act.

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[33] All existing powers of land acquisition conferred by statute must be construed in accordance with this provision.

[34] As discussed below, this reference to "purposes" must refer to statutory purposes, i.e., the local authority's functions under any legislation (whether before or after the 2000 Act) and includes giving "effect to or facilitating the implementation of its development plan or its housing strategy". It is clear that the expression does not refer to a "particular scheme of development": see *Clinton v. An Bord Pleanála & ors*, unreported, High Court, Finnegan P., 15th March 2005.

[35] As amended by section 86 of the Housing Act, 1966 and section 222 of the Planning and Development Act, 2000.

In addition, section 65 of the same Act obliges a sanitary authority to "provide and keep in any waterworks constructed or purchased by them a supply of pure and wholesome water". A power to lay pipes "at such pressure as will carry [water] to the top story of the highest dwelling-house within the district or part of the district supplied" is also conferred.

Section 53 of the Waterworks Clauses Act, 1847 permits every owner and occupier of a dwelling house to demand and receive "a sufficient supply of water for his domestic purposes". There are preconditions to this right to demand a water supply, including that communication pipes must first be laid. No demand can be made where the house is an unauthorised structure or its use is unauthorised.[32]

The Water Services Bill, 2003, which was passed by Seanad Éireann on 1st July 2004, was referred to the Dáil Select Committee on Environment and Local Government on 3rd February 2005. This Bill is intended to revise the provision of drinking water and the collection and treatment of waste water, which is currently governed by a legislative framework that dates back to Victorian times. Quite apart from changes to the relevant nomenclature (the water sanitary authorities becoming "water services authorities"), it is proposed that each of the foregoing functions and statutory purposes would be repealed, revoked and replaced.

Sections 31 and 32 of the Bill establish the proposed functions and powers of water services authorities – the provision or supervision of water services for domestic and non-domestic requirements in its functional area. A water services authority may take all measures necessary to ensure compliance with its obligations including "abstraction, impoundment, treatment, purchase or supply of water for drinking or any other purpose" and "the construction or maintenance … of waterworks".

The Minister for the Environment may oblige a water services authority to provide a particular class of water services to a particular area. It would appear that this is the only circumstance where the water services authority would be obliged to provide a water supply.

2. Acquisition of Property Rights

Having established the corporate *vires* to undertake the relevant local authority project, attention turns to the preferred location for the project and acquisition of the necessary property rights.

Appropriation of existing lands

Of course, the local authority may already own lands that are appropriate for this purpose. Where such lands had originally been acquired for some different statutory purpose or other, section 210 of the Planning and Development Act, 2000 permits the local authority to appropriate such lands for the purpose of any other of its functions. In other words, lands that had been acquired for the purpose of developing a housing estate may be appropriated for use as a water treatment works, where subsequent to acquisition the local authority becomes satisfied that the land should be made

[32] See section 259 of the Planning and Development Act, 2000.

costs must have already been incurred.[26] The special contribution does not clearly relate to the costs of projects delivered under public private partnership. Also, a special contribution may be refunded where the relevant exceptional works are not commenced or completed within prescribed time periods.

Quite separately, section 49 permits a planning authority to prepare a supplementary development contribution scheme specifying the amount and manner of payment of supplementary development contributions for a public infrastructure service or project. The expression "public infrastructure service or project" is more limited than "public infrastructure and facilities" (used in section 48): it is limited to particular rail, light rail or other public transport infrastructure; particular new roads; and, particular new sewers, waste water and water treatment facilities, drains or watermains.[27]

Before a supplementary development contribution may be levied, the relevant public infrastructure service or project must (it would appear) have already been provided or carried out[28] and it must also benefit the development to which the permission relates.[29]

Water Supply

Each sanitary authority[30] is authorised to supply its district with a supply of water proper and sufficient for public and private purposes. This is clear from section 61 of the Public Health (Ireland) Act 1878, which provides:

> "Any urban authority may provide their district or any part thereof, and any rural authority may provide their district or any contributory place therein, or any part of any such contributory place, with a supply of water proper and sufficient for public and private purposes, and for those purposes, or any of them, may –
>
> (1) Construct and maintain waterworks, dig wells, and do any other necessary acts".

From this you will see that the relevant function or statutory purpose relates to the supply of water for public and private purposes; in support of which there exists a express ancillary powers to construct and maintain relevant infrastructure.[31]

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[26] Although it appears the costs must have already been incurred, there is no requirement for the project to have been commenced or completed: indeed, section 48(12) would suggest the contrary, as provision regarding refund for works not carried out or completed would otherwise be unnecessary.

