THE HIGH COURT
JUDICIAL REVIEW

[2021] IEHC 403
[2020 No. 761 JR]

BETWEEN:

PEMBROKE ROAD ASSOCIATION

APPLICANT

-AND-

AN BORD PLEANÁLA, THE MINISTER FOR HOUSING, LOCAL GOVERNMENT AND HERITAGE

RESPONDENTS

-AND-

DERRYROE LIMITED AND DUBLIN CITY COUNCIL

NOTICE PARTIES

JUDGMENT of The Hon. Mr. Justice Alexander Owens delivered on the 16 day of June, 2021.

1. When considering judicial review applications, courts must evaluate whether any non-conformity with a rule relating to procedural matters is sufficiently serious to justify intervention. I am cautious of accepting invitations to engage in analysis which suggests that resolution of an issue requires categorisation of any rule contained in legislation as mandatory, directory or jurisdictional. These are terms used by lawyers and judges. The Oireachtas does not use these formulations and may not specify consequences of failure to comply with statutory or other provisions.

2. Some legal rules are more important than others. Some breaches of a legal rule are of greater significance than others. The purpose for which a rule exists is relevant. Some rules may have no discernible purpose or may be inessential. Compliance with other rules is necessary in the interest of values which are identifiable and important. The significance of any breach of a rule may sometimes be measured against the interest of the person complaining of that breach. Has that person a real interest in upholding a value which the law attaches to compliance or does the rule only exist to protect an interest of others?

3. Where there is a request to set aside an administrative process on the basis of an asserted lack of conformity, it is necessary to analyse what interests or values need to be protected by insisting on conformity.

4. Many of the legal rules in the planning code are designed to achieve important purposes in the public interest such as certainty and transparency, proper administration and the right of the public to engage in effective participation. Courts have been reluctant to disregard these rules and have in many cases considered adherence to formal procedural requirements sufficiently important to either justify intervention by judicial review or to refuse judicial review in claims seeking to enforce "default permissions".

5. Other rules within this code may not come within the category of important rules in the public domain or may have no relationship to any legitimate procedural, planning or environmental concern of the person challenging the validity of a process or decision. While, in general, a member of the public has sufficient interest to rely on any breach of

statutory procedures, challenges based on breaches of rules designed to protect property rights of others in the context of materiality of identity of an applicant for permission have sometimes been looked on with disfavour.

6. *Schwestermann v. An Bord Pleanála and Others* [1994] 3 I.R. 437 is an example of a case where this type of challenge failed. Another example is *McDonagh and Sons Limited v. Galway Corporation* [1995] 1 I.R. 191 where the Supreme Court excused an unintentional misstatement attributing ownership to an associate company of the real owner since it did not have the effect of misleading anyone and could not possibly have been to the disadvantage of the planning authority or the public.

7. Pembroke Road Association has challenged the validity of a decision of An Bord Pleanála (the Board) to grant planning permission for a development which includes an apartment building of up to 12 storeys over basement at Herbert Park in Ballsbridge, Dublin 4 on a number of grounds.

8. The first ground of challenge asserts the application for permission should have been rejected because the "applicant" is not the same person as the "prospective applicant" which participated in the statutory pre-application consultation process under Part 2 Chapter 1 of the Planning and Development (Housing) and Residential Tenancies Act 2016 (the 2016 Act).

9. The second ground of challenge asserts that the application failed to include a statement prescribed by sub-article 299B(1)(b)(ii)(II)(C) of the Planning and Development Regulations 2001 (S.I. No. 600 of 2001) (the Regulations of 2001), as inserted by article 94 of the European Union (Planning and Development) (Environmental Impact Assessment) Regulations 2018 (S.I. No. 296 of 2018) (the Regulations of 2018) and that the Board should have rejected the planning application on that ground.

10. The third ground of challenge asserts that the Board failed to engage with a provision in a ministerial guideline issued under s.28 of the Planning and Development Act 2000 (the 2000 Act) before deciding to grant permission for buildings in excess of height limits allowed by the Dublin City development plan.

11. The fourth ground of challenge asserts that the Board failed to have regard to the architectural status and historic significance of a house at 40 Herbert Park in determining that the proposed development is unlikely to have significant effects on the environment. This is phrased as an objection that there is no evidence that the Board considered the significance of these matters in making a screening determination not to require an environmental impact assessment under sub-article 299B(2)(b)(ii)(I) of the Regulations of 2001.

12. The final ground of challenge is that the Board incorrectly concluded that the proposed development did not involve material contravention of provisions of the Dublin City development plan relating to public open space and that the Board relied on an inapplicable statutory provision in imposing condition 26 of the permission.

13. Pembroke Road Association is correct in its submission that condition 26 is invalid. I do not agree that the proposed development involves material contravention of the Dublin City development plan relating to public open space. I am also rejecting the other grounds of challenge. I will dismiss the applications for judicial review based on each of the rejected grounds of challenge.

