THE HIGH COURT
JUDICIAL REVIEW

[2021] IEHC 303
[2020 No. 725 JR]

IN THE MATTER OF SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 2000, AS AMENDED

BETWEEN

CLONRES CLG

APPLICANT

AND

AN BORD PLEANÁLA

AND

THE MINISTER FOR HOUSING, LOCAL GOVERNMENT AND HERITAGE, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

CREKAV TRADING GP LIMITED

AND

DUBLIN CITY COUNCIL

NOTICE PARTIES

AND

THE HIGH COURT
JUDICIAL REVIEW

[2020 No. 693 JR]

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTIONS 50, 50A AND 50B OF THE PLANNING AND DEVELOPMENT ACT 2000, AS AMENDED

BETWEEN

JOHN CONWAY AND LOUTH ENVIRONMENTAL GROUP

APPLICANTS

AND

AN BORD PLEANÁLA

RESPONDENT

AND

CREKAV TRADING GP LIMITED

NOTICE PARTY

(NO. 2)

JUDGMENT of Humphreys J. delivered on Friday the 7th day of May, 2021

1. This case involves a housing development that is somewhat more contentious than usual: so far it has clocked up four board decisions and ten sets of legal proceedings, and counting.

2. The issue of zoning of institutional lands in Dublin city has a turbulent history. In 2010, the development plan for 2011 to 2017 was adopted which included a zoning for institutional lands (Z15). Initially residential development was open for consideration on such lands, as the draft plan was proposed by the manager, but the members removed this against official advice. That element of the zoning was quashed in *Christian v. Dublin City Council (No. 1)* [2012] IEHC 163, [2012] 2 I.R. 506. The Z15 zoning was ultimately rephrased in the manager's terms, allowing residential development as open for consideration.

3. The site here is on lands formerly part of St. Paul's College in Raheny. The site is bounded to the north, east and south by St. Anne's Park, and to the west by residential developments and by St. Paul's College and a protected structure, Sybil Hill House. That house, according to the National Inventory of Architectural Heritage, was built around 1750 and bought by Lord Ardilaun in 1876 for the St. Anne's estate. His nephew Bishop Benjamin Plunkett sold the estate to Dublin Corporation in 1939, retaining the house and demesne. The house was then acquired in 1950 by the Vincentian Fathers to establish a school which was opened as St. Paul's College later that year.

4. The Natura Impact Statement records that over the 2018-19 winter season, during one survey, a peak of 480 light-bellied Brent geese were recorded on the St. Paul's playing pitches. Other information before the board, particularly the Scott Cawley report, noted St. Anne's Park as the closest site utilised by birds that were qualifying interests for the North Bull Island Special Protection Area (SPA) (004006).

5. It appears from the environmental impact assessment report (EIAR) of the notice party, in chapter 11 dealing with Archaeology, Architecture and Cultural Heritage, that the pitches were laid around 1953. A further portion (marked B), was laid out after 1959, when these lands were acquired by the school and when a building, Maryville, was demolished.

6. The institutional lands originally had six pitches. One remains attached to St. Paul's school and five are on the site in question which was sold by the Vincentian order to the notice party developer in 2015. Subsequent to that sale, the Dublin City Development Plan 2016-20 was adopted and came into operation.

7. These lands were zoned Z15 "to protect and provide for institutional and community use". The zoning map B notes the lands as including a "sports ground". The developer, presumably in the belief that it would improve the prospects for residential development, terminated the use of the five pitches by sports clubs in late 2017 and ceased cutting the grass on the pitches in August 2018.

8. As regards the sixth pitch retained by the school, the council refused permission to convert that to an AstroTurf pitch. That was appealed to An Bord Pleanála on 20th April, 2018 but the appeal was refused on 6th February, 2020.

9. The lands have now been fenced off. Licenses to use them by sports groups have not been renewed and the *de facto* situation at present is that they are unused grasslands.

The first decision - April 2018

10. On 18th October, 2017, the developer applied for the construction of 536 dwellings on the site. That was granted by the board on 3rd April, 2018. Three judicial reviews then issued: *Sweetman v. An Bord Pleanála* [2018 No. 422 JR], *Conway v. An Bord Pleanála* [2018 No. 423 JR] and *Clonres v. An Bord Pleanála* [2018 No. 426 JR]. Barniville J. granted *certiorari* and remitted the matter back to the board: *Clonres CLG v. An Bord Pleanála (No. 1)* [2018] IEHC 473 (Unreported, High Court, 31st July, 2018).

Second decision - September 2018

11. On 10th September, 2018, following remittal the board made a further decision refusing permission for the development. That was then challenged by the developer. In *Crekav Trading GP Ltd. v. An Bord Pleanála* [2020] IEHC 400 (Unreported, High Court, 31st July, 2020), Barniville J. quashed the refusal.

Third decision - February 2020

12. In the meantime, the developer had lodged a revised application on 16th October, 2019.

13. On 10th December, 2019, the Chief Executive of Dublin City Council recommended that the application should be refused. The views of the elected members appear to have been also all negative.

14. The board made a further decision to grant permission in February 2020.

15. Two further judicial reviews were then issued *Clonres CLG v. An Bord Pleanála* [2020 No. 346 JR] and *Conway v. An Bord Pleanála* [2020 No. 237 JR].

16. On 11th June, 2020, a consent order of *certiorari* was made on the basis that appropriate assessment had not been correctly carried out, and the matter was remitted to the board.

Fourth decision - August 2020

17. A further inspector's report was prepared dated 31st July, 2020 and on 20th August, 2020 the board, under the strategic housing development procedure, granted permission for 657 dwellings, a crèche and associated site works. Three judicial reviews were instituted in respect of that decision: the two with which I am dealing at the moment *Conway v. An Bord Pleanála* [2020 No. 693 JR] and *Clonres CLG v. An Bord Pleanála* [2020 No. 725 JR] and a third set of proceedings *Sweetman v. An Bord Pleanála* [2020 No. 729 JR]. That third case is based on EU law and so is not being dealt with in the current module, which is confined to the domestic law points.

Designation proceedings

18. Separately proceedings were issued seeking the designation of the five pitches as an SPA (*Clonres CLG v. Minister for Arts, Heritage and the Gaeltacht* [2019 No. 2960P]). That application was dismissed by Twomey J. on 16th July, 2020, and while a judgment has not been provided to me, it was apparently on the basis that the proceedings were held out of time. That decision has been appealed to the Court of Appeal [2020 No. 181] and judgment is currently reserved.

Modularisation of issues

19. Given the sheer number of issues involved in the three proceedings challenging the decision with which we are now concerned, I decided to modularise the matter and to deal firstly with issues of domestic law. As noted above the *Sweetman* proceedings fell out of consideration for this purpose.

Alleged lack of reasons regarding how remittal was dealt with

20. It is alleged that the board failed to give adequate reasons to understand how the remitted file was handled following the *certiorari* of the third decision. It seems to me that there is nothing in this point. The board appointed a new inspector who was made

aware quite properly of what the reasons for the previous quashing were and she understood she was not to place reliance on the earlier decision. She expressly states that she did not read the analysis of the merits contained in that earlier decision. None of that is problematic. One cannot assume pre-judgment bias. An applicant has to show that proper *de novo* consideration might not have happened, and it seems to me there is nothing from which such a conclusion can be drawn.

