

**APPROVED**

**THE HIGH COURT  
JUDICIAL REVIEW**

**[2021 No. 111 JR]**

**BETWEEN**

**PETER CARVILL AND MANNIX FLYNN**

**APPLICANTS**

**AND**

**DUBLIN CITY COUNCIL, IRELAND AND THE ATTORNEY GENERAL**

**RESPONDENTS**

**JUDGMENT of Mr. Justice Meenan delivered on the 30<sup>th</sup> day of July, 2021**

**Introduction**

1. The effects of the Covid-19 pandemic have reached into almost every aspect of our working, social and family lives. This application concerns the impact which the pandemic has had and, possibly, will continue to have on our transport system.
2. For many months following March 2020, levels of traffic on our streets and roads reduced dramatically. This presented the first named respondent (“the City Council”) with an opportunity to reshape transport policy for the future. With this in mind, the City Council published a document entitled: “*Enabling the City to Return to Work Interim Mobility Intervention Programme for Dublin City (May 2020)*”.
3. This document, under the heading “*Scope and Objectives*”, states: -  
  
“The goal of this programme, in essence, is to allow the city to function under the new arrangements arising from the Covid-19 Public Health Emergency, both in terms of providing space for safe movement plus business activities, and in accommodating the changed transport patterns.”

The document then sets out a number of “*high-level aims*” and continues: -

“These high-level aims have been translated into transport-specific objectives as follows:

- To improve pedestrian safety through the provision of additional space for movement and enhanced pedestrian areas;
- To enable more people to cycle by providing safer cycling facilities; ...”

To achieve the objective of enabling more people to cycle, the City Council proposed the Strand Road cycleway trial.

4. The applicants have brought these proceedings to seek certain reliefs by way of judicial review to halt the cycleway trial as presently proposed. It should be stated at the outset, lest there be any doubt about it, that the Court in determining this application is not concerned with policy matters, such as the appropriateness or otherwise of the aims and objectives of the transport policy of the City Council.

5. The first named applicant is a retired Civil Servant who resides at Farney Park, Sandymount, Dublin 4. The second named applicant is an elected member of the City Council.

#### **Strand Road Cycleway Trial (“the Cycleway Trial”)**

6. Strand Road is located in the Sandymount area of Dublin and runs between Merrion Gates and Beach Road/Sean Moore Road. Strand Road is mainly made up of residential dwellings on the west side of the road, with the Irish Sea on the east side. There are numerous roads off Strand Road.

7. The cycleway trial is proposed to involve the following: -

- i. Provision of a two-way separated cycle track from Sean Moore Road to Merrion Gates;

- ii. The removal of the northbound traffic lane on Strand Road to provide for a one-way south bound traffic system to facilitate the proposed two-way cycle track;
- iii. The provision of bollards and orcas along the proposed cycle track; and
- iv. The installation of traffic signals equipped with Smart Micro technology to monitor cyclist numbers and vehicle classification.

**8.** The effects of the cycleway trial are as follows: -

- i. Inbound city traffic along the Merrion Road intending to access the north side or certain areas of the south side would no longer be permitted to turn right at Merrion Gates and would have to continue along the Merrion Road to find available alternatives to turn right and head towards their destination. The National Transport Authority (“the NTA”) have calculated that this would increase the traffic on Merrion Road to the order of 114%. It is also the case that it would now be permitted to turn right at the junction of Strand Road and Merrion Road. It is not clear whether any increased traffic as a result of this new right hand turn on Merrion Road is part of the 114% increase referred to;
- ii. The traffic that would no longer be permitted to use Strand Road would have to use alternative roads. The NTA have calculated that this would lead to an increase of traffic on Park Avenue of 22%, Sandymount Road 22%, Serpentine Avenue 36% and Sandymount Avenue 63%. As against this there would be a reduction of traffic on Nutley Lane of 9%;
- iii. Making Strand Road one way would have an effect on local access for many homes and businesses located on and off Strand Road. There are numerous such residential roads which would obviously be affected.

This was clearly understood by the City Council. In an affidavit by Mr. Brendan O'Brien, Head of Technical Services, Environment and Transportation for the City Council, it is stated: -

“... The reduction in traffic on Strand Road and the provision of a two-way safe protected cycle route as part of the Cycle Trial means that residences and business are not able to travel in a Northbound direction, rather they do so by other modes of transport, namely walking, cycling or other modes of transport allowed on a cycleway. ...”