14. It is clear that the Board would not have granted this permission without requiring financial contribution in lieu of public open space. It follows that it is not possible to regard the invalid condition as severable.

15. It remains to be seen whether the appropriate consequential order is to invalidate the order of the Board granting permission and remit the matter for reconsideration. The only points which require reconsideration relate to the decision to impose a financial contribution in lieu of public open space.

16. An alternative to invalidating the permission may be to adjourn granting judicial review to enable the Board to revisit the invalid element by amending the permission to include a valid condition in exercise of powers given by s.146A(1)(b) of the 2000 Act. An issue may also arise as to whether it is necessary, having regard to the provisions of s.50A(9) of the 2000 Act, to quash the entire decision of the Board.

17. I will now turn to the reasons for my conclusions on each of the matters raised.

18. The first matter is the complaint that the Board ought not to have entertained the application for permission because the applicant is not the same person as the "prospective applicant" which engaged in the statutory pre-application process.

19. Derryroe Limited (Derryroe) applied to the Board for permission for a strategic housing development using the special fast-track procedure contained in Part 2 Chapter 1 of the 2016 Act. The normal planning process would have involved an initial application to Dublin City Council under Part III of the 2000 Act.

20. The special procedure requires a "prospective applicant" for permission to engage in the consultation process set out in s.5 of the 2016 Act. This process may conclude with an opinion of the Board under s.6(7)(a)(i) that documents provided under s.5(5) "constitute a reasonable basis for an application under section 4" for permission for a strategic housing development. The Board then issues a notice under s.6(7)(b) "to the prospective applicant" who is permitted by s.6(8) to apply to the Board for permission for the strategic housing development under s.4(1) by complying with the requirements of section 8(1). Section 8 refers to matters which "an applicant" for permission must comply with before applying under s.4(1) and during the course of that application. The 2016 Act envisages that any "prospective applicant" who gets through the pre-application process will be the applicant for permission.

21. Similar provisions contained in ss.37A-37J of the 2000 Act were considered in the judgment of Barniville J. in *Cork Harbour Alliance for a Safe Environment v. An Bord Pleanála and Others* [2021] IEHC 203.

22. The definition of "prospective applicant" in s.3 of the 2016 Act has no equivalent in the provisions contained in ss.37A-37J of the 2000 Act. This definition requires that a "prospective applicant" have sufficient interest in the site. It is necessary to have due regard to this when assessing whether consequences flow from lack of correspondence between a "prospective applicant" and the applicant for permission.

23. In his judgment in Cork Harbour Alliance for a Safe Environment v. An Bord Pleanála and Others [2021] IEHC 203, Barniville J. examined the rationale for insisting on compliance with this aspect of the statutory scheme in circumstances where it was clear that the prospective applicant and the applicant were connected and had an identical interest in both the pre-application process and the planning application. I agree with what is stated in para. 245 of that judgment and with the approach adopted by Barniville J. No objective of the legislation would be undermined by giving the benefit of the statutory pre-application process to the applicant for permission in this case.

24. I should add that I would consider it to be within the discretion of the Board to treat an application for permission as valid where it is clear that there is sufficient continuity of interest in pursuing the application between a "prospective applicant" and the applicant. If the statutory intention that a "prospective applicant" must also be the applicant is not all-important for a court, it should not be regarded as all-important for the Board either.

25. Whatever be the position, it is clear from the approach taken by Barniville J. in *Cork Harbour Alliance for a Safe Environment v. An Bord Pleanála and Others* [2021] IEHC 203, that he did not regard a requirement of identity of a "prospective applicant" and the applicant for permission as so set in the stone of "jurisdiction" that a court considering judicial review is precluded from taking any step other than that of treating the planning application as invalid where the identity of the applicant differs from that of the "prospective applicant".

26. If this requirement were treated as "jurisdictional" in the sense that an absolute mandatory rule is enshrined in the 2016 Act, then there could never be room for exercise of discretion by the Board in deciding on admissibility of a planning application in circumstances such as the present one. It would also follow from such a rigid interpretation of the statutory framework that a court would not have any discretion to refuse judicial review. In my view, there is no such absolute mandatory rule.

27. The purpose of the legislative provisions is to ensure continuity and identity of interest of the person seeking permission during the statutory process. It is not necessary that the person to whom permission is eventually granted must always be the same as an identified "prospective applicant" in order to uphold any legal value which underpins this rule.

28. In this case the statutory pre-application process was initiated by Lordglen Limited (Lordglen) in late 2019. Lordglen was one of the owners of the site. Shortly before this, the issued shareholdings and directorships of Derryroe were changed to mirror those of Lordglen. Both entities are controlled by the same directing minds.

29. The opinion of the Board under s.6(7)(a)(i) of the 2016 Act issued to Lordglen in December 2019.

30. The planning application was lodged by Derryroe in May 2020. The documents lodged with the application included letters of consent from the owners of the site. These included a letter from Lordglen which owns most of the site and were obtained after the Board issued its opinion. The other landowners gave consents in writing to Lordglen for the planning application which enabled it to initiate the pre-application process.