Failure to put information on the board's website regarding remittal

21. The applicant in *Clonres* complains that the board failed to put documents on its website showing how it handled the remitted application. One problem with this submission is that insofar as s. 146(5) of the Planning and Development Act 2000 requires that documents relating to the matter be made available by the board, this cannot include documents relating to a quashed decision. Indeed, to do so could be seen to contaminate the process. It seems to me there is no basis for a suggestion that documents relating to how a remitted file was handled are to be included. Section 146(5) relates to documents that are part of the statutory process, not internal administrative documents. It was also submitted that there is an EU law angle to this point, but we did not get to that for present purposes.

22. Finally, since the placing of materials on the website under s. 146(5) and (6) occurs *after* the decision, non-compliance cannot be a basis for quashing the decision. Having said that I am not in any way minimising the complaint made by the applicant in *Clonres* that the board may not be fully complying with the section. But if that is the case, some more specific relief in that regard, not related to the validity of a particular decision, would have to be sought.

Whether this is strategic housing development

23. For a development to be strategic housing development the land has to be "zoned for residential use or for a mixture of residential and other uses" under s. 3 of the Planning and Development (Housing) and Residential Tenancies Act 2016. Helpfully the applicant in *Conway* notes in legal submissions at para. 7 that "use of matrices as used in certain development plans indicating types of development which may [be] 'permissible in principle' or 'open for consideration' does not have any particular statutory basis."

24. I do not see any basis for an interpretation of the 2016 Act that limits the term "zoned for residential use" so as to exclude lands zoned for residential use being open for consideration. Whether one thinks in terms of the literal wording, the context of the Act as a whole, or consideration of its purpose, or ideally all three mutually informing each other, it does not seem to me that there is anything warranting such a narrow interpretation. That is also the conclusion arrived at in *Balscadden Road SAA Residents Association v. An Board Pleanála (No. 1)* [2020] IEHC 375 (Unreported, High Court, 25th November, 2020), albeit with less detailed argument on the point.

Alleged misinterpretation of 2009 guidelines

25. The applicant in *Clonres* complains that the board failed to have regard to or misinterpreted the Guidelines for Planning Authorities on Sustainable Residential Development in Urban Areas (Cities, Towns & Villages) issued by the Minister in May

2009. However, the considerations set out in those guidelines are prefaced by the term "in general". The somewhat open-textured nature of the guidelines is such that we are largely in the realm of planning judgement in terms of their implementation. While admittedly there is not much reference to the guidelines by the inspector, she does seem to have dealt with the issues in substance: see also *Higgins v. An Bord Pleanála* [2020] IEHC 564, [2020] 11 JIC 1301 (Unreported, High Court, 13th November, 2020).

Alleged material contravention regarding zoning

26. In the Strategic Housing Development context, the board is entitled to materially contravene the development plan generally, but not in relation to zoning. The relevant zoning as noted above is Z15 which provides in the crucial paragraph that "[w]here there is an existing institutional and/or community use, any proposed development for 'open for consideration' uses on part of the landholding, shall be required to demonstrate to the planning authority how the proposal is in accordance with and assists in securing the aims of the zoning objective; how it secures the retention of the main institutional and community uses on the lands, including space for any necessary expansion of such uses; how it secures the retention of existing functional open space e.g. school playing fields; and the manner in which the nature and scale of the proposal integrates with the surrounding lands."

27. While obviously I have considered the terms of the Z15 zoning in full, that is the main provision on which the issue here turns. The way that the inspector dealt with this matter is crucial for understanding of the present point because at para. 12.2.5 she said "[w]ith respect to an existing community use, I note that these lands were sold by the religious order to the applicant and are no longer available for a community use"; and she repeats that point at para. 12.2.9.

28. I should also say that this is a pure question of interpretation of the development plan, not a matter of planning judgement: see the distinction referred to in *Tesco Stores Ltd. v. Dundee City Council* [2012] UKSC 13 at para. 19. Nor, therefore, can this be converted, as the notice party sought to characterise it, as simply being an unreasonableness challenge. The requirement in the Z15 zoning is mandatory, and the developer is "required to demonstrate" that the criteria are met. That certainly has not been done.

29. It seems to me that there are three things fundamentally wrong with the way in which the inspector (and, consequently, the board) approached this matter:

    (i). the analysis involves an irrelevant consideration;

    (ii). the analysis involved a failure to have regard to a relevant consideration, namely the possibility of a forward-looking use; and

    (iii). the analysis misinterpreted the term "use".

30. These are independent grounds, and the decision falls on any one of them. It certainly falls on all three taken together. I will address each of these in turn.

The irrelevant consideration

31. The first and most obvious problem is that change in ownership does not in itself alter the interest to be protected by the zoning: see *per* Simons J. in *Redmond v. An Bord Pleanála* [2020] IEHC 151 (Unreported, High Court, 10th March, 2020), at paras. 55 and 56. Simons J said that"[t]his established use and designation is not lost by dint of a transfer of ownership. Rather, it remains until such time as planning permission is granted for an alternative use, such as, for example, residential use." I agree, and apply that decision here.

32. What is particularly irrelevant on the facts here about the change of ownership is that that had already occurred when the development plan was adopted. The planning map is in a way even more important to this case than the Z15 zoning because it identifies that the site in question includes a sports ground, and did so notwithstanding that the ownership change had already occurred at that point.

Lack of regard to possible forward-looking use

33. Secondly, the inspector seems to have proceeded on the assumption that because the previous *de facto* institutional or community use was not continuing by reason of the sale, the lands were not thereafter available for community use. However, that assumes that the development plan is only interested in protecting the precise existing or previous community use. That, in my view, is clearly not the case; and the plan is not phrased in those terms. It includes future-looking community uses whether precisely the same as the existing ones or not.

34. It is noteworthy that in *Christian*, Clarke J. made the point (para. 9.7) that "the maintenance of some degree of open space in an area seems, at least at a general level, to be potentially a legitimate and desirable object which can inform the contents of a development plan even where some of the lands in question may not be publicly owned or are not such as the public generally have a right of access to." Thus, the maintenance of the area in question as a green area (even if it is not used as playing fields in practice) is still very much within the aims of the objectives applicable to the Z15 zoning. Consequently, it seems to me that the inspector's analysis is fundamentally flawed both as to its methodology and indeed as to the conclusion that the proposed development complies with the Z15 zoning.

Incorrect interpretation of "use"

35. Thirdly, it seems to me that the inspector fell into fundamental error by assuming that the word "use" in the development plan means the *de facto* existing use on the ground. That is incorrect for a number of independent reasons:

    (i). the non-expert reader of the development plan would not interpret it as such even without being aware of the terms of the 2000 Act;

    (ii). the non-expert reader of the plan would be aware that the plan is a statutory document and should be read in conjunction with the parent legislation, particularly in terms of a core concept like "use";

(iii). in any event, terms in the plan should normally be given the meaning in the parent Act, a principle reflected in the Interpretation Act 2005; and finally

(iv). while *obiter* for present purposes, I would respectfully suggest that the doctrine of the non-expert interpreter may need to be refined and updated, to avoid an approach to planning documents that is anomalous when one widens the lens to look at legal documents generally.