This would seem to suggest that residents and other persons in the affected roads should they wish to go to Dublin Airport would have to either walk or cycle. I am sure that this is not what was intended by the City Council but it does seem to show a level of indifference to those affected; and

- iv. As against the above, there would be a dedicated two-way cycle lane separated from the road. This would be to the benefit of those who wished to cycle.

**9.** The works involved in establishing the cycleway are set out in detail in a document entitled: “*Order of the Executive Manager (Acting) (ET/178/2021)*”. These works are, for the most part, the installation of road signage, changing road markings and moving bus stops. Also involved is the removal of some six mini roundabouts on Strand Road. The provision of a new right hand turn from Strand Road to Merrion Road would involve road excavation in the removal of a concrete traffic island. There would also be some ducting work for cabling for traffic signals.

### **Public consultation**

10. The affidavit of Mr. O'Brien sets out, in some detail, various steps that the City Council took to consult the public on the cycleway trial. He makes the point that such consultation was "*non-statutory*". It is not necessary to outline the various steps that were taken in the public consultation process in any detail since the primary complaint made by the applicants concerns the provisions of the EIA Directive and the Habitats Directive, which have not involved public consultation.

11. The first named applicant is involved in a local residential organisation of those living on Serpentine Avenue, Tritonville Road, Claremont and other adjoining roads (STC Community Group). This Community Group proposed to the City Council an alternative cycleway trial. This proposal, according to STC, would avoid what it considered to be the adverse impacts on traffic movement in the area of Sandymount which would result from the cycleway trial proposed by the City Council.

12. The cycleway trial was put before members of the City Council pursuant to s. 138 of the Local Government Act, 2001 ("the Act of 2001"). However, no vote was taken under s. 139 of the said Act.

### **Legal proceedings**

13. Despite the opposition of STC and others to the cycleway trial, the City Council was not for turning so it was inevitable that legal proceedings would ensue. Matters commenced with a letter from the Solicitor instructed by the applicants of 23 November 2020. It took some four weeks for the Acting Law Agent of the City Council to reply, from which I infer that the replying letter was a fully considered response to which I can attach weight.

**14.** The Solicitor's letter from the applicants set out some seven questions concerning the cycleway trial, and the City Council responded to each. I set out below certain of the questions and the corresponding answers: -

1. What specific statutory authority is [the City Council] relying on to implement its proposal. Insofar as it is relying on either the Planning and Developments Act and/or the Road Traffic Acts? Please specify the relevant sections relied upon.

**Answer:**

The proposal involves local authority development, which is exempted development under the Planning Acts. The Council is relying upon the proposal constituting traffic calming measures within the meaning of section 38 of the Road Traffic Act 1994, which is excluded from the requirements for Part 8/section 179 process under s. 179(6)(bb) of the 2000 Act.

2. Please confirm whether or not any screening assessment or Appropriate Assessment was carried out? If it was please provide a copy of same.

**Answer:**

Screening for Appropriate Assessment has been conducted and has concluded that an Appropriate Assessment is not required. However, a final report is not yet available but will be furnished when completed.

3. Was a formal decision taken to proceed with the scheme and, if so, when? Please identify who made this decision.

**Answer:**

A “formal decision” has not yet been made. However, Councillors were advised, under Section 138 of the Local Government Act 2001 of the intention to proceed with the proposed works.

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6. The precise duration of the ‘trial’ scheme?

**Answer:**

It is proposed that the trial period will be for a period of 6 months.

**15.** In a further letter from the City Council, dated 12 January 2021, it was stated: -  
“Appropriate Assessment and Environmental Impact Assessment screening reports were commissioned from an independent consultant, which confirmed that approval from An Bord Pleanála is not required.”

The letter also stated: -

“The action by your client is clearly an attempt to frustrate the Council in providing this trial of improved cycling infrastructure on Strand Road.”

**16.** An application for leave to seek reliefs by way of judicial review was made to this Court on 22 February 2021. Following the granting of leave, the applicant applied for a stay on works being carried out by the City Council in connection with the provision of the cycleway. This stay was opposed by the City Council on various grounds, including inconvenience and cost. A stay was granted and a date was fixed for the hearing of the action.

