

**TRIBUNAL OF INQUIRY INTO CERTAIN PLANNING MATTERS
AND PAYMENTS**

(Appointed by Instrument of The Minister for the Environment and Local Government dated the 4th day of November 1997 and as amended by Instrument dated the 15th day of July 1998)

SOLE MEMBER OF THE TRIBUNAL:
The Honourable Mr. Justice Feargus M. Flood

Interpretation of the Terms of Reference as Amended

Wednesday 21st October, 1998 at 9 a.m.

Interpretation

1. The Supreme Court in its recent decisions in the case of Haughey and Others v. Mr. Justice Moriarty and Others delivered on the 28th July 1998 has provided careful guidance to tribunals of inquiry in relation to both the time and the manner in which a tribunal of inquiry should interpret its terms of reference. In the course of its judgment at page 69 it held

"... the Court is satisfied that it is not the function of the High Court or this Court to interpret the Terms of Reference of the Tribunal at this stage. The interpretation of the Terms of Reference of the Tribunal is at this stage entirely a matter for the Tribunal itself."

2. The Chief Justice, speaking for the Court, adopted as a correct statement of the law and practice of tribunals of inquiry in Ireland the terms of paragraph 79 of the Report of the Royal Commission on Tribunals of Inquiry (November, 1966 Cmnd. 3121), and known as the Salmon Report, which states:

79. The Tribunal should take an early opportunity of explaining in public its interpretation of its terms of reference and the extent to which the inquiry is likely to be pursued. As the inquiry proceeds, it may be necessary for the Tribunal to explain any further interpretation it may have placed on the terms of reference in the light of the facts that have emerged.

3. The explanation of the terms of reference, today, by this tribunal may be expanded or revised in the light of other facts which may emerge during the course of this inquiry.
4. It should be clearly understood by any person or entity that has an interest in the work of this tribunal that they are entitled to make any submission to the tribunal relevant to their particular interest in relation to the interpretation of these terms of reference. The tribunal would request that, in the first instance, any submission made by an interested party should be in writing and should be received by the tribunal not later than fourteen days from the date of this public sitting. The tribunal does not require an immediate response from any interested party at this public sitting as to any possible difficulty they may perceive in relation to this interpretation.
5. The terms of reference of this Tribunal are set out in the Instrument of the Minister for the Environment and Local Government of the 4th November 1997 as amended and extended by a further Instrument of the same Minister of the 15th July 1998 made pursuant to the Tribunals of Inquiry (Evidence) Acts 1921 to 1998.
6. These terms of reference are to be read in conjunction and, for convenience, the Tribunal has made publicly available to any interested person a consolidated text.
7. This public sitting is not confined to an explanation of the terms of reference of this tribunal. The tribunal is also making a

public statement on the related question of the extent to which this inquiry is likely to be pursued, and providing general guidance in relation to certain aspects of the Tribunal's procedure.

8. The tribunal is presently investigating definite matters in the course of its confidential preliminary investigation in private. The central purpose of this preliminary investigation is to identify what evidence is available to the Tribunal, and to determine whether that evidence is relevant to the matters into which this tribunal is required to inquire.

9. It is regrettable that this preliminary investigation is being delayed to an extent by persons and entities that have been less than whole-hearted in their co-operation with the tribunal. This situation will not divert the tribunal from discharging its task but it does have a bearing on the tribunal's view, at this time, as to the extent to which this inquiry is likely to be pursued.

10. The tribunal has had considerable success in assembling evidence in relation to particular matters into which it is required by its terms of reference to inquire. The tribunal has not, as yet, exhausted its endeavours in seeking to establish the existence of evidence that may be relevant to certain other matters pertinent to this inquiry.

11. The tribunal intends to make a further public statement in relation to the extent to which aspects of this inquiry are likely to be pursued at a future public sitting.