36. While any one of these bases is sufficient, for clarity, it's probably worth taking each of these alternative grounds in turn.

The non-expert reader would not read the plan as referring only to de facto use

37. On the first point, it seems to me that where the Z15 zoning is speaking of an existing use or "existing functional open space" it is talking about existing uses in the sense that Simons J. is referring to in *Redmond v. An Bord Pleanála*, namely a previously established use which enures for the benefit of the land until such time as a planning permission for a new use is granted. Even the non-expert reader could appreciate that point. There is a fundamental distinction between cessation of a use in practice at a particular time and the formal abandonment of a use on a permanent basis, which in a situation like this would normally arise where planning permission for some inconsistent use or development was granted. Thus, it seems to me that the inspector had erroneously had regard to the simple *de facto* situation on the ground which in my view is incorrect as a matter of law.

38. There was an argument about whether the landowner had validly abandoned the recreational use of the lands, but I don't think this has been established on the facts.

39. Whether one can lawfully abandon a use that the development plan seeks to retain, would fall for consideration if the developer demonstrated on the evidence that the use has been otherwise permanently abandoned, so we don't get to that point. Anyway I don't have to consider that because the board didn't make any decision on the basis of any alleged abandonment.

40. That issue might be filed for the moment under the heading of questions not explicitly answered by the wording of Z15. While the broad point being made by the development plan – protect institutional and community uses – is all fine and dandy, the wording doesn't seem to have been adequately war-gamed against the scenario of a developer who might not entirely play along. Protect uses – in what sense? I've tried to answer that question in this judgment. Protect to what extent? Again, I am endeavouring to cover the immediate aspect, but I don't think I need to explore the far contours of that question for the purposes of this judgment, in the sense of what shape the outer envelope of options would take for a developer who wishes to build on institutional or community lands. Use as of what date? If the date is the adoption of the development plan, then does the developer just have to sit it out until the next plan? Does the zoning cease to apply if the use is abandoned? If all a developer has to do to circumvent a protection in the development plan for institutional or community use is to abandon that use, then that possibly either militates in favour of an interpretation that does not allow the apparent

intention of the plan to be so nullified, or alternatively in favour of the argument that the wording of the plan is insufficient for the apparent purpose. I'm not suggesting that the council should favour any specific answer to these questions, but rather that it might be an idea (and it would certainly be helpful to the court) if some of these answers were spelled out in the plan itself.

The non-expert reader would understand that concepts like "use" have the meanings they have in the Parent Act

41. On the second point, one cannot ignore the fact that the development plan is a statutory document issued under s. 9 of the Planning and Development Act 2000 so occurs in a statutory context where "use" is an absolutely core concept throughout the entirety of planning law. The fact that it isn't statutorily defined is irrelevant.

42. In one sense, any document should be read as if to be construed by the reasonably intelligent person. But if the reader is at all informed, she will recognise that a statutory document like a development plan fits into a statutory framework. Any reader of average intelligence is well able to navigate the concept that the development plan is made under the Planning and Development Act 2000 and fits into the framework and conceptual terminology of that Act.

43. The *XJS Investments Ltd*. [1986] I.R. 750 doctrine has been held consistent with the view that planning documents may use technical terms which have a technical meaning: *Dublin City Council v. Liffey Beat Ltd*. [2005] IEHC 82, [2005] 1 IR 478.

44. Only the reader falling outside the category of the "reasonably informed" interpreter would nowadays think that a development plan was a totally self-contained document, to be construed without reference to the legal framework within which it sits. Lay litigants in the High Court have no problem with this concept in practice and I wouldn't be prepared to equate lack of training in law with absolute ignorance of law. The two are very distinct especially in this modern and highly democratic age.

45. In *Spencer Place Development Company Ltd v. Dublin City Council* [2020] IECA 268 (Unreported, Court of Appeal, Collins J. (Costello and Donnelly JJ. concurring), 2nd October, 2020), the Court of Appeal held that "section 28 guidelines should be construed in the context of and by reference to the [2000 Act]" (*per* Collins J. at p. 28). That logic applies equally to development plans.

46. Assuming awareness of the statutory context is consistent with the approach in England where planning knowledge is imputed to the interpreter. In *R.* (*The Co-Operative Group Ltd.) v. West Lancashire Borough Council* [2021] EWHC 507 (Admin), Holgate J. stated: "The general principles on judicial review relating to criticisms of an officer's report to a planning committee were summarised by Lindblom L.J. in *R. (Mansell) v. Tunbridge and Malling Borough Council* [2019] PTSR 1452 at [42]. Such a document is not to be read with undue rigour but with reasonable benevolence, bearing in mind that it is addressed to an informed audience with substantial local and background knowledge (see *R. (Palmer) v. Herefordshire Council* [2017] 1 WLR 411 at [8]). 'Background knowledge' includes a working knowledge of the statutory test for the determination of planning

applications, referring in that case to the controls on development affecting a listed building. But, by parity of reason, the same principle applies to the test in this case dealing with the application of development control in the Green Belt. It is to be noted that about 90 per cent of the defendant's district lies within the Green Belt. There is no dispute between the parties that the members of the Planning Committee would be well experienced in dealing with that policy in the discharge of their duties….".

47. Lindblom L.J.'s decision in *Mansell* at para. 42, to which reference was made in this passage, is of note: "Planning officers' reports to committee are not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge (see the judgment of Baroness Hale of Richmond in *R. (Morge) v. Hampshire County Council* [2011] UKSC 2, at paragraph 36, and the judgment of Sullivan J., as he then was, in *R. v. Mendip District Council, ex parte Fabre* (2000) 80 P. & C.R. 500 , at p. 509)."

48. The latter authority referred to, Sullivan J.'s judgment in *Mendip District Council,* is of particular relevance. At para. 81 he said: "Whilst planning officers' reports should not be equated with inspectors' decision letters, it is well established that, in construing the latter, it has to be remembered that they are addressed to the parties who will be well aware of the issues that have been raised in the appeal. They are thus addressed to a knowledgeable readership and the adequacy of their reasoning must be considered against that background." That makes clear that the point about the informed readership is not just relevant to a document generated within the planning process itself but also applies to the local and relevant knowledge of the addressees of any ultimate decision.

49. The key concept is that planning documents are addressed to an informed audience with substantial local and background knowledge – not to unlettered amateurs, albeit reasonably intelligent ones. That reflects the reality. Doubly so in the strategic housing development context, where every developer surrounds herself with a formidable squadron of highly qualified professional advisers and experts on every major aspect of the application. The notice party here is no exception.