**17.** The amended Statement of Grounds sets out the reliefs being sought by the applicants. The essential reliefs are: -

1. An order of *certiorari* quashing the decision of the City Council to proceed with cycleway trial; and

2. A declaration that the decision of the City Council to proceed with the cycleway trial was unlawful, void and/or had no lawful effect, insofar as it is in breach of the codified 2011 Environmental Impact Assessment (EIA) Directive and/or the principle of *nemo iudex en sua causa* and/or the Habitats Directive.

The City Council filed a detailed Statement of Opposition. Each side filed numerous affidavits.

**“Legal issues”**

**18.** The legal issues in this application concern the interpretation and requirements of the following legislation, both domestic and European: -

- i. The Environmental Impact Assessment Directive (EIA Directive) as amended.
- ii. The Habitat’s Directive.
- iii. The Planning and Development Act, 2000 (“the Act of 2000”) as amended, Regulations made thereunder and the Road Traffic Act, 1994 (“the Act of 1994”).

**19.** There is also a central factual issue that has to be addressed, namely: the contention by the City Council that the cycleway trial is “*temporary*”. I will address this issue first and then consider my determination in the context of the above legislation.

**“Temporary”**

**20.** Mr. Stephen Dodd S.C., on behalf of the City Council, submitted that the cycleway trial was temporary, as was deposed to in the affidavit of Mr. Brendan O’Brien. No application was made to cross examine either Mr. O’Brien or any other deponent, so this issue cannot be contested he maintained. There is substance in this

submission, but I am entitled to consider all the contents of the relevant affidavits and exhibits filed on behalf of the City Council in reaching my determination as to whether or not the cycleway trial can be said to be “*temporary*”.

**21.** For the cycleway trial to be temporary it must have a start date and an end date. There is no issue as to the start date, but there is as to the end date. The City Council, through Mr. O’Brien, maintains that the end date is six months after the start date. In support of this reference is made to the “*Order of the Executive Manager*” of 25 February 2021, which states: -

“A six month trial, commencing on **1<sup>st</sup> March, 2021**, of a 2-way separated cycle track from Merrion Gates to Sean Moore Rd ...”

Further, Mr. O’Brien stated in his affidavit, sworn 22 March 2021, that: -

“... The Council have repeatedly stated that the Cycle Trial is a 6 month trial. ...”

However, he then goes on to record what was stated at a community forum on 3 December 2020: -

“- Consultation – Public Consultation will be held 5 months into the trial. A report will be prepared for the South East Area Councillors detailing the results of the consultation, the views of the Forum and the data collected. DCC will provide a recommendation on whether to continue or remove the measures.”

**22.** The aforesaid, to my mind, casts considerable doubt as to whether the cycleway trial is temporary. What is stated is that five months into the trial, i.e.: one month before the end date, there will be a review by way of public consultation which will give a recommendation as to whether or not to continue with the cycleway trial. Thus, on the last day of the six months the cycleway may or may not be removed. Clearly, if it is not removed it is not temporary. Mr. O’Brien further stated in his affidavit (para. 29): -

“... If the Trial is not a success it will be removed. ...”

It must follow from this that if the trial is a success it will not be removed.

23. Therefore, it cannot be said that the cycleway will only be there for six months. The most that can be said is that the cycleway trial is reviewable. A reviewable cycleway is not a temporary cycleway. From this I conclude, contrary to what was submitted on behalf of the City Council, that the cycleway trial is not “*temporary*”.

### **Legal issues**

24. In its letter of 22 December 2020, the City Council stated that they were relying upon the proposal constituting “*traffic calming measures*” within the meaning of s. 38 of the Road Traffic Act, 1994, which is excluded from the requirements of Part 8/s.179 process under s. 179(6)(bb) of the 2000 Act.

25. However, the first issue that must be considered is the application, or otherwise, of the Environmental Impact Assessment Directive (Directive 2011/92/EU) and also the Habitats Directive (Directive 92/43/EEC). In considering the terms of these Directives, I will also examine the “*screening*” reports which were carried out on the instructions of the City Council.

### **Environmental Impact Assessment Directive (EIA Directive)**

26. Mr. Dodd SC, on behalf of the City Council, submitted that the EIA Directive had no application in that the proposed cycleway does not correspond to any project type in the relevant legislation implementing the EIA Directive. Though the City Council carried out a “*screening report*”, he maintained this was not necessary.