31. The Oireachtas has not considered it necessary to provide a definition of "applicant" in the provisions dealing with applications for permission under Part III of the 2000 Act or in those dealing with applications for permission under the 2016 Act. It has not been thought necessary to lay down rules requiring personal qualifications of an applicant. Any person identified as an applicant or "prospective applicant" in these processes need not produce references or show capacity to carry through the proposed development.

32. The person who intends to develop or who carries out development is often different to the applicant for permission. Once a permission for development has been obtained, it may be availed of by any person who has sufficient control over the site. Permission does not, of itself, operate to allow any person to develop another person's property without agreement or other legal right.

33. The statutory scheme for all applications for permission proceeds on the basis that an application will be made and processed to completion on behalf of a named applicant and that any permission or decision to refuse permission will issue to that person. There are no express rules on whether applications or appeals may be progressed by persons other than an applicant as identified at the outset of the process or covering issues such as the status of a permission which has issued after an applicant has died, or whether a change in the identity of a person who acts as an applicant has any effect on the application or appeal process. The same point arises where an objector to an application for permission ceases involvement in the process in circumstances where the role of that objector is taken over by another person having identical interest in pursuing the objection.

34. There is no reason in principle why things must grind to a halt or that an application must recommence from the beginning where this type of event occurs during the process. I can see no reason why a permission cannot be amended, if necessary, to reflect the reality arising from any such change. Courts should be reluctant to construe or give effect to legislation which may not expressly cover or provide for a particular happening or eventuality in a manner which would produce bizarre results.

35. In this case the association of the "prospective applicant" with the applicant for permission in the sense that both were under identical ownership, direction and control is relevant. The fact that at all times one or other was an owner of the site or had consent of other owners to engage in the process set out in Part 2 Chapter 1 of the 2016 Act is also relevant.

36. The position is similar to that which would obtain if a "prospective applicant" died and pursuit of the application was taken over by another person with an identical interest, such as an executor. Other instances where this might happen are where an applicant for permission goes bankrupt, or where mortgaged property is taken over by a secured creditor, or where land is sold on. In each of these cases the person who takes the land has a sufficient interest in both the site and the outcome of the planning application to advance that process.

37. Identity of an applicant for permission may become relevant in some circumstances. These circumstances are also relevant to the pre-application process under the 2016 Act. The significance of any change in identity of a "prospective applicant" or an applicant for permission, even if not expressly permitted by the legislation, can be assessed by reference to whether underlying requirements which determine "standing" are satisfied.

38. Furthermore, a requirement of "standing" may serve only to protect a specific class of interests. Should those who are not within the class of interests protected by such a requirement be heard to complain about matters which do not concern them?

39. The first circumstance in which identity of an applicant for permission may be important was recognised by the Supreme Court in *Frescati Estates Limited v. Walker* [1975] I.R. 177. This relates to the necessity for a connection between the applicant and the owners of any site which the permission sought relates to. The following passage from the judgment of Henchy J. at p. 190 is relevant:

> "To sum up, while the intention of the Act is that persons with no legal interest (such as would-be purchasers) may apply for development permission, the operation of the Act within the scope of its objects and the limits of constitutional requirements would be exceeded if the word "applicant" in the relevant sections is not given a restricted connotation. The extent of that restriction must be determined by the need to avoid unnecessary or vexatious applications, with consequent intrusions into property rights and demands on the statutory functions of planning authorities beyond what could reasonably be said to be required, in the interests of the common good, for proper planning and development.

Applying that criterion, I consider that an application for development permission, to be valid, must be made either by or with the approval of a person who is able to assert sufficient legal estate or interest to enable him to carry out the proposed development, or so much of the proposed development as relates to the property in question. There will thus be sufficient privity between the applicant (if he is not a person entitled) and the

person entitled to enable the applicant to be treated, for practical purposes, as a person entitled."

40. The Supreme Court reasoned that the Local Government (Planning and Development) Act 1963 (the 1963 Act) must be interpreted in a manner which protects property rights of owners of land from potential adverse effects as a result of planning applications by interlopers lacking sufficient estate or other interest in that land. Planning authorities should not be vexed with the burden of dealing with these meddlesome applications.

41. The 1963 Act has been replaced by the 2000 Act. The 2000 Act is supplemented by the 2016 Act. The provisions of the 2000 Act which refer to an "applicant" for permission are identical to those in the 1963 Act. The reasoning in the decision of the Supreme Court in *Frescati Estates Limited v. Walker* [1975] I.R. 177, is equally applicable to the 2000 Act and the 2016 Act. It also applies in any situation which arises as a result of an event such as a change of ownership during the currency of a planning application. Any person taking over an application must have sufficient interest to pursue that application.

42. An interest in land sufficient to give an applicant standing may be ownership, or consent of another person who is an owner, or in some cases a right to resort to compulsory purchase procedures to acquire a right over land. The provisions of the 2016 Act are less flexible on this as they only allow for ownership or consent of owners.