50. As the applicant in *Conway* validly puts it in submissions, "[i]n *Lanigan v. Barry* [2016] IESC 46, 1 I.R. 657, Clarke J, referred to *XJS Investments* (p. 37 of 49), and indicated that the "well-settled" principles described by McCarthy J. required "the court to construe planning documents not as complex legal documents drafted by lawyers but rather in the way in which ordinary and *reasonably informed* persons might understand them" (at p. 665). Thus, it is a reasonably informed member of the public who would understand that he is interpreting a development plan which is a planning document, where "*use*" has a particular meaning in a planning context. The requirement that it would be interpreted by a reasonably intelligent informed member of the public does not mean that terms which have a meaning in a planning context would be given some different meaning. The development plan repeatedly refers to "proper planning and sustainable development" and this clearly has a particular meaning in a planning context and there is no suggestion this should be given some different layman's interpretation of such phrase."

51. The applicant goes on to perceptively point out that: "The reference to "…*as well as by developers and their agents*" in *XJS* is of crucial importance, as agents clearly includes planners, who do have expertise in town planning. ... The reference to developers and their agents clearly implies a level of knowledge of planning concepts and planning definitions could be said to apply to the interpretation of the documentation. This therefore includes reference to particular terms or phrases used and understood to have a particular meaning in a planning context. Moreover, the reference is to "without legal training", this does not mean without knowledge of the law relating to planning ...". I would endorse that analysis.

52. The applicant in *Clonres* submits, correctly in my view: "In the first place a court judgment is itself, of course, not a statutory provision, and needs to be read in context. As Fennelly J said in *Pringle v Ireland* [2013] 3 IR 1 at 101, "… judgments are not to be read in the same way as statutes. A single sentence in a judgment rarely encapsulates the essence of a lengthy judgment, and a judgment of one judge, even one as eminent and influential as Walsh J., is not to be taken, in isolation, as stating the *ratio decidendi* of a case. There is always a danger of substituting the invocation of a vivid and memorable phrase for the analysis of the substance of a judgment." Clearly, *XJS* was not itself a lengthy judgment, and there were no other sentences discussing the rule which McCarthy J posited, or explaining how he arrived at it; but the phrase "without legal expertise" is not capable of bearing the weight which the Developer and Board seek to place on it. It is not a requirement to discard the terms of the 2000 and 2016 Acts wholesale."

53. The response by the board and notice party is in effect that to find the meaning of "use", the amateur interpreter would have to look at caselaw, which "manifestly runs counter to the entire premise of the 'reasonably intelligent person without particular expertise in law or planning' and exposes the flaw in the interpretative approach contended for on behalf of the Applicant" (board replying submissions para. 8). Another way of looking at that is that it manifestly exposes the flaw in a restrictive view of the capacities of the amateur interpreter. What a reasonably intelligent non-expert reader would know for certain is that the plan is made under the 2000 Act, that "use" is a term in the 2000 Act, and that "use" in the development plan is likely to have the same meaning as "use" in the parent Act. What that meaning might be is, like the meaning of any term in any legal document, a matter for the court, so the reasonably intelligent person would know that answers might lie in caselaw even if he or she didn't know where to immediately find that. But we have really reached an interpretative nadir if we are saying that a document made under an Act can't have the meaning in the Act because, while the meaning in the Act is determined in caselaw, the document under that Act can only have a meaning that would be accessible on its face to someone unlettered in law, so that meaning must somehow be different. Such a result doesn't make sense, and the flaw is in the unsustainable premise that the meaning of a term in a statutory document can't be found in caselaw.

In any event, s. 19 of the Interpretation Act 2005 applies

54. On the third point, the notice party raised a preliminary objection, for want of a better word, that since the parties hadn't "pleaded" the Interpretation Act 2005 or raised it

themselves, I shouldn't decide on its application. That is a misunderstanding. Article 34.5.1° of the Constitution identifies three key roles for a judge: to execute the office to which she is appointed, to do so without bias, and to "uphold the Constitution and the laws". The fact that a party doesn't mention a particular law in a submission doesn't absolve the court from upholding that law – although obviously, as here, one tries to give the parties a chance to consider it first. As pointed out in *Rostas v. DPP* [2021] IEHC 60, [2021] 2 JIC 0904 (Unreported, High Court, 9th February, 2021) (a case upholding a decision by a District Court judge to amend a charge sheet of her own motion, the prosecution having declined to seek such an amendment), the system being adversarial doesn't mean the court has to be totally impassive. To repeat that discussion, the court bringing something up needs to be understood as something being done in the interests of justice and not in a partisan spirit. In *T.D. v. Minister for Justice, Equality and Law Reform* [2014] IESC 29, [2014] 4 I.R. 277, the Supreme Court noted without apparent disapproval (see judgment of Fennelly J. at para. 2), that Hogan J. in the High Court had of his own motion taken a point as to the validity of legislation in terms of EU law, legislation that hadn't been challenged by the applicant. In *J.K. (Uganda) v. Minister for Justice and Equality* [2011] IEHC 473 (Unreported, High Court, 13th December, 2011), Hogan J. took an important point of his own motion, not raised by any of the parties, *after* having reserved judgment and reconvened the hearing to invite submissions on it. Rakoff J. of the US District Court for the Southern District of New York speaking extracurially said that, "[y]es, occasionally "the skilled, imaginative lawyer may raise issues that the judge may not even consider on her own, but this is not nearly as common as a judge raising such issues independently (as a result of having seen the issues raised in similar cases) and then asking the lawyers to address the issues." (www.slate.com, July 2017, "Posner and Rakoff debate whether courtroom lawyers ever make a difference").

55. To repeat the obvious, a development plan is made under a statutory provision, s. 9 of the 2000 Act. Section 2(1) of the Interpretation Act 2005 defines statutory instrument in wide terms: "'statutory instrument' means an order, regulation, rule, bye-law, warrant, licence, certificate, direction, notice, guideline or other like document made, issued, granted or otherwise created by or under an Act and references, in relation to a statutory instrument, to 'made' or to 'made under' include references to made, issued, granted or otherwise created by or under such instrument." If the definition includes mere guidelines it certainly includes a formally effective legal document like a development plan. As pointed out by Murray J. (McGovern and Power JJ. concurring) in *Habte v. Minister for Justice and Equality* [2020] IECA 22 (Unreported, Court of Appeal, 5th February, 2020), the definition of "statutory instrument" is wide, and was held there to include a certificate of naturalisation.

56. That doesn't mean that development plans are equated to laws (*Tristor Ltd. v. Minister for Environment* [2010] IEHC 397 (Unreported, High Court, Clarke J., 11th November, 2010)). That said, the word "laws" is not a specific statutory term of art and nor is it a catch-all term with a read-across for all statutory purposes (although it is referred to in the Constitution as noted above). Likewise, terms used loosely in caselaw, like "secondary legislation" or "delegated legislation", are not statutory terms either. I don't

find these sort of theoretical non-statutory categorisations massively helpful when one gets down to granular questions of statutory interpretation. Different statutes define "enactment", "statutory instrument" or "statute" (*e.g.*, Statute Law Revision Act 2007 s. 1) differently. The fact that something falls into one of these categories for one purpose doesn't mean it falls into that category for some other purpose.

57. Indeed it's clear that plans are not statutory instruments for all purposes under all enactments, but s. 2 of the 2005 Act does mean that the particular rules in the Act applicable to statutory instruments, as defined for the purposes of that Act, apply to development plans.