27. Mr. Stein SC, on behalf of the applicants, submitted that the proposed cycleway was “*urban development*” caught by the regulations implementing the EIA Directive. He also further submitted that the cycleway was a project that fell within the provisions of S.I. 279/2019 which amended s. 50 of the Roads Act, 1993 which refers to road

improvement projects which would be likely to have significant effects on the environment.

**28.** Article 2 (1) of the EIA Directive provides: -

“Member States shall adopt all measures necessary to ensure that, before development consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects on the environment. Those projects are defined in Article 4.”

Article 4 provides: -

“1. Subject to Article 2(4), projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Subject to Article 2(4), for projects listed in Annex II, Member States shall determine whether the project shall be made subject to an assessment in accordance with Articles 5 to 10. Member States shall make that determination through:

(a) a case-by-case examination;

or

(b) thresholds or criteria set by the Member State.

Member States may decide to apply both procedures referred to in points (a) and (b).

3. Where a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the relevant selection criteria set out in Annex III shall be taken into account. ...”

The EIA Directive has been transposed into Irish law. In particular, I refer to the provisions of the Planning and Development Regulations, 2001-2021 (S.I. No. 600 of

2001), as amended. Class 10 (b) (iv) in Part 2 of Schedule 5 to the Regulations requires an EIA for: -

“Urban development which would involve an area greater than 2 hectares in the case of a business district, 10 hectares in the case of other parts of a built-up area and 20 hectares elsewhere.”

Clearly, the proposed cycleway does not involve such an area. However, Class 15 of Part 2 (as provided for in S.I. No. 454/2011) states: -

“Any project listed in this Part which does not exceed a quantity, area or other limit specified in this Part in respect of the relevant class of development but which would be likely to have significant effects on the environment, having regard to the criteria set out in Schedule 7.”

**29.** What “*urban development*” encompasses has been considered in a number of English authorities. Of particular relevance is the decision in *R (City of Westminster) v. Mayor of London* [2002] EWHC 2440. In this case the applicants maintained that certain infrastructure required for the congestion charging scheme in central London was an “*urban development project*” for the purposes of the EIA Directive. What was involved here, in terms of infrastructure, was “*the cameras, the signs and certain road-markings*”. In giving judgment, Kay J. considered that this did not amount to an “*urban development project*”. He stated: -

“65. In my judgment, it would strain the words of the Directive beyond a purposive construction to hold that ‘urban development project’, in the precise context in which they appear, embrace this Scheme which is, as Mr. George submits, essentially a traffic management scheme. I am disposed to the view that, in general, ‘urban development project’ connotes rather more in the nature of buildings or construction. ...”

In my view, what is involved in the provision of the proposed cycleway goes beyond signs and certain road markings. The cycleway will require the removal of a traffic island at the junction of Strand Road and Merrion Road, the removal of a number of mini roundabouts and the placing of barriers to separate the cycleway from the road carrying traffic. This comes within the nature of building or construction as referred to by Kay J.

**30.** Further, I am satisfied that the proposed cycleway is “*road development*” for the purposes of s. 50 of the Roads Act, 1993 (as amended by S.I. 279/2019). I therefore conclude that the cycleway trial does fall within the provisions of the EIA Directive, as implemented in domestic law.

**31.** Having decided that the cycleway trial does fall within the terms of the EIA Directive, I next have to consider the “*screening report*” carried out on the instructions of the City Council.

**32.** The report was prepared by CAAS Ltd on behalf of City Council. Under the heading “*Screening Considerations*” the report lists “*project type/criteria*” and then gives the comments of CAAS Ltd.

**33.** On the criteria “*Roads Legislation*”, which refers to the provision of S.I. 279/2019, the following is said by way of comment: -

“The potential for effects on the SAC and SPA, which are both European (Natura 2000) sites, is considered in detail in the separate Appropriate Assessment (AA) screening report. That report finds that the scheme is unlikely to have significant effects on those sites.”

Later in the judgment I will consider the terms of the screening report for AA.

**34.** On the criteria of “*pollution and nuisances*” the following is the comment: -

“The proposed scheme is likely to temporarily reduce air pollution, noise and other temporarily traffic related nuisances along the length of the scheme. It will temporarily affect traffic levels elsewhere due to displacement of northbound traffic from Strand Road. Temporary effects of displaced traffic are considered further below.”

It will be noted that in this short comment the word “*temporarily*” or “*temporary*” has been used four times. As I have found, contrary to what is asserted by the City Council, the cycleway project is not temporary it follows that the criteria “*pollution and nuisances*” has not been correctly considered in the screening report.