43. A number of regulations have been made to give effect to the rule that an applicant for permission must have sufficient interest in the site. These have included article 18(1)(d) of the Local Government (Planning and Development) Regulations 1994 (S.I. No. 86 of 1994), article 22(1)(d) of the Regulations of 2001 in its original form, article 22(1) and 22(2)(g) and Form No. 2 of the Regulations of 2001, as inserted by article 8 of the Planning and Development Regulations 2006 (S.I. No. 685 of 2006).

44. Section 3 of the 2016 Act defines "prospective applicant" as follows:

" 'prospective applicant' means a person who -

(a) is the owner of the land concerned, or
(b) has the written consent of the owner to make an application under section 4 in respect of that land,

and who intends to apply for permission under that section in respect of that land; …"

45. This makes direct statutory provision for part of what is otherwise implied into the 2016 Act as a result of the decision of the Supreme Court in *Frescati Estates Limited v. Walker* [1975] I.R. 177. The term "owner" is not defined in section 3. The Board is empowered to evaluate whether any person's interest is sufficient to constitute ownership.

46. Section 3 of the 2016 Act is supplemented by article 285 of the Regulations of 2001, as inserted by article 5 of the Planning and Development (Strategic Housing Development) Regulations 2017 (S.I. No. 271 of 2017) (the Regulations of 2017), which provides that

the request by a prospective applicant under s.5 of the 2016 Act to enter into consultations with the Board must use Form No.11 of Schedule 3. This form in turn deals with ownership or written consent from the "site owner" at para. 7 under the heading "Prospective applicant's interest in the site, etc." Article 285(2) states as follows:

> "A request referred to in sub-article (1) shall be accompanied by the following, including maps and drawings, where appropriate:
>
> (a) where the prospective applicant is not the owner of the land concerned, the written consent of the owner to make an application under section 4 of the Act of 2016 in respect of that land; …"

47. Article 297(1) of the Regulations of 2001, as inserted by article 5 of the Regulations of 2017, deals with applications to the Board for permission for strategic housing developments. This includes similar provisions by requiring the applicant for permission to use Form No. 14 of Schedule 3. This deals with ownership or written consent from the "site owner" at para. 7 under the heading "Applicant's interest in the site, etc." This form also requires details of any ownership or control of the applicant over adjacent lands. Article 297(2) states as follows:

> "An application in sub-article (1) shall be accompanied by-
> (a) where the applicant is not the owner of the land concerned, the written consent of the owner to make an application under section 4 of the Act of 2016 in respect of that land; …"

48. Article 297(2)(c)(iii) specifies that wayleaves relating to the site are to be shown separately from the land or structure to which the application relates and must be clearly marked and coloured yellow. This mirrors article 22(2)(b)(iii) of the Regulations of 2001 which apply to permissions under Part III of the 2000 Act.

49. Proof of standing is necessary to protect property rights of an owner of a site from adverse consequences arising from conditions in permissions or refusals of permission on planning applications brought by vexatious interlopers relating to that site.

50. The requirement in the 2016 Act that any "prospective applicant" have sufficient interest in the site in accordance with s.3 must be satisfied when the pre-application process is initiated. Proof of consent of owners of a site removes at the outset any issue that an intended application might lead to a planning result which could adversely affect property rights in the site of those who have not consented to the application for permission. Both the definition of "prospective applicant" in s.3 and the regulations make clear that any written consent of an owner must relate to the application for permission and not just to the pre-application process.

51. In this case no issue concerning adverse impact on property rights of other owners of the site arose because the person then identified as the "prospective applicant" had sufficient "interest" when the pre-application process was set in motion. Lordglen established this in accordance with the regulations. When the application for permission was lodged,

Derryroe also established sufficient "interest" in the site in accordance with the regulations by producing letters from the owners consenting to the application.

52. Pembroke Road Association is entitled to seek judicial review on planning grounds. However, its interest in upholding a rule requiring that an applicant be the same person as the "prospective applicant" is not based on any claim that it owns the site or should intervene in the interest of owners to protect their property rights. There was no need for the Board to weed out either the pre-application process or the planning application on this ground. Judicial intervention is not necessary to enforce property rights of owners of the site.

53. I was referred to the judgment of Hyland J. *in Sweetman v. An Bord Pleanála and Others* [2021] IEHC 16. I agree with Hyland J. that examination in a planning application of the interest of an applicant in the site is "jurisdictional". This is, of course, not the full story because the person protected by law is the owner of the site and the purpose of planning regulations relating to ownership or other interest in the site is to give effect to this protection.

54. In *Sweetman v. An Bord Pleanála and Others* [2021] IEHC 16, the applicant for judicial review was not able to demonstrate that the applicant for permission did not have written consent from all landowners affected. The approach taken by the Court meant that it was unnecessary to consider whether it would be appropriate in exercise of discretion to grant or refuse judicial review. The issue of whether the application for judicial review would have succeeded if, perchance, he could have shown some small portion of the site to be outside ownership or consent did not arise. While he had general standing to challenge the decision of the Board, it did not necessarily follow that a court should nullify the permission if he could demonstrate some minor defect of this sort.