[27] It is immediately clear that refurbishment etc. of roads, waste water and water treatment facilities are not included. Also excluded are the acquisition of land and the provision of open spaces and other amenities etc.

[28] In this respect, the scheme adopted on 13th January 2003 by Dun Laoghaire/Rathdown County Council for the extension of LUAS Line B1 from Sandyford to Cherrywood would appear premature. Notwithstanding this, conditions under this scheme have been attached by An Bord Pleanála, e.g., ref.: PL 06D.203308.

[29] A good example of such a

[30] From 1st January 2004, County and City Councils only.

[31] In *Keane on Local Government* (First Law / Law Society of Ireland, 2003, 2ed), Butler SC, argues that although section 61 is enabling "it is clear that the sanitary authority is under a statutory duty to supply its district with a supply of proper water". However, with respect, this conclusion does not logically follow: discretion has clearly been vested in the sanitary authority.

clear authority for levying payment for services by way of contribution under planning conditions.

These latter powers are particularly relevant to the delivery of local authority projects, comprising as they do one of the few mechanisms whereby a local authority may recover the costs for providing public infrastructure.

This is even more valuable for water supply infrastructure[22] where section 65A of the Public Health (Ireland) Act, 1878 prohibits a sanitary authority from making "a charge for a supply by them of water for domestic purposes".[23] Further, there is no equivalent to the powers exercised by sanitary authorities to recover the capital and operation costs of wastewater treatment infrastructure. Although the use of conditions in discharge licences[24] to effect the recovery of such charges has been the subject of recent dispute in both Cork and Dublin – where attempts have been made to recover significant recent investment costs by this mechanism.

Section 48 requires a planning authority to prepare a development contribution scheme stating the basis for the determination of contributions to be paid in respect of public infrastructure and facilities.[25] In turn, when granting permission, a planning authority is permitted to include conditions requiring the payment of such 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)".

In addition to the terms of such a scheme, the planning authority may require the payment of a so-called "special contribution":

> "where the specific exceptional costs not covered by a scheme are incurred by any local authority in respect of public infrastructure and facilities which benefit the proposed development".

Both relate to "public infrastructure and facilities" which is defined to mean, in summary: the acquisition of land, the provision of open spaces and other amenities etc., "the provision and refurbishment of roads, car parks, car parking places, sewers, waste water and water treatment facilities, drains and water mains" and the provision of infrastructure to facilitate public transport.

Contributions levied under the scheme may relate to the costs of future local authority projects, but it would appear that before a special contribution may be attached the

[22] Although a significant proportion of water supply infrastructure is currently funded by central Government.

[23] Most recently substituted by section 12 of the Local Government (Financial Provisions) Act 1997.

[24] i.e., licences granted under section 16 of the Local Government (Water Pollution) Acts, 1977 to 1990.

[25] An attempted challenge to the scheme adopted by Dublin City Council was recently rejected by the Supreme Court on the basis that the applicant, the Construction Industry Federation, did not have sufficient *locus standi* to maintain the complaint: *Construction Industry Federation v. Dublin City Council*, unreported, Supreme Court (McCracken J.), 18th March 2005.

Gratuitous Payments

In contrast, when considering gifts made by a local authority to third parties, it could be argued that section 69(1)(a) of the Local Government Act, 2001 imposes a restriction of similar effect to the *ultra vires* rule by requiring the local authority to have regard to "the need to secure the most beneficial, effective and efficient use of [its] resources".[16] In this way, it could be argued that express functions are required for gratuitous payments to survive the application of the *ultra vires* rule. It is worth noting that section 66 of the Local Government Act, 2001 provides such express functions for the promotion of the interests of the local community (i.e., for social inclusion, social, economic, environmental, recreational, cultural, community or general development of an area) – this tends to support an argument that express functions are required.

That said, the language "to have regard" is considered to impose quite a low threshold: i.e., to inform oneself fully of and give reasonable consideration to, with a view to accommodating, and from which departure may be justified for *bona fide* reasons.[17] In addition, other countervailing matters to which the local authority must have regard include "the need to maintain adequately those services provided by it",[18] "policies and objectives of the Government"[19] and "the need for a high standard of environmental and heritage protection".[20]

If an apparent gratuitous disposition was made, e.g., in settlement with a potential objector, there seems little doubt that the necessary power to compromise claims could be implied and justified where exercised in furtherance of legitimate objectives connected with delivering the project. The early delivery of essential public infrastructure and the costs increases avoided would be relevant in this regard.