**35.** The screening report also considered “*the nature of the impact*” of the proposed cycleway. By way of comment the following is stated: -

“According to modelling carried out by the NTA in October 2020 (ref Appendix I), removal of northbound traffic will reduce traffic volumes by approximately 40%. During the trial operational period, it can be anticipated that traffic, noise and air quality impacts the scheme area will be less than at present.

The NTA traffic modelling predicts that the displaced northbound traffic will disperse through a number of alternative routes for the duration of the scheme. During the a.m. peak (the ‘worst case’) the changes in traffic on alternate routes are estimated to range from - 9% to +63% (ref Appendix I). This displaced traffic will be monitored and managed by DCC Transportation and Environment section in accordance with their normal remit to manage City traffic efficiently and sustainably.

Impacts will be temporary and are not likely to be significant, within the meaning of the Directive.”

Looking at the modelling carried out by the NTA in October 2020, this summary of the change in traffic pattern does not give a true representation of the picture. There is no mention of the 114% increase in northbound traffic on Merrion Road (which may possibly be a higher figure given the new right hand turn from Strand Road onto Merrion Road). The explanation for this appears to be that Merrion Road is a “*regional*” road, rather than a “*local*” road. However, in an urban setting this may well be a distinction without a difference. No reference is made to the fact that some four local roads are involved with an increase in traffic varying between 22% and 63%. It is the case that the Court must have some deference to the expertise of CAAS Ltd, but common sense would indicate that the screening report has not properly addressed “*the nature of the impact*” of the proposed cycleway to a considerable extent.

**36.** In my view, the screening report that was carried out was based on a project that was very different to the cycleway trial that is actually proposed. The screening report proceeded on an incorrect assumption that the cycleway would be temporary. Further, despite having data on traffic displacement from the NTA, the report seriously underestimated the effects of traffic displacement. Thus, the screening report is inadequate in circumstances where an EIA is required.

**37.** The applicants made a number of submissions concerning the timing of the EIA screening, public participation and a breach of Article 9A of the EIA Directive: -

(i) Timing

The applicants maintain that the screening report was obtained by the City Council at a time after the taking of the decision to proceed with the cycleway. It was not disputed but that to have validity the screening report would have to be obtained before the decision was taken. In support of its submission, the applicant refers to the fact that the elected members of the City Council were notified on 16 November 2020 of the

intention to proceed with the cycleway. The City Council submits that after receiving the screening report by Executive Order of 14 January 2021 the screening report was adopted and by a further order of 25 February 2021 the cycleway was to be commenced. In support of its submission, the City Council refers the following passage from the judgment of Barniville J. in *Cork Harbour Alliance v. An Bord Pleanála* [2021] IEHC 203: -

“...that decision was not a final decision to grant permission and whether it may properly be called a decision ‘*in principle*’, it was certainly an inchoate or incomplete decision.”

and: -

“...it seems to me to accept the applicant’s contention that a final and complete decision to grant permission in respect of the development was made at the meeting on 17<sup>th</sup> May, 2018 would involve a wholesale disregard in what occurred at the subsequent meeting on 23<sup>rd</sup> May, 2018 which was set out in the Board Direction of the following day, 24<sup>th</sup> May, 2018.”

In my view, though it was more than probable that the City Council were firmly of the view that the cycleway would proceed, this could not have happened until after the formal order had been made. Clearly, this formal order was made after receipt of the screening report.

(ii) Public Participation

The applicants submit that there was no public consultation or participation in the screening exercise and rely on the provisions of Article 6 (2) of the EIA Directive: -

“In order to ensure the effective participation of the public concerned in the decision-making procedures, the public shall be informed electronically and by public notices or by other appropriate means, [certain prescribed means] early

in the environmental decision-making procedures referred to in Article 2(2) and, at the latest, as soon as information can reasonably be provided.”

In its submission, the City Council refers to the following set out in Recital (29) of the Directive: -

“... Moreover, taking into account unsolicited comments that might have been received from other sources, such as members of the public or public authorities, even though no formal consultation is required at the screening stage, constitutes good administrative practice.”

The City Council also relies on the wording of Article 2 (2), which states: -

“2. The environmental impact assessment may be integrated into the existing procedures for development consent to projects in the Member States, or, failing this, into other procedures or into procedures to be established to comply with the aims of this Directive.”