55. I have considered the two authorities cited by Hyland J. *In McCallig v. An Bord Pleanála and Others* [2013] IEHC 60, the applicant for judicial review showed ownership of part of a site which was the subject of a planning application made without her consent. She therefore had an interest in how the outcome of that application affected her land. She demonstrated that information provided in the planning application was misleading on this aspect.

56. In *Hynes v. An Bord Pleanála and Others* [1998] IEHC 127 (Unreported, High Court, 30 July 1998) McGuinness J. decided that the applicant for permission had sufficient "interest" in the site for the purposes of the test laid down by Henchy J. in *Frescati Estates Limited v. Walker* [1975] I.R. 177. An infringement of article 18(1)(d) of the Regulations of 1994 which misdescribed the nature of the interest of the developer in part of the site was considered to be minor. It was clear that the developer did not set out to mislead the public or the planning authority. The planning authority itself owned this part of the site and consented to the planning application.

57. For these reasons I consider that the decision in *Sweetman v. An Bord Pleanála and Others* [2021] IEHC 16 does not assist on the issue of whether Pembroke Road

Association ought to be given judicial review. Ownership of the site is the only value which I can identify as underpinning any requirement in the 2016 Act that a "prospective applicant" must be the same person as the applicant. The statutory pre-application process did not involve the public. Nothing in what happened worked to the disadvantage of either the planning authority, the Board, the public, or the owners of the land or involved any underhand or misleading activity by either Lordglen or Derryroe.

58. The initial decision of the Board on standing in this case related to the qualification of Lordglen as "prospective applicant" when the pre-application documents were accepted. Lordglen complied with the obligation to show that it had the consent of any other owner of the site. Derryroe also complied with the underlying requirement, albeit that it did not hold consents in writing from owners prior to the pre-application process and was not the "prospective applicant". However, the statutory objective of ensuring that the person for the time being pursuing the planning process has sufficient interest in the site was met.

59. The only other circumstance which I can identify in the legislation when identity of an applicant for permission might be decisive is set out in s.35 of the 2000 Act. This allows a planning authority to refuse permission where a person to whom the section applies has been guilty of planning breaches. I doubt that this provision applies to permissions granted by the Board under Part 2 Chapter 1 of the 2016 Act as these are not "permission" for the purposes of Part III of the 2000 Act. The provisions of s.35 had no relevance to either Lordglen or Derryroe during the currency of this planning application.

60. It follows it is not appropriate to nullify this planning application on grounds that Derryroe is not the same as Lordglen. These two entities have common sufficient interest in both the site and pursuit of the application. No statutory factor or policy consideration is engaged which made it appropriate for the Board to decline the planning application. In contrast, Pembroke Road Association has no legitimate interest in securing compliance with this particular aspect of the planning process.

61. The judgment of O'Hanlon J. in *Schwestermann v. An Bord Pleanála and Others* [1994] 3 I.R. 437 is relevant. Where a challenge to validity of a permission relates to identity of the applicant disclosed in a planning application, the concern of the law is with the applicant's connection with the site which is the subject of the development and that the application for permission has been made with the knowledge and approval of the owners or by somebody who can show other sufficient interest. This is clear from the following passage at p. 445 which comes after the citation of what is described in the judgment as a "formidable body" of supporting authority:

> "In my opinion the application should be regarded as one made on behalf of, and with the knowledge and approval of, the freehold owner of the lands, and in any event I would also consider that on the facts of the present case any one of three parties concerned – Glenmoy Ltd., Glenmoy Developments Ltd. and James Hoare – had a sufficient interest in and connection with the lands concerned and the proposed development thereof, to sustain an application for planning permission made in the name of any one of the said parties. The question of knowledge and

approval can hardly present any difficulty when Mr. and Mrs. Hoare were the only shareholders in, and directors of, both companies, at all relevant times."

62. The second matter raised by Pembroke Road Association is the contention that Derryroe failed to provide "a statement indicating how…" as prescribed by sub-article 299B(1)(b)(ii)(II)(C) of the Regulations of 2001 and that the Board ought to have refused to entertain the application for permission because this was not included in the planning documents. This point was argued in full before me. On the last day of a four-day hearing I was told that my colleague, Humphries J., would be delivering judgment on the same issue on the following Monday. It is suggested that this should determine the matter for me.

63. This is not a case where I am bound to follow reasoning in a precedent which was available and cited when the matter was argued before me. It sometimes happens that two judges who are asked to decide the same issue in separate actions which are heard at around the same time and come to differing conclusions. When this happens, the issue of whether one judgment becomes a binding precedent on the other does not resolve itself into "a question of dates" which depends on which judgment gets into print first.

64. As it happens, by the time of my colleague's judgment in *Waltham Abbey Residents Association v. An Bord Pleanála and Others* [2021] IEHC 312, I had already concluded that I should reject this ground of complaint. As I had made up my mind, I do not consider that I am obliged to unmake it on issues where I reached conclusions which differ from those of my colleague.