58. The fact that the development plan is not treated as an instrument for the purposes of the Statutory Instruments Act 1947 or given an S.I. number doesn't mean that it isn't a statutory instrument within the meaning of the 2005 Act, which is clearly broader (local instruments generally aren't given S.I. numbers). That's another example of the point that statutory terms mean what they are defined to mean (which I will return to later in this judgment), so there's nothing unusual about a term being defined to mean different things in different Acts.

59. Section 19 of the 2005 Act says "[a] word or expression used in a statutory instrument has the same meaning in the statutory instrument as it has in the enactment under which the instrument is made." That is only common sense. As the applicant in *Conway* validly puts it, "The purpose of this is clearly to ensure consistency in interpretation between the enactment and the statutory instrument itself, including in the application of same." Hence the concept of "use" in the development plan is to be construed as having the meaning it has in the 2000 Act.

60. Even if otherwise binding authority held that I could not construe a word in a development plan as having the meaning in the Act under which the plan was made, which it doesn't, a court would be obliged by the duty to uphold the Constitution and the laws to give effect to the 2005 Act over statements and judgments that don't take that legislation into account.

61. The notice party argues that if s. 19 applies then other provisions of the 2005 Act apply (such as the wide definition of "land") and suggests that "that would be a very significant change". I'm afraid I don't agree. The 2005 Act is *intended* to be a universal statutory template, so its application to statutory development plans is both unsurprising and sensible. It promotes consistency and certainty in the law. Plus it can always be disapplied if the council concerned makes that clear. The notice party claims that such disapplication could cause "significant difficulties" to the unfortunate drafters of the plan who are "not skilled draftsmen" (para. 28 of replying submissions). Unfortunately that is totally overblown, seriously underestimates the abilities of council management and officials and the level of legal advice internally and externally available to them, underestimates the benefits of a consistency of interpretation, and pitches the argument at a highly theoretical level, conjuring up a bamboozling dust-cloud of problems where none exists in reality.

The amateur-interpreter doctrine would benefit from refinement

62. Finally, on the fourth point, it is worth reviewing for a moment the jurisprudential underpinnings of the test that "the provisions of the plan fall to be interpreted as they would be understood by a reasonably intelligent person having no particular expertise in law or town planning", which Simons J called "well-established" in *Redmond v. An Bord Pleanála.* As I hope to make clear in this judgment, I don't think that the clause about no expertise in town planning is either well-established or indeed correct, and as far as no expertise in law is concerned, that is not to be equated with ignorance of law. And in any event even a well-established mantra is not immune from contextualisation, refinement, or even evolution.

63. While the common law system and the doctrine of precedent have many merits, the issue of the interpretation of planning documents by the unlearned but intelligent person shows the doctrine in a more problematic way. Something begins as an *obiter* comment from one judge, and as it is passed from hand to hand, it hardens into something akin to statute law. Qualifications are shorn off, the doctrine is extended to wholly different situations, and to conclusions that could only be supported on its own inherent logic. Finally, the whole tottering edifice remains undisturbed by vast changes in the social, statutory and jurisprudential background.

64. My own view is that the English courts have got much closer to the practical reality by saying that a planning document "is addressed to an informed audience with substantial local and background knowledge", as opposed to the mantra in the Irish caselaw that no particular expertise is to be attributed to the addressee of such decisions. The English approach is just the reality – both the people who produce the planning documents and the addressees are normally steeped in intimate knowledge of both planning and environmental issues and the relevant legislation and legal context.

65. Even though the concept began with major qualifications ("unless such documents, read as a whole, necessarily indicate some other meaning" *per* McCarthy J in *In re X.J.S. Investments Ltd.* [1986] I.R. 750 at 756), the emphasis on that important caveat was gradually diluted as the jurisprudence rolled on. In addition, the *XJS* formula referred to a lack of legal training, not an ignorance of law, and certainly not to an ignorance of planning matters generally, which seems to have crept into later formulations. And McCarthy J. did refer not just to the reasonably informed member of the public, but also to developers and agents, who most certainly do have planning expertise.

66. The doctrine was extended from decisions to development plans by the High Court in *Tennyson v. Corporation of Dún Laoghaire* [1991] 2 I.R. 527 at 535, at which point the imputed lack of expertise was extended, wrongly I would respectfully suggest, to include a lack of expertise in town planning (as opposed to just in law).

67. Legal literacy has increased enormously since McCarthy J. wrote in *XJS* in 1986, a lifetime ago. In those days, if the lay person wanted information, they had to find a specialist library. The rise of the internet from the 1990s onwards has changed everything. Now the Planning and Development Act 2000 as enacted is online along with all of the post-

1922 statute book and much of the pre-1922 legislation. The Law Reform Commission has published an "as amended" version on its website as part of the series it calls "Revised Acts". Explanations of any planning concept you care to mention are readily available on the internet to everybody.

68. A further problem is that the initial formulation of the reasonably intelligent person test was in one respect slightly incorrect. That formulation included "[t]o state the obvious, they are not Acts of the Oireachtas or subordinate legislation emanating from skilled draftsmen and inviting the accepted canons of construction applicable to such material." It is not correct to imply that "subordinate legislation" inherently emanates from "skilled draftsman", or for that matter to imply that the drafting of documents that are not subordinate legislation is to some degree unskilled. The Chief Parliamentary Counsel and her office are required to draft statutory instruments made by the Government, commencement orders, and orders amending primary legislation, but beyond that, it is up to individual Departments to request drafting assistance. Most statutory instruments made by non-departmental bodies are prepared by those bodies themselves rather than professional drafters. That doesn't stop them being as much secondary legislation as ministerial regulations are. That said, it is of course legitimate to point out that some statutory documents are more formal than others and there is a sliding scale from the wholly legal to the somewhat policy-based. The fallacy of the *obiter* concept of canons of construction not applying is that it assumes a totally binary choice: either a statutory document is subject to a strict interpretation as if primary law, or else absolutely none of the normal interpretative techniques apply and it must be considered as a stand-alone item to be read by amateurs. That is a false dilemma. Like much else, this is a matter of degree.

69. The final and perhaps broadest problem with the "intelligent person ignorant of the law" approach is its sheer exceptionalism, applying only to planning documents and nothing else. In all other contexts, knowledge of the law is to be imputed. Ignorance thereof excuses nothing. In planning law and planning law alone, ignorance is assumed and almost celebrated. That doesn't seem very logical. A more correct principle would seem to be that the interpreter should be presumed to know the law. The problem created here is that the interpretation of planning documents has become like a separate species of finch stranded on a minor Galápagos island, that in isolation has evolved unique characteristics that differ markedly from closely related species on neighbouring islands.

70. The applicant in *Conway* refers to the lack of town planning expertise point made by Simons J. in *Redmond v. An Bord Pleanála* [2020] IEHC 151 at para. 16 and submits "The reference to "*town planning*" by Simons J. in the above-mentioned quote is in fact incorrect, when one considers the aforementioned extract from XJS, which refers to persons "*without legal training*" but then specifically refers to developers and their agents (i.e. planners)." I agree that there is no basis in *XJS* to impute lack of expertise in town planning to the interpreter of planning documents, indeed *XJS* implies the reverse. The misconception, however, can't be attributed to Simons J. – as pointed out by the notice

party, when Simons J. was referring to a person with "*no particular expertise in law or town planning"*, he was referring to the judgment in *Tennyson* which uses that phrase.