12. The Tribunal in approaching the task of interpretation has, in general, sought to apply the ordinary and natural meaning of words to the wording of the terms of reference. In certain instances particular words may have a special or technical meaning attributed to them, or particular words may have a specific statutory meaning. Where these instances of special, technical or specific statutory meanings occur the Tribunal has outlined its interpretation of those words.

13. The wording of the terms of reference is, in the view of the Tribunal, reasonably clear. I am satisfied that on a plain reading of the terms of reference they, in the main, convey a proper interpretation of the wording concerned. In certain instances specific words in the terms of reference may, in particular circumstances, have a statutory or technical meaning.

14. On any occasion where the Tribunal is interpreting specific words in the terms of reference in a particular way it will duly notify any interested person, where their interests are concerned, of that interpretation and the context in which it arises. At the same time the Tribunal intends to avoid a situation where any interested person seeks to impose a particular interpretation of the terms of reference with a view to limiting inappropriately, or delaying, this inquiry.

15. I now propose to outline in public specific aspects of the terms of reference that, in my view, require explanation by the Tribunal. It should be clearly understood that while the Tribunal

welcomes any submission by an interested person in relation to an aspect of the interpretation of the terms of reference relevant to their particular interest, it is for the Tribunal to interpret its terms of reference.

16. It should be noted that where an explanation makes reference to a specific law, statute or regulation that reference should be taken as including, where appropriate, any relevant amendment of such provision.

Paragraph A

17. Paragraph A is divided into six distinct sub-paragraphs that detail specific matters to be inquired into by the Tribunal. I propose to deal with each sub-paragraph in turn.

Sub-paragraph A.1

18. This sub-paragraph requires the Tribunal to identify the lands listed in a letter dated the 8th June 1989 from Michael Bailey to James Gogarty. The terms of that letter are reproduced in the Schedule to the terms of reference of the Tribunal.

19. The meaning of the word "**identification**" in this sub-paragraph is interpreted by the Tribunal to include the exact boundaries and location of those lands, their ownership, and all their appropriate conveyancing particulars from the 8th June 1989

to a date prior to the commencement of the development of those lands.

20. The meaning of the word "**development**" in this sub-paragraph is interpreted by the Tribunal to include development within the meaning of Section 3 of the Local Government (Planning and Development) Act 1963.

21. The meaning of the words "**beneficial ownership**" in this sub-paragraph are interpreted by the Tribunal as including any legal or equitable right, entitlement, or interest existing in any natural or legal person, whether directly or indirectly, in relation to the lands concerned. These words are, in particular, interpreted as including any natural or legal person who, in fact, exercised any control or influence, whether directly or indirectly, in relation to the lands concerned.

Sub-paragraph A.2

22. The "**lands**" referred to in this sub-paragraph are the same as those mentioned in sub-paragraph A.1.

23. The words "**planning history**" in this sub-paragraph are clearly intended to be given a broad interpretation and are interpreted by the Tribunal as referring to any factual, legal or statutory matter which touches on, or concerns, any development or planning in relation to the lands concerned.

24. The words "**Development Plan**" in this sub-paragraph are interpreted by the Tribunal as including a development plan made pursuant to Section 19 of the Local Government (Planning and Development) Act 1963 or any draft development plan.

25. The words "**Dublin local authorities**" in this sub-paragraph are interpreted by the Tribunal as including any borough corporation created by royal charter as recognised and confirmed by the Municipal Corporations (Ireland) Act 1840, any county council or urban district council designated a statutory corporation by the Local Government (Application of Enactments) Order 1898, and any town commissioners designated by Section 65 of the Local Government Act 1955 whose administrative area is within, whether wholly or partly, the boundaries of Dublin County or where appropriate An Bord Pleanala.

26. The words "**the servicing of the lands**" in this sub-paragraph are interpreted by the Tribunal as including the drainage, electricity, footpath, gas, lanes, lighting, roads, sewers, telephone and water services to the lands concerned, and to what extent, where appropriate, any of those services had been taken in charge by a local authority.