65. The parties have been given an opportunity to make further submissions in the light of the judgment in the *Waltham Abbey* case. With the greatest respect to the views of my colleague, my view has not changed as a result of this.

66. It struck me when I was hearing submissions on this issue that the sense in which the phrase "a statement indicating how…" is used in sub-article 299B(1)(b)(ii)(II)(C) of the regulations, conveys that an applicant is being asked to provide an assessment, appraisal or evaluation.

67. It also struck me that the issue of whether material provided by an applicant is sufficient for the purposes of sub-article 299B(1)(b)(ii)(II)(C) is the sort of matter which the Board is empowered to decide conclusively in exercise of its right to determine questions when examining whether to assume jurisdiction. I cannot interfere unless exceptional circumstances are established which demonstrate clearly that the substance of what is required by the regulation was not provided by an applicant or that the decision of the Board to accept the adequacy of material as fulfilling the requirement was irrational or unreasonable.

68. The issue raised by Pembroke Road Association arises in the context of the election by the State to require examination on a case-by-case basis of projects listed in Annex II of Directive 2011/92/EU of the European Parliament and of the Council of 13 December

2011 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2014/52/EU of the European Parliament of the Council of 16 April 2014 (codification) (the Directive) in evaluating whether an environmental impact assessment is necessary for any such project.

69. Article 4(4) of the Directive provides as follows:

> "Where Member States decide to require a determination for projects listed in Annex II, the developer shall provide information on the characteristics of the project and its likely significant effects on the environment. The detailed list of information to be provided is specified in Annex IIA. The developer shall take into account, where relevant, the available results of other relevant assessments of the effects on the environment carried out pursuant to Union legislation other than this Directive. The developer may also provide a description of any features of the project and/or measures envisaged to avoid or prevent what might otherwise have been significant adverse effects on the environment."

70. Annex IIA is headed "Information referred to in Article 4(4) (information to be provided by the developer on the projects listed in Annex II)" and sets out the following categories of information:

> " 1. A description of the project, including in particular:
>
> (a) a description of the physical characteristics of the whole project and, where relevant, of demolition works;
> (b) a description of the location of the project, with particular regard to the environmental sensitivity of geographical areas likely to be affected.
>
> 2. A description of the aspects of the environment likely to be significantly affected by the project.
>
> 3. A description of any likely significant effects, to the extent of the information available on such effects, of the project on the environment resulting from:
>
> (a) the expected residues and emissions and the production of waste, where relevant;
> (b) the use of natural resources, in particular soil, land, water and biodiversity.
>
> 4. The criteria of Annex III shall be taken into account, where relevant, when compiling the information in accordance with points 1 to 3."

71. It is clear from the wording of Article 4(4) that the core obligation is to provide an adequate description of the characteristics of the project and its likely significant effects on the environment with reference to the items listed in Annex IIA at points 1 to 3 and that in providing this information "The developer shall take into account, where relevant, the available results of other relevant assessments of the effects on the environment carried out pursuant to Union legislation other than this Directive". The idea is that the specified information is provided to enable an assessment of the project and that as part

of this exercise available results of other relevant assessments having a bearing on the environment which have been carried out pursuant to other European Union legislation are evaluated.

72. These provisions in the Directive have been implemented in Irish law in the context of the 2016 Act by sub-articles 299B(1)(b)(ii) and 299B(1)(c) of the Regulations of 2001, as inserted by article 94 of the Regulations of 2018, the former of which provides as follows:

"Where the Board concludes, based on such preliminary examination, that-

(II) there is significant and realistic doubt in regard to the likelihood of significant effects on the environment arising from the proposed development, it shall satisfy itself that the applicant has provided to the Board

(A) the information specified in Schedule 7A, (which repeats paras. 1 to 4 of Annex IIA of the Directive virtually word for word)
(B) any further relevant information on the characteristics of the proposed development and its likely significant effects on the environment, and
(C) a statement indicating how the available results of other relevant assessments of the effects on the environment carried out pursuant to European Union legislation other than the Environmental Impact Assessment Directive have been taken into account."

73. It is also relevant to consider sub-article 299B(1)(c) which provides as follows:

"The information referred to in paragraph (b)(ii)(II) may be accompanied by a description of the features, if any, of the proposed development and the measures, if any, envisaged to avoid or prevent what might otherwise have been significant adverse effects on the environment of the development." This mirrors the final sentence in article 4(4) of the Directive.

74. Sub-article 299B(1)(b)(ii)(II) of the regulations gives effect to the underlying provision of the Directive, which is Article 4(4). The overall obligation is to provide information on the characteristics of the development and its likely significant effects on the environment. Within this, there is an obligation to look at the detail in Annex IIA and to take into account available results from other relevant assessments under European Union legislation. It is necessary to construe obligations imposed by this sub-article in a manner which gives functional effect to the objectives of the corresponding provision in the Directive.