71. As regards the result in *Redmond*, the background to legislation, historical documents and the understanding of terms of art are clearly potentially relevant to all other forms of legislative interpretation: see reference to legislative history in *A. v. Governor of Arbour Hill Prison* [2006] IESC 45, [2006] 4 I.R. 88 at para. 255. In *Bederev v. Ireland* [2016] IESC 34, [2016] 3 I.R. 1, Charleton J at para. 23 quoted Bennion, *Statutory Interpretation,* 6th ed. (London, 2013) at p. 540 that "Courts ... may have regard to the legislative history, the statutory context furnished by legislation in *pari materia* … and the common law context." There is no logical reason for legislative history being relevant to statutes, but not statutory instruments. I don't see any jurisprudential basis for saying that in planning decisions, and planning decisions alone, one can't have regard to the history of the matter, and nor is there any compelling basis for saying that in planning decisions alone one has to assume ignorance of the subject matter and of the law.

72. Take for example immigration and asylum documents which are frequently addressed or directed to individuals who often personally don't have a great degree of legal literacy. But such persons have access to professional advisers. It has never been suggested that such documents must be construed in a way that assumes that the interpreter has no expertise in law or the subject matter of immigration. Indeed such documents would be completely incomprehensible if such a mode of interpretation were to be applied.

73. The applicant in *Conway* validly points out that "by way of analogy, it is well established that public procurement documents published by a public body are to be interpreted by a person with knowledge of public procurement matters. Thus, for example in *Transcore v. National Road Authority* [2018] IEHC 569, Barniville J., having set out that public procurement documents are to be understood in the context of the documents as a whole, observed (at para. 191) that: "Finally, the court must focus on the "industry" concerned in which the professionals and persons involved are not lawyers but participants in that industry". Such an argument validly makes the case for a joined-up approach to legal interpretation, not a series of disconnected approaches scattered across different silos.

74. Of course, lawyers are great at coming up with *post hoc* explanations, and it's relatively easy to complete the sentence "the interpretation of planning documents requires fundamentally different principles from the interpretation of any other legal or statutory document because [insert intellectually contorted *ad hoc* rationalisation here]", much as you could complete any other dubious proposition to achieve whatever result you want. But Ronald Dworkin was right about one thing - law should be a seamless web. Its rules should not be restricted railroad tickets, good for this day and this journey only (*Smyth v. Allwright*, 321, U.S. 649, 669 (1944) (Roberts J. (dissenting))). Legal principles can't be confined to individual silos; they have to make sense when the system is viewed as a whole.

75. The Supreme Court has indeed endeavoured to situate the approach to interpretation of planning documents in a broader context. In *Lanigan v. Barry* [2016] 1 IR 656, at paragraph 3.11, Clarke J. refers to the *XJS* approach and says: "It might, in passing, be appropriate to note that this was, perhaps, an early example of the move towards what has been described as the "text in context" method of construction appropriate to the determination of the meaning of all documents potentially affecting legal rights and obligations. This approach has now become well established. The "text in context" approach requires the Court to consider the text used in the context of the circumstances in which the document concerned was produced including the nature of the document itself."

76. The applicant in *Clonres* comments on this as follows: "Here the *XJS* test is placed in context: it is not a *sui generis* test, but is part of a broader approach of interpreting documents in context in order to ascertain their true meaning." I think that insight points the way to the correct approach.

77. In my view it is not the law that planning documents or generally the development plan in particular should be read in any fundamentally different way to any other legal documents, or read by reference to a fixed assumption that the interpreter has no detailed knowledge of law or of the subject matter of the document. Indeed nowadays, most addressees of legal documents (whether we are talking about contexts like asylum, planning, public procurement or otherwise) have (either in person or through their advisers) intimate knowledge of the area, and this includes knowledge of the legal context. As statutory documents, planning materials should be read as a general proposition like any other statutory document, but with due regard where appropriate to the extent to which the plan or other document is in the nature of a policy statement as opposed to formulating a rule capable of precise legal application. As Clarke J. put it, "the circumstances in which the document concerned was produced including the nature of the document itself" may often militate in favour of a meaning to be given to particular documents that would be given by a non-expert reader, but that can't be an iron rule, and there will be many aspects and circumstances where that doesn't apply.

78. There is a further problem with the existing approach which is that the complexity of planning and environmental law has mushroomed since the hypothetical amateur reader was first postulated in the mid-1980s. Every aspect of planning applications is now saturated not only with complex domestic regulation and caselaw, but also European law, overlain by a tapestry of jurisprudence from Luxembourg. Every paragraph and maybe every line of a planning decision (let alone a development plan) now bristles with legal significance. The days when planning decisions were just matters of planning judgement, to be challenged only on an unreasonableness basis, are long over, and they aren't coming back. Even if the view that planning documents were policy matters that should be read from a non-legal perspective was understandable at one point in time, it isn't fit for purpose now. Maybe I'm wrong, but I'd be surprised if there were many significant planning documents (like development plans for example) that are not run past the in-house lawyers of whatever authority produces them. But either way, even the non-

legally qualified planning officials of councils are themselves deeply versed in the statutory context.

79. To summarise, the way forward is I think to refine and update the understanding of the interpretative doctrine so that planning documents are read as follows:

(i). at the level of broad generality, planning documents should be read in the same way as other legal documents, namely in the first instance as to their ordinary meaning (which inherently involves an element of the viewpoint of the reasonably intelligent, but not necessarily legally trained, reader), in the context in which they arise, and where appropriate with due regard to the purpose of the document – Clarke J.'s "text in context" approach;

(ii). regard should be had to the extent to which the document (including a planning document) articulates a policy decision, which to that extent should be read in the first instance as it would appear to the reasonably intelligent reader without legal training – McCarthy J. in *XJS*;

(iii). regard should also be had to the fact that addressees of documents in particular specialised areas (non-exhaustive examples being public procurement, planning, immigration or asylum) will (either personally or through advisers) have considerable expertise in that area and familiarity not only with the subject-matter of the decision and its place in a particular body of knowledge, but also with the legislation and legal context more generally, even bearing in mind the lack of legal training of such addressees – applying the point made by Barniville J. in *Transcore*; and

(iv). where an administrative document is issued under an enactment (like many documents in areas such as asylum, immigration, planning or public procurement), the approaches set out in the Interpretation Act 2005 will normally apply.

The alleged need for a restrictive interpretation

80. As an answer to these contentions, the notice party argues that one should adopt a restrictive interpretation of the development plan because anything that limits development is an "abridgment" or "interference" with its constitutional rights.