In my view, the applicants have failed to identify any legal basis to support the submission that public participation is required for the screening process.

(iii) Article 9a of the EIA Directive

The applicants submit the City Council was in breach of Article 9a of the EIA Directive.

Article 9a reads as follows: -

“Member States shall ensure that the competent authority or authorities perform the duties arising from this Directive in an objective manner and do not find themselves in a situation giving rise to a conflict of interest.  
...”

The applicants submit that there was a conflict here as the “*competent authority*” was also the developer. In its submission, the City Council claims that the amended Statement of Grounds furnished by the applicants does not set out with sufficient

particularity the precise point it was making, namely: lack of separation between conflicting functions within the City Council. Had it been pleaded, the City Council would have filed affidavits setting out in detail the administrative steps that are taken to avoid such a conflict.

In my view, though a breach of Article 9a is pleaded, I accept the submission of the City Council that the plea lacks the particularity that is required.

By reason of the foregoing, I do not accept the submissions made by the applicants concerning timing, lack of public participation and breach of Article 9a of the EIA Directive.

### **Habitats Directive**

**37.** The proposed cycleway is in an area directly adjacent to the South Dublin Bay and River Tolka Estuary SPA and South Dublin Bay SAC. Thus, the project falls within the Habitats Directive, which provides legal protection for habitats and species of European importance.

**38.** Article 6 (3) of the Habitats Directive provides: -

“Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. ...”

Thus, there is a legal obligation to carry out an Appropriate Assessment (AA). There are four stages which may be involved in the AA process. Firstly, stage 1: “*screening for AA*”. The screening report for AA was also carried out by CAAS Ltd, on behalf of the City Council. This report states the following: -

“The scheme is currently proposed to be put in place for a temporary 6-month period.” (page 5 report).

and: -

“This is a key concern particularly for the SCI species of South Dublin Bay and River Tolka Estuary SPA. These effects are likely to be small scale, the scheme is a limited 6-month duration which minimises potential effects. Dublin City Council already undertake monitoring works in Dublin Bay as part of an ongoing wildlife conflict management strategy. The temporary nature of the proposed scheme and associated disturbance effects have been considered with respect to the existing management actions and monitoring protocols on site. On this basis it is considered that there are no significant effects are (sic) likely to result from the potential for increased recreational use of the site during the proposed scheme period.”

**39.** It is clear that the conclusion that the effects of the cycleway “*are likely to be small scale*” is based on the cycleway being temporary. I have concluded that the proposed cycleway is, in fact, not temporary. In my view, this fatally undermines the credibility of the screening report for AA.

**40.** The applicants also made submissions concerning the lack of public participation in the screening process for AA. The City Council submits that the applicants have failed to identify any such legal requirement in the legislative provisions that transpose the Habitats Directive into domestic law. In particular, the City Council relies on the provisions of s. 177U of the Act of 2000 and Regulation 42 of the 2011 Regulations. I believe that the City Council is correct in this submission in that the applicants have not identified a legal requirement for public participation in the screening for AA.

**41.** I found that both an EIA and an AA is required for the proposed cycleway and that the screening reports commissioned by the City Council are fundamentally flawed. It follows that if the cycleway is to proceed, the requirements of the EIA Directive and the Habitats Directive must be addressed and complied with.

### **Domestic legislation**

**42.** My findings concerning the EIA Directive and the Habitats Directive have clear implications for the City Council's reliance on a number of statutory provisions.

**43.** Section 4 of the Act of 2000 provides that "*development by a local authority in its functional area*" is "*exempted development*". However, by virtue of the provisions of s. 4 (4) such development is not exempt if an EIA or an AA is required.

**44.** The City Council has relied on the provisions of s. 38 of the Road Traffic Act, 1994 maintaining that the cycleway is a "*traffic calming measure*" and would have the exemption provided for in s. 179 (6) (bb) of the Act of 2000 and, thus, be excluded from the public consultation procedure provided for by s. 179. However, that exemption does not apply where the development requires an EIA (s. 179 (6)(d)) and an AA under the Habitats Directive (as transposed into domestic law) (s. 179 (6)(e)). Thus, if the proposed cycleway is to proceed it will have to go through the planning process.

### **Conclusion**

**45.** By reason of the foregoing, the applicants have succeeded in their application. As to the form of the order and any other consequential orders, I will list this matter on Monday, 9 August for the purpose of making final orders.