27. The word "**development**" in this sub-paragraph is interpreted by the Tribunal in the same manner as outlined in sub-paragraph A.1.

28. The word "**proposal**" in this sub-paragraph is interpreted by the Tribunal as including any draft, plan, project, proposition,

recommendation, scheme, statement or suggestion in relation to the Development Plans concerned.

29. The word "**officials**" in this sub-paragraph is interpreted by the Tribunal as including any person who was an officer or employee of a Dublin local authority or An Bord Pleanala or a Government Department or any other public body, or any servant or agent of such persons.

30. The word "**motions**" in this sub-paragraph is interpreted by the Tribunal as including any motion proposed, or intended to be proposed, by an elected member of a Dublin local authority at a duly constituted meeting of such authority.

31. The word "**re-zoning**" in this sub-paragraph is interpreted by the Tribunal as including any change by a Dublin local authority to the designation in its development plan of the permitted uses of the lands concerned.

32. The words "**applications for planning permission**" in this sub-paragraph are interpreted by the Tribunal as including any application to a Dublin local authority in accordance with permission regulations for the development of land pursuant to the Local Government (Planning and Development) Act 1963, or for an approval required by those regulations.

33. The words "**a material contravention of the Development Plan**" in this sub-paragraph are interpreted by the Tribunal as including any planning permission application which required a

resolution of a Dublin local authority pursuant to Section 26 (3) of the Local Government (Planning and Development) Act 1963.

Sub-paragraph A.3

34. The "**lands**" referred to in this sub-paragraph are the same as those mentioned in sub-paragraph A.1.

35. The words "**re-zoning resolutions**" in this sub-paragraph are interpreted by the Tribunal as including any motion proposed, or intended to be proposed, by an elected member of a Dublin local authority at a duly constituted meeting of such authority to "re-zone" as interpreted at sub-paragraph A.2.

36. The words "**Resolutions for material contravention of the relevant Development Plans**" in this sub-paragraph are interpreted by the Tribunal as including any motion proposed, or intended to be proposed, by an elected member of a Dublin local authority at a duly constituted meeting of such authority to effect a material contravention of the Development Plan of such authority pursuant to Section 26(3) of the Local Government (Planning and Development) Act 1963.

37. The words "**special tax designation status pursuant to the Finance Acts**" in this sub-paragraph are interpreted by the Tribunal as including any tax incentive regime established by the Finance Acts.

38. The words "**Applications for planning permission**" in this sub-paragraph are interpreted by the Tribunal in the same manner as outlined in sub-paragraph A.2.

39. The words "**servicing of the lands**" in this sub-paragraph are interpreted by the Tribunal in the same manner as outlined in sub-paragraph A.2.

40. The word "**development**" in this sub-paragraph is interpreted by the Tribunal in the same manner as outlined in sub-paragraph A.1.

41. The words "**building bye-law approval**" in this sub-paragraph are interpreted by the Tribunal as including any approval or disapproval made pursuant to Section 42 of the Public Health (Ireland) Act 1878.

42. The words "**fire safety certificates**" in this sub-paragraph are interpreted by the Tribunal as including a certificate issued pursuant to The Building Control Act 1990 and the Regulations made thereunder.

43. The word "**persons**" in this sub-paragraph is interpreted by the Tribunal as including any natural or legal person or unincorporated association or trust.

44. The word "**companies**" in this sub-paragraph is interpreted by the Tribunal as including but not limited to any company formed and registered under the Companies Act 1963 in this State and

any company formed and registered under the laws of any other State.

45. The words "**beneficial owners of such companies**" in this sub-paragraph are interpreted by the Tribunal as including any natural or legal person, or trust having any legal or equitable right, entitlement, or interest in such company or a shadow director within the meaning of Section 27 of the Companies Act 1990.

46. The words "**material interest**" in this sub-paragraph are interpreted by the Tribunal as including any legal or equitable claim, right or entitlement, or any title, advantage, duty or liability whether present or future, ascertained or potential which in the view of the Tribunal is material.