75. Article 299B(2)(a) states as follows:

"Where the information referred to in sub-article (1)(b)(ii)(II) was not provided by the applicant, the Board shall refuse to deal with the application pursuant to section 8(3)(a) of the Act of 2016."

76. This includes a discretionary element because it is clear from s.8(3)(a) of the 2016 Act, as amended, that the Board is given jurisdiction to assess and consider whether the material provided in an application passes muster. It is not for me to second guess any evaluation by the Board on this type of issue except in circumstances where it is clear that on any view of matters something vital is missing and that the discretion was improperly exercised. Section 8(3)(a) of the 2016 Act reads as follows:

> "The Board may decide to refuse to deal with any application made to it under section 4(1) where it considers that the application for permission, or the environmental impact assessment report or Natura impact statement if such is required, is inadequate or incomplete, having regard in particular to the permission regulations and any regulations made under section 12, or section 177 of the Act of 2000, or to any consultations held under section 6."

77. Although the Regulations of 2018 are not made under any of the provisions referred to in s.8(3)(a) of the 2016 Act, it is clear that the Board must have regard to them in exercising its jurisdiction on whether to admit or refuse to deal with an application. The Regulations of 2018 amended s.8(3)(a) to include the "environmental impact assessment report". Section 8(3)(b)(ii) specifies that where the Board rejects an application it must give reasons for its decision not to consider the application. The Board is not obliged to give reasons where it decides that the application is in order and that it should assume jurisdiction.

78. I refer to an analysis by the learned editor of Wade & Forsyth, *Administrative Law,* 10th Ed., (Oxford University Press, 2009) at p. 219 commenting on a quoted extract from the speech of Lord Mustill in the House of Lords in *R v. Monopolies and Mergers Commission ex p. South Yorkshire Transport Limited* [1993] 1 W.L.R. 23 at p. 32 which I agree with and consider applicable to the role of the Board in making this type of assessment. Sub-article 299B(1)(b)(ii)(II) of the regulations deals with evaluative material and there is a range of reasonable interpretation of how the requirements of that sub-article may be complied with.

79. It is necessary to permit the Board a proper margin of appreciation in the discharge of this function. The issue of whether material provided by an applicant is adequate to comply with sub-article 299B(1)(b)(ii)(II) falls to be decided in accordance with the principles laid down by the Supreme Court in *O'Keefe v. An Bord Pleanála and Others* [1993] 1 I.R. 39 at pp. 70-71. It has not been demonstrated that the Board acted irrationally or unreasonably when it decided to accept material presented in the "Environmental Impact Screening Report" as sufficient compliance with the requirement in sub-article 299B(1)(b)(ii)(II)(C).

80. The "statement" which sub-article 299B(1)(b)(ii)(II)(C) refers to means analysis which identifies any relevant assessments of the effects on the environment carried out pursuant to other European Union legislation and sets out the consideration which has been given to each of these assessments in the context of the proposed development. " A statement indicating how…" referred to in this sub-article is a requirement that an

appraisal be provided "indicating", in the sense of identifying, and analysing, "how" these matters have been "taken into account." It is sufficient to identify the assessments and provide analysis of how the results of each assessment have been taken into account. The appraisal may show that a particular assessment relating to an environmental matter is in fact irrelevant or that the project will not impact on the results of that assessment or that the project may impact on the results of that assessment in a particular way. There are a number of potential outcomes to this type of appraisal.

81. The issue of interpretation of this sub-article should not be framed as one of whether the words "information" and "statement" should each be given a separate stand-alone meaning divorced from surrounding context.

82. Furthermore, the issue should not be framed as one of whether "information" and "statement" have the same meaning and must be treated as interchangeable because they are used to describe the same things in sub-article 299B(1)(b)(ii)(II)(C) and in sub-article 299C(1)(a) which I quote in a later section of this judgment. The subject matter of what is described as "information" in one regulation may have an extended meaning where referred to as something else in another regulation which has a different purpose.

83. The purpose of sub-article 299B(1)(b)(ii)(II)(C) is to ensure that the developer "take into account, where relevant, the available results of other relevant assessments of the effects on the environment carried out pursuant to Union legislation…". This requirement does not use the word "information" or the word "statement" because neither of these words in isolation can convey the full sense of what the developer must provide. It is clear from the quoted extract from Article 4(4) that the developer must provide contextualised evaluations which refer to the results of relevant assessments.

84. The context in which this appraisal is required to be submitted by the applicant is to enable the Board to give full consideration to relevant matters set out in Article 4(4) of the Directive.

85. It is clear on any reading of the planning file that the material required by sub-article 299B(1)(b)(ii)(II)(C) is to be found in the "Environmental Impact Screening Report". The cover of this document states that it is "prepared in response to Item 12 of An Bord Pleanála Opinion". The introduction at para. 1 p. 1 of this document specifies as follows:

> "This EIA screening report has been prepared in response to item 12 of the An Bord Pleanála Opinion, dated 10 December 2019, having regard to article 299B(1)(b)(ii)(II) and article 299B(1)(c) of the Planning and Development Regulations 2001 – 2018."