Local authority funding

In alternative circumstances, where, e.g., a local authority levies payment for the exercise of its functions, an express power would almost certainly be required. The rebuttable presumption against the imposition of taxes and charges would prevent a local authority from levying payment without clear authorisation under statute.[21] For example, sections 48 and 49 of the Planning and Development Act, 2000 provide

[16] This very question has arising with private companies, where the answer turns first on whether the company is solvent or not. Where solvent, charity and other gratuitous payments are likely to be incidental to the objects. Where insolvent, such powers are not likely to be implied. Indeed, when insolvent, even payments to the Revenue Commissioners in settlement of the tax liabilities of associated companies will be *ultra vires*: see *Re Frederick Inns Ltd et al* [1994] 1 ILRM 387.

[17] See, by analogy with the requirement for a planning authority to have regard to regional planning guidelines in making the development plan, *McEvoy v. Meath County Council* [2003] 1 ILRM 431.

[18] Section 69(1)(b) of the Local Government Act, 2001

[19] *Ibid.*, section 69(1)(e).

[20] *Ibid.*, section 69(1)(h).

[21] See, e.g., *Athlone UDC v. Gavin* [1985] ILRM 434 (single charge for water, waste and sewage services *ultra vires*) and *Ballybay Meat Exports Ltd. v. Monaghan County Council* [1990] ILRM 864 (charge for connection, as of right, to public sewer *ultra vires*). Both cases post date section 2 of the Local Government (Financial Provisions) (No. 2) Act, 1983, which had been intended to provide local authorities with the power to impose charges for the services provided by them.

(b) Second, the doctrine of implied ancillary powers is given express statutory force. Section 65(1) provides that a local authority:

> "may do anything ancillary, supplementary or incidental to or consequential on or necessary to give full effect to, or which will facilitate or is conducive to the performance of, a function conferred on it by this or any other enactment which can advantageously be performed by the authority in conjunction with the performance of such a function".

Language of this kind was the subject of detailed analysis by the House of Lords in the United Kingdom, in determining that speculative money transactions (i.e., "swaps") conducted through a capital market fund in the name of the relevant local authority, which where undertaken for profit, were *ultra vires*.[12] It was held that such a provision does not grant any new functions or statutory purposes to a local authority. The section is clearly premised on the existence of other "functions conferred … by this or any other enactment" that may be supported or achieved by ancillary powers implied under this section 65(1).

(c) Third, section 69, like section 7 of the Local Government Act, 1991 before it, prescribes certain matters to which a local authority must "have regard"[13] in performing the functions conferred on it. These matters include available resources, adequate maintenance and balance of services, co-operation and consultation with other local authorities, Government policies, high standards of environmental and heritage protection and the need to promote social inclusion.

From this it should be clear that functions[14] or statutory purposes should not be confused with the express and implied ancillary powers that describe mechanisms whereby the local authority can deliver upon the relevant purposes. This parallels the distinction between the objects and ancillary powers, e.g., a private company.[15]

For example, in the *Huntsgrove* case, from which the above quote was taken, the Court agreed that Meath County Council could accept payment of £20,000 from a prospective developer to fund a review of the development plan. The statutory purpose was to review the development plan; a purpose established under the relevant Planning Acts. The implied power was to accept gifts that would allow it pursue this purpose; although there was no express authority or power to accept gifts, such a power was readily implied.

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[12] See *Hazell v. Hammersmith & Fulham London Borough Council & ors* [1991] 1 All ER 545.

[13] See further below, including fn 17, regarding *McEvoy v. Meath County Council* [2003] 1 ILRM 431.

[14] Notwithstanding the definition that includes "powers and duties".

[15] Often described as "objects", but properly understood as express ancillary powers, the Memorandum of Association of a private company will often list matters incapable of standing as independent objects, e.g., to borrow money or to advertise. See Courtney, *The Law of Private Companies*, (2002, Butterworths), Chapter 6.