47. The words "**material involvement**" in this sub-paragraph are interpreted by the Tribunal as including any activity, association, complicity, entanglement, participation or partnership which in the view of the Tribunal is material.

48. The words "**members of the Oireachtas**" in this sub-paragraph are interpreted by the Tribunal as including any member of Dail Eireann or Seanad Eireann.

49. The words "**relevant local authorities**" in this sub-paragraph are interpreted by the Tribunal in the same manner as Dublin local authorities in sub-paragraph A.2.

50. The words “**planning authority**” and “**the authority**” in this sub-paragraph are interpreted by the Tribunal in the same manner as Dublin local authorities in sub-paragraph A.2.

51. The words “**public officials**” in this sub-paragraph are interpreted by the Tribunal in the same manner as the word “**officials**” in sub-paragraph A.2.

Sub-paragraph A.4

52. The words “**connected person or company**” in this sub-paragraph are interpreted by the Tribunal as including the meaning specified in Section 2(2) of the Ethics in Public Office Act 1995. That statutory definition provides as follows:

- (a) Any question whether a person is connected with another shall be determined in accordance with the following provisions of this paragraph (any provision that one person is connected with another person being taken to mean also that that other person is connected with the first-mentioned person);
- (i) a person is connected with an individual if that person is a relative of the individual,
 - (ii) a person, in his or her capacity as a trustee of a trust, is connected with an individual who or any of whose children or as respects whom any body corporate which he or she controls is a beneficiary of the trust,

- (iii) a person is connected to any person with whom he or she is in partnership,
 - (iv) a company is connected with another person if that person has control of it or if that person and persons connected with that person together have control of it,
 - (v) any two or more persons acting together to secure or exercise control of a company shall be treated in relation to that company as connected with one another and with any person acting on the directions of any of them to secure or exercise control of the company.
- (b) in paragraph (a) "**control**" has the meaning assigned to it by Section 157 of the Corporation Tax Act 1976, and any cognate words shall be construed accordingly.

53. The statutory definition of "**control**" in Section 157(8) of the Corporation Tax Act 1976 provides:

"**control**" shall be construed in accordance with Section 102 (meaning of "associated company" and "control").

54. Section 102(2) of the Corporation Tax Act 1976 defines "**control**" in the following manner:

For the purposes of this Part a person shall be taken to have control of a company if he exercises, or is able to exercise

or is entitled to acquire, control, whether direct or indirect, over the company's affairs, and in particular, but without prejudice to the generality of the preceding words, if he possesses or is entitled to acquire-

- (a) the greater part of the share capital or issued share capital of the company or of the voting power in the company; or
- (b) such part of the issued share capital of the company as would, if the whole of the income of the company were in fact distributed among the participators (without regard to any rights which he or any other person has as a loan creditor), entitle him to receive the greater part of the amount so distributed; or
- (c) such rights as would, in the event of the winding up of the company or in any other circumstances, entitle him to receive the greater part of the assets of the company which would then be available for distribution among the participators.

55. Section 102 (3),(4),(5) and (6) of the Corporation Tax Act 1976 additionally provide as follows:

- (3) Where two or more persons together satisfy any of the conditions of sub-section (2), they shall be taken to have control of the company.

- (4) For the purposes of sub-section (2) a person shall be treated as entitled to acquire anything which he is entitled to acquire at a future date, or will at a future date be entitled to acquire.
- (5) For the purposes of sub-sections (2) and (3), there shall be attributed to any person any rights or powers of a nominee for him, that is to say, any rights or powers which another person possesses on his behalf or may be required to exercise on his direction or behalf.
- (6) For the purposes of sub-sections (2) and (3), there may also be attributed to any person all the rights and powers of any company of which he has, or he and associates of his have, control or any two or more such companies, or of any associate of his or of any two or more associates of his, including those attributed to a company or associate under sub-section (5), but not those attributed to an associate under this sub-section; and such attributions shall be made under this sub-section as will result in the company being treated as under the control of five or fewer participators if it can be so treated.