81. That submission seems to be based on a misconception that there is a right to development. The notice party's submissions starting point was "I can do what I want with my land" absent statutory interference. But that is a false premise. The argument was made that one can challenge a zoning objective on the ground of disproportionate interference based on *Christian* at pp. 561 to 562. However, proper planning and sustainable development has an objective content and thus proportionality as such is not necessarily the correct metric to consider it with. If a particular development or type of development is not in accordance with proper planning and sustainable development, then permission should be refused, either on an individual basis or backed up with

preclusion of any inappropriate category of development in the terms of the zoning. That is a "yes" or "no" outcome - proportionality does not really come into it.

82. Admittedly such an approach does leave a certain amount of room open for an argument that zoning is unreasonable in an *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 sense, but it is hard to see conceptually how one could apply a proportionality challenge in the face of a reasonable judgement that a particular type of works or use was not in accordance with proper planning and sustainable development.

83. While the right to private property is essential of course, it does not include a right to develop; or in particular to develop in a way that is not in accordance with proper planning and sustainable development. The preclusion of the latter kind of development by zoning or an adverse decision does not infringe any right of a property owner still less a constitutional right. The Constitution is a social contract - not a one-way offer.

84. Without taking from the principles of land law, we are all, at best, leaseholders on Planet Earth. All property must be held with some view to the benefit of society as a whole and of future generations, and is not to be dealt with as one sees fit. Even the most self-made Ayn-Randian entrepreneur draws enormous benefits from her membership of society – whether directly, or through the benefits provided by the State to her workers, contractors, tenants and purchasers, that ultimately facilitate the entrepreneur's economic well-being. What society asks in return is, among other things, that there should be no development other than that which is proper, sustainable and lawful. To argue that society's endeavours to ensure that outcome (through development plans, for example) have to be read narrowly and restrictively, while the individual property owner can take the full advantage of societal provision both direct and indirect, is to entirely distort the social contract. Insofar as law in general and development plans in particular are part of the People's benefit under that contract, they are terms for the welfare of all, not penal clauses to be read *contra proferentem*.

85. In any event, this is not a question of taking a strained interpretation of the development plan in a manner that unreasonably abridges the rights of property owners. It seems to me that the meaning of the development plan, properly considered, is quite clear; and the inspector's analysis is unfortunately not in accordance with it.

Material contravention regarding building heights

86. The applicants complain that the board failed to properly apply the criteria in binding ministerial guidelines, particularly Specific Planning Policy Requirement (SPPR) 3.

87. An initial complaint is made that there is no standing to make this point because it was not raised before the board. However, it is reading too much into the situation to say that this falls under the heading of gaslighting of a decision-maker or impermissible challenges based on a point that was never made. The central case of gaslighting a decision-maker is failure by the applicant in the administrative process to make a point and then arguing that the decision is invalid because the decision-maker did not deal with the point. That concept informed cases such as *Dublin Cycling Campaign CLG v. An Bord*

Pleanála [2020] IEHC 587 (Unreported, High Court, McDonald J., 19th November, 2020). What is happening in the present case is very different. It is an absence of material before the board supporting the actual decision made. It is not the role of the objector to point out deficiencies in advance or as it was put by counsel, to "correct the developer's homework". That distinction is the answer to the standing objection here (see generally, *Reid v. An Bord Pleanála* [2021] IEHC 230 (Unreported, High Court, 12th April, 2021)).

88. Not raising this can't be seen as a "credibility point" as contended by the notice party – this is a process issue, not one involving weighing the credibility of evidence.

89. Section 9(6) of the 2016 Act permits the board to grant permission in material contravention of the development plan other than in relation to zoning and s. 9(3) obliges the board to apply SPPR in guidelines issued by the relevant minister under s. 28 of the 2000 Act. SPPR 3 comes at the end of a series of development management criteria that are included in the Urban Development and Building Height Guidelines 2018. The criteria include the following:

> **"Development Management Criteria**
>
> In the event of making a planning application, the applicant shall demonstrate to the satisfaction of the Planning Authority/ An Bord Pleanála, that the proposed development satisfies the following criteria: …
>
> **Specific Assessments**
>
> To support proposals at some or all of these scales, specific assessments may be required and these may include: …
>
> In development locations in proximity to sensitive bird and / or bat areas, proposed developments need to consider the potential interaction of the building location, building materials and artificial lighting to impact flight lines and / or collision."

90. SPPR 3 then states:

> "It is a specific planning policy requirement that where;
>
> (A) 1. an applicant for planning permission sets out how a development proposal complies with the criteria above; and 2. the assessment of the planning authority concurs, taking account of the wider strategic and national policy parameters set out in the National Planning Framework and these guidelines;
>
> then the planning authority may approve such development, even where specific objectives of the relevant development plan or local area plan may indicate otherwise."

91. In fairness there is a certain amount of linguistic challenge to that phrasing because it begins with a mandatory "shall" followed by two "mays" and then a mandatory "need". But taking the guidelines as a whole it's clear that if the condition of proximity to sensitive bird areas applies then developments "need" to consider interaction with flight lines or

collision. The mandatory "need" would be meaningless if the discretionary "may" remained governing, despite the satisfaction of the "in development locations in proximity" condition. The requirement to consider flight lines or collision doesn't say "may need".

92. On the facts here there is a clear proximity to sensitive bird areas. That was the evidence before the board, and certainly the board didn't treat it otherwise. Furthermore, the inspector did consider this criterion, which is consistent with its relevance. The planning report says in respect of this criterion that "[t]he proposed development is subject to both EIAR and a NIS which considers the impact of birds and bats as a result of the proposed development." The notice party's statement of opposition accepts that the EIAR and NIS didn't consider the flight lines or collision issue (paras. 7 and 62).

93. The board tried to make a virtue of this by arguing in effect that because the matter wasn't considered, it can't have been relevant and, therefore, it didn't need to be considered. Lewis Carroll would have applauded that masterclass in circularity.

94. It was also submitted that "[t]o require Crekav to have added a specific sentence to the effect that impact on flight lines or collision risk is not anticipated, or to have require it to go further and prepare an assessment where such impacts are not anticipated, is to advocate for a level of formalism and 'box-ticking' which is simply not required."

95. There are two misconceptions in that submission. First of all SPPR 3 requires this issue to be considered. The outcome of the consideration (for example, that there is not going to be an impact) is a separate and subsequent thing. Secondly, there is a confusion between the EIA process where the effect has to be significant for it to be assessed, and the mandatory nature of the requirement to consider the issue in SPPR 3 which is not conditional on the effect being significant before it's considered.

96. Furthermore, departure from the statutory scheme is not to be excused by a defence that this is a matter of formalism. As Baker J. (Irvine and Costello JJ. concurring) said in *V.K. v. Minister for Justice and Equality* [2019] IECA 232 (Unreported, Court of Appeal, 30th July, 2019) at para. 109: "[w]ords do matter, and if the language of the Minister departed in its emphasis, tone, and possible import from that in the case law, in seems to me that [the judge] was correct to grant *certiorari*".

97. The mere fact that something is a checklist or a ticking of a box is not to be totally dismissed. Checklists do ensure that points are considered, and they can lead to significantly better outcomes (an advantage discussed at some length by Atul Gawande in *The Checklist Manifesto* (London, Profile Books, 2010)). The real question is whether an omission could possibly have made a difference. If there could have been no conceivable difference to the outcome, then one might say that the matter may be a matter of formalism. However, I certainly don't think that could be said here - particularly when a related but conceptually separate problem arises.