Town Councils (including former Town Commissioners).[6] With waste management functions, the expression local authority is likewise reserved to County and City Councils.[7]

The ultra vires *rule*

In this context it is important to remember that the *vires* of statutory corporations are limited and circumscribed by the relevant statutes and

> "extend no further that it is expressly provided by them or is necessarily and properly required for carrying into effect the purposes of its incorporation or may fairly be regarded as incidental or consequential upon those things which the legislature has authorised".[8]

The logical consequence is that local authorities are limited in the kinds of project may be undertaken by them and the manner by which such projects may be delivered. For example, it would be difficult for any local authority to identify statutory purposes that would justify the provision of turf accountancy[9] or brothel services. This is known as the *ultra vires* rule, the effect of which might include invalidity for acts carried out in the absence of the relevant statutory purpose.

With sections 6 through 8 of the Local Government Act, 1991, the Oireachtas has relaxed the *ultra vires* rule. These provisions are replaced and augmented by the Local Government Act, 2001,[10] the most relevant parts of which are considered below.

(a) First, the functions[11] or statutory purposes of local authorities are expanded. In particular, sections 64, 66, 67 and 68 elaborate on the functions to include, respectively, democratic representation of the local community, promotion of the interests of the local community and local amenity and recreation etc., to encourage use of the Irish language. Section 63(1)(b) makes clear that functions are also conferred by or under statute "including this Act and any other enactment whether enacted before or after this Act".

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[5] The expression "water functions" is defined with reference to the functions granted under certain specified statutes, e.g., relating to water supply and fluoridation and waste water treatment.

[6] These non-water related functions include, e.g., the licensing of caravan parks and the management of burial grounds.

[7] Although, section 33(9) of the Waste Management Act, 1996 effectively provides that the expression "local authority" includes Town Councils (excluding former Town Commissioners) for the purpose of providing them with powers (but not obligations) regarding the collection of waste in their functional area.

[8] *per* Lardner J., *Huntsgrove Developments Limited v. Meath County Council* [1994] 2 ILRM 36.

[9] Although arguments to the contrary might be raised where the racing industry is important to some areas, e.g., in Kildare.

[10] See sections 63 through 73 (Part 9, Chapter 1) of the Local Government Act, 2001.

[11] An expression that includes both powers and duties; see section 2 of the Local Government Act, 2001. In this regard, the expression "power", should be read as meaning a statutory discretion vested in the local authority and should be distinguished from ancillary powers that merely provide mechanisms whereby purposes are achieved.

This paper considers the regulatory framework that applies to the delivery of local authority projects. Much of this paper is relevant to any project that a local authority might deliver, whether relating, e.g., to road or waste infrastructure, the provision of housing or other public services and utilities.

This paper will focus on water supply infrastructure. In particular, experience from work in the past two years on several water supply infrastructure projects will be used for useful examples of the operation of the regulatory framework in practice. These projects include:

- Donegal, Lough Mourne/Letterkenny Water Supply Scheme (Abstraction);
- Fingal, Leixlip to Ballycoolen Water Supply Scheme (Pipeline and Treatment Plant);
- Galway, Costello Regional Water Supply Scheme (Abstraction);
- Kildare, Proposal to Abstract Water from the River Barrow (Abstraction);
- Kildare, Wellfield Development Schemes (Groundwater Abstraction); and,
- Offaly, Edenderry/Rhode Water Supply Scheme (Abstraction).

For current purposes, there are three principal areas of interest: (1) corporate *vires*; (2) acquisition of property rights; and, (3) development consent. This paper will address each area in turn:

1. Corporate Vires

Local authorities

Each of the 114[1] local authorities in Ireland is a body corporate or corporation "with perpetual succession and power to sue and be sued in its corporate name and to acquire, hold, manage, maintain and dispose of land or any interest in land".[2]

There are 29 counties (or County Councils), 5 cities (or City Councils) and 80 towns (comprising 5 boroughs (or Borough Councils), 49 former Urban Districts and 26 former Town Commissioners (both now Town Councils)). There are significant, if sometimes subtle, differences between these different corporations. For example, traditionally and for most purposes, the functions of a sanitary authority were vested in County Councils, City Councils, Borough Councils and Town Councils (including former Town Commissioners). The current definition of a planning authority is similar, but excludes former Town Commissioners.[3]

With effect from 1st January 2004,[4] the water functions[5] of sanitary authorities repose in County and City Councils only – other sanitary services functions remain vested in

[1] The relevant local government area for each of these authorities is listed in Schedules 5 and 6 of the Local Government Act, 2001.

[2] Section 11(7) of the Local Government Act, 2001.

[3] Section 2 of the Planning & Development Act, 2000.

[4] Section 83 of the Local Government Act, 2001.

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Water Supply Infrastructure:
Local Authority Projects: the methods and the myths

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