56. The word "**payment**" in this sub-paragraph is interpreted by the Tribunal in the same manner as outlined in sub-paragraph A.6.

57. The word "**benefit**" in this sub-paragraph is interpreted by the Tribunal as including the meaning specified in Section 2 of the Ethics in Public Office Act 1995 which provides:

"benefit" includes-

- (a) a right, privilege, office or dignity and any forbearance to demand money or money's worth or a valuable thing,
- (b) any aid, vote, consent or influence or pretended aid, vote, consent or influence,
- (c) any promise or procurement of or agreement or endeavour to procure, or the holding out of any expectation of, any gift, loan, fee, reward or other thing aforesaid,

or other advantage and the avoidance of a loss, liability, penalty, forfeiture, punishment or other disadvantage.

Sub-paragraph A.5

58. The word "**corruption**" in this sub-paragraph is interpreted by the Tribunal as including destroying, hindering or perverting the integrity or fidelity of a person in the discharge of his duty, or the abuse of influence or power or duty by any person, or to bribe, or to induce another to act dishonestly or unfaithfully, or an attempt to do the same, or circumstances of control, influence or involvement with such person to the extent that it gives rise to a reasonable inference of unequal access, or favouritism, or a set of circumstances detrimental to his duties.

59. The words "**attempts to influence**" in this sub-paragraph are interpreted by the Tribunal as including an attempt through power or pressure or control of whatever character whether acting on fears or hopes or otherwise to induce or coerce or persuade another to act in a manner such that the free use of his judgment has been deprived.

60. The words "**corruption**" and "**attempts to influence**" are both words which, where relevant to this inquiry, plainly depend on their factual context. There is no single set of circumstances that constitute "**corruption**" or "**attempts to influence**".

Paragraph E

Sub-paragraph E.1

61. The words "**substantial payments**" in this sub-paragraph are interpreted by the Tribunal as including any monetary amounts, benefits, enrichment, gain, advantage or some other consideration, or payment in kind, or services rendered, or the transfer of property, or a set-off or release or discharge of an obligation, or pecuniary or other reward which in the opinion of the Tribunal is substantial. In interpreting the word "**substantial**" the Tribunal will have regard, inter alia, to the size of any payment, the time at which it was made, the question as to whether that payment is reasonably related to any other payment, the resources of the person or entity making any payment and the resources of the person or entity receiving any payment.

62. The words "**improperly connected**" in this sub-paragraph are interpreted by the Tribunal as including a connection which reasonable judgment would not condone, or a connection not likely to promote the proper exercise of the duties relating to that public office or position.

63. The word "**person**" in this sub-paragraph is interpreted by the Tribunal in the same manner as the word "**persons**" as outlined in sub-paragraph A.3.

64. The word "**entity**" in this sub-paragraph is interpreted by the Tribunal as including the interpretation of the word "**companies**" as outlined in sub-paragraph A.3, or undertaking, regulator or authority, organisation or society, whether incorporated or not.

PROCEDURE

65. The Tribunals of Inquiry (Evidence) Acts 1921 to 1998 does not establish any detailed model of procedure to be adopted by a tribunal of inquiry in carrying out its function. This is a sensible policy having regard to the wide variety of circumstances and subject-matter in respect of which the Oireachtas has on previous occasions established tribunals of inquiry.
66. The result is that once established it is for a tribunal itself to model its own rules of procedure.
67. The starting point for any tribunal, in this State, in relation to the model of procedure to be adopted is the Constitution. A tribunal must at all times fully respect the constitutional rights of all persons whose interests may be affected by the course of the inquiry work.
68. In addition, in appropriate circumstances, the tribunal must also have regard to the statutory and other legal rights of any person where they may be affected by the work of an inquiry.
69. The Supreme Court in a number of decisions, including the recent decisions in the cases of Haughey & Others v Mr. Justice Moriarty and Others and Bailey & Others v Mr. Justice Flood & Another both delivered on the 28th July 1998, has provided considerable guidance to tribunals of inquiry as

to the legal and constitutional parameters in which the work of an inquiry is to be carried out. It is the intention of this tribunal to fully implement the guidance outlined in those decisions.