98. The inspector when discussing collision risks at para. 13.6.15 refers to "the literature". The phrase "the literature" is something of a term of art and implies that one has comprehensively reviewed all the relevant literature or at least the main elements of it. But in fact all that she refers to is a single paper not produced by any of the parties to the process. The applicant in *Conway* suggested that this paper is the first thing that comes up if one googles "bird collisions with tall buildings" (although I will confess that I didn't find it myself using that method). The board disregarded this study at p. 7 of its decision, but doesn't say why.

99. Admittedly, s. 34(10) of the 2000 Act (which requires reasons to be given for disagreeing with the inspector) doesn't apply to the 2016 Act for no apparent reason, a feature which Barniville J. in *Crekav v. An Bord Pleanála* at para. 154 called "a significant omission … and a significant oversight on the part of the Oireachtas." Nonetheless, there is an independent administrative law requirement to give reasons which is enhanced where one is rejecting the inspector's analysis. That is essentially for two reasons: if the board isn't accepting the inspector's reasons it has to come up with reasons of its own; and secondly, it has to engage with the inspector's rationale.

100. The board can't simply reject the relevance of purported scientific evidence which the inspector is acting on in formulating her conclusion and yet accept her conclusion with no clear explanation as to why. I would regard that as an independent ground for holding that the conclusion on material contravention regarding building heights was invalid, giving rise to a lack of reasons in respect of satisfaction of SPPR 3.

Lack of reasons for relying on the development being of strategic or national importance.

101. The applicant in *Clonres* complains that the board failed to give any or any adequate reason as to why s. 37(2)(b)(i) of the Planning and Development Act 2000 applied as a basis for material contravention. That subparagraph permits a material contravention where the development is of "strategic or national importance". SHD development in and of itself can't be strategic in the sense used in sub-para. (i).

102. The fact that something proceeds from strategy doesn't make it strategic. In public administration, everything should proceed from a strategy of some kind. To construe sub-para. (i) in that way would make all SHD applications strategic would render any restrictions involved meaningless. Nor is there any basis to focus purely on the strategic housing development category as proceeding from a strategy. There are also strategies for one-off rural housing, architectural protection and many other kinds of developments or aspects of development. An application governed by any of these strategies would also become strategic if one were to adopt the flawed logic that sub-s. (i) is satisfied merely because the development proceeds from a strategy.

103. It is true that the word "strategic" is used in the phrase that is defined in the 2016 Act, but as that is simply a technique or manoeuvre by the drafter (unquestionably on instructions from the Department). Words can be defined to mean anything. "In this Chapter ... 'strategic housing development' means ...." doesn't confer any particular

status on the words "strategic housing development" or on the word "strategic" in particular. The words "development to which this Chapter applies" could have been used instead and the meaning wouldn't change. To place emphasis on the word "strategic" confuses the concept of a definition with the concept of the particular phrase that is statutorily defined. From the drafting point of view, words should ideally be defined in a way that bears a very close relationship to what they normally mean. To depart too far from that runs the risk of the professional integrity of the drafter being co-opted in an exercise in "spin".

104. In the sense in which the word "strategic" is used in the SHD legislation, all it really means is *large* housing developments, rather than ones that are individually pivotally crucial to, or even individually significantly impactful on, the national interest. To say that democratically adopted development plans can be overridden for housing developments if the housing developments are large (and hence if the developments constitute "strategic housing development" as artificially defined), but not if they are small, could be viewed as another example of Jonathan Swift's proposition that "laws are like cobwebs which may catch small flies but let wasps and hornets break through" (*A Tritical Essay upon the Faculties of the Mind*, 1707).

105. It seems to me that there wasn't anything on the basis of which the board could have held this to be a development of strategic or national importance. It was simply one of many high-density housing developments. Admittedly, such developments are governed by government policy, but then again, many things in the world of public administration or otherwise could be said to be governed by policy in one shape or form. That doesn't make them strategic.

106. There is a second problem here which is that the inspector considered that this was *not* a development of strategic or national importance. In a situation where the board is disagreeing with its inspector, there needs to be a more express and explicit statement of reasons in more detail than might otherwise be the case. That is lacking here.

107. The notice party relies on *Dunne v. An Bord Pleanála* [2006] IEHC 400 (Unreported, High Court, McGovern J., 14th December, 2006) as authority for the proposition that the duty to give reasons is less when not disagreeing with the ultimate conclusion. However, that seems to relate to the interpretation of the statutory provision and not to the administrative law requirement for reasons. In any event on the particular facts in *Dunne*, the omission of the particular condition seems to have had only a peripheral impact (see para. 34), and so this could be viewed as not being one of the main issues requiring a high level of reasons. By contrast, the issue of material contravention couldn't have been more central in the present case and is always going to be a central issue if the ultimate decision of the board actually turns on that.

108. A fall back argument is made that even if there was an invalid reliance on sub-para. (i), the board also relied on sub-para. (iii) and thus the decision can be saved on that basis. I don't accept that because the discussion viewed as a whole seems intermingled. In fairness, the board didn't propose any word-by-word analysis of where the blue pencil

would have to be wielded through the text, which, in a wording as complex as that of a modern board decision, would really be a prerequisite to even consider severance. Indeed on the contrary the board accepted at the hearing that there were challenges in such an argument because the reasons given were effectively referable to both points. I don't think the points can be properly severed, and I think that the conclusion must be viewed as having been tainted by an irrelevant consideration under this heading.

Error in reliance on SPPR1 in support of the material contravention

109. The applicant in *Clonres* pleads that the board erred in relying on SPPR 1 of the 2018 guidelines which requires local authorities to vary their development plans to give effect to the Minister's policy. The board offered reliance on SPPR 1 as one of the reasons for the material contravention. However, SPPR 1 is clearly about development plans and is not in any way a basis for material contravention. Thus, it is erroneous in law to rely on it as the basis for deciding to permit such a contravention. That is a separate and final ground of invalidity here.

Order

110. As the matters can be determined on the module 1 domestic law grounds, the EU law issues in module 2 don't arise. The appropriate order is one for *certiorari*. There is no obvious principle that one can't make two orders for *certiorari* of the same decision in two separate cases and it seems appropriate to do that here in case failure to do so would cause any unanticipated procedural complications depending on what happens next. So the order in both *Conway* and *Clonres* will be one of *certiorari* removing the board's decision for the purpose of being quashed in each case. The alternative (which if anyone wants, I will consider before the order is perfected) would be to consolidate the cases and make a single order.

111. The parties should liaise with the List Registrar to mention the matter on the next convenient Monday for consequential directions and also to liaise with the parties in the *Sweetman* case in order to list those proceedings simultaneously to address the question of what the appropriate order would be in that case. Very provisionally and subject to hearing argument I would be minded to strike out that case as it now seems moot, without prejudice to the right to raise any of the issues again in any future proceedings if necessary, and with liberty to re-enter if some later procedural development in the present cases made that appropriate.