70. A tribunal of inquiry is established as a matter of last resort where the ordinary processes of inquiry, or civil or criminal litigation, are considered by the Oireachtas to be inappropriate to attempt to establish the true facts giving rise to the establishment of such tribunal. Tribunals of Inquiry are, not infrequently, in this country and elsewhere established in circumstances where there has been an apparent loss of confidence in some aspect of public administration.
71. It is important to keep in mind that the terms of reference of this tribunal of inquiry expressly require this inquiry to be carried out "urgently". The matters to be inquired into are described as "definite matters of urgent public importance". The specific mandate of the tribunal is to undertake an inquiry with a view to reporting to the Clerk of Dail Eireann any "findings" and to make any appropriate "recommendations".
72. The essence of a tribunal of inquiry has been recently encapsulated by the Chief Justice in the recent Haughey decision where he stated at page 64 of the judgment of Supreme Court:

“... the principal function of such tribunals has been to restore public confidence in the democratic institutions of the State by having the most rigorous possible inquiry consistent with the rights of the citizens into the circumstances which gave rise to the public disquiet.”

73. The Chief Justice also describes, at page 121 of that judgment, the procedural phases of a tribunal of inquiry as follows:

- “ 1. A preliminary investigation of the evidence available;
2. The determination by the Tribunal of what it considers to be evidence relevant to the matters into which it is obliged to inquire;
3. The service of such evidence on persons likely to be effected thereby;
4. The public hearing of witnesses in regard to such evidence, and the cross-examination of such witnesses by or on behalf of persons effected thereby;
5. The preparation of a report and the making of recommendations based on facts established at such public hearing.”

74. This Tribunal is presently carrying out a confidential preliminary investigation in private. The purpose of this phase of the inquiry is to establish what evidence is available to the Tribunal, and to determine whether that evidence is relevant to the subject-matter of this inquiry. In carrying out this confidential work the Tribunal has relied on the voluntar,

co-operation of persons who the Tribunal are satisfied may have documentation or information relevant to this inquiry.

75. In certain instances, for a variety of legal reasons, it has been necessary to invoke the compulsory statutory powers available to a tribunal of inquiry in an effort to discover the extent of any relevant documentation or information. In those cases the Tribunal will adopt the guidance of the Supreme Court in relation to the manner in which those compulsory powers are to be exercised.
76. The matters being investigated by this Tribunal are very serious and it is becoming apparent that a small number of persons and entities may be seeking to avoid or delay the disclosure of what the Tribunal considers to be relevant documentation and information.
77. The concern of the Tribunal that such person may seek to avoid or delay the inquiry work of this Tribunal does not have the effect of negating their constitutional, legal or statutory rights. These rights are enjoyed by all persons in the State irrespective of any preliminary, or other views, that the Tribunal may form.
78. The Tribunal has an overriding duty to discharge its urgent mandate from the Oireachtas to the extent possible. The Oireachtas has, in the terms of reference, anticipated the possibility that certain individuals may fail to co-operate fully and expeditiously with this inquiry. In the event that the

Tribunal were to conclude that a given individual or entity did in fact fail to co-operate fully and expeditiously the Tribunal will report that "finding" to the Oireachtas.

79. For the avoidance of doubt the Tribunal should indicate that it has not, to date, made a finding against any person or entity that they have failed to co-operate fully and expeditiously. In addition the Tribunal would necessarily take all reasonable steps to respect the constitutional, legal and statutory rights of any such person before considering making a finding of this type.