86. The "Notice of Pre-Application Consultation Opinion" dated 10 December 2019 is specific about what the applicant was required to provide to enable screening on whether an environmental impact assessment would be required. It lists the following amongst the "specific information" to be "submitted with any application for permission:…

12. Information referred to in article 299B(1)(b)(ii)(II) and article 299B(1)(c) of the Planning and Development Regulations 2001-2018, submitted as a standalone document."

87. I agree with the Board and Derryroe that any necessary statements indicting how other relevant assessments carried out pursuant to European legislation have been "taken into account" are contained in the "Environmental Impact Screening Report". I consider that the requirement of the Board that all relevant material for the purposes of sub-article 299B(1)(b)(ii)(II) and sub-article 299B(1)(c) should be submitted as a stand-alone document was a direction properly given in interest of good administration. This required that everything which the applicant was obliged to provide and put before the Board for due consideration on these issues, which are all related to each other, be presented in a single document. All of this information is assessed together when the Board is considering whether to require an environmental impact assessment.

88. With due respect to my colleague's view, I did not conclude that there is any absolute requirement that the analytical material referred to as "a statement indicating how…" in sub-article 299B(1)(b)(ii)(II)(C) must always be presented in the form of one distinct identifiable document. For example, the purpose of requiring that this analysis be carried out and presented might be achieved by including a chapter in the "Environmental Impact Screening Report". In my view, the required "statement indicating how…" or analysis may also be provided by referring to different assessments of the effects on the environment carried out pursuant to European Union legislation in different parts of an environmental impact screening report where relevant underlying issues arise and are examined.

89. There is no basis for any assertion that the Board did not duly consider whether the requirements of article 299B(1)(b)(ii)(II) were complied with. It was not necessary to record in a formalised way the manner in which the Board vetted the application for compliance with the provisions of the 2016 Act and the regulations or what led the Board to conclude that the application was in order.

90. Nothing arises because of the fact that the Water Framework Directive was not referred to in the "Environmental Impact Screening Report". This submission does not pay sufficient regard to the fact that the "Environmental Impact Screening Report" is accompanied by and refers to further specialist reports dealing with matters such as hydrology and ecology which feed into the conclusions. I agree with the submission of the Board that Pembroke Road Association has not identified any assessment carried out pursuant to European Union legislation which was available, and which was not taken into account in the material submitted to the Board.

91. The third issue raised by Pembroke Road Association relates to the height of buildings in the proposed development. The complaint is that the height of the buildings involves a material contravention of the Dublin City development plan and that the Board failed to consider whether it could be demonstrated that implementation of policies and objectives of the Dublin City development plan which pre-dated the "Urban Development and Building Heights Guidelines for Planning Authorities" of December 2018 (the ministerial

guidelines) does not align with and support the objectives and policies of the National Planning Framework.

92. The provisions of Dublin City development plan relating to building height in the Ballsbridge area, which the Board can be taken to be fully familiar with, do not align with and support the objectives and policies of the National Planning Framework. No other view is tenable.

93. The order of the Board refers to objective 13 of the National Planning Framework which is quoted at Chapter 1 para. 1.18 of the ministerial guidelines. This specifies for the application of performance criteria in planning appraisal of the height of proposed buildings. This is clearly at odds with blanket height-based restrictions in the Dublin City development plan which would have precluded the grant of this permission. These performance criteria are set out in the "Development Management Criteria" in Chapter 3 para. 2 of the ministerial guidelines.

94. The argument by Pembroke Road Association is premised on the assumption that a determination by the Board that height policies and objectives of the Dublin City development plan do not align with objectives and policies of the National Planning Framework is a precondition to application of the "Development Management Criteria" and SPPR 3 to override height provisions in the Dublin City development plan.

95. The Board did not go down that route in arriving at its decision as it did not apply SPPR 3 in the ministerial guidelines as overriding and replacing contradictory provisions of the Dublin City development plan under s.9(3) of the 2016 Act.

96. The Board chose instead to exercise power under s.9(6) of the 2016 Act. The Board accepted that the development would materially contravene height provisions in the Dublin City development plan. It decided that permission for the development should nevertheless be granted because of its strategic or national importance and also having regard to SPPR 3 in the ministerial guidelines, proved compliance with the criteria in para. 2 of Chapter 3 of those guidelines and having regard to national policy in Project Ireland 2040 National Planning Framework, and in particular objectives 13 and 35 of same.

97. I will now refer to relevant statutory provisions, extracts from ministerial guidelines, special planning policy requirements, provisions of the development plan and the relevant part of the order of the Board granting this permission.

98. Chapter 16.7 of the Dublin City development plan, dealing with building height, sets out general policies. These include a policy that higher building forms create clusters and prevent visual clutter or negative disruption of the city skyline. The plan emphasises the quality of Dublin as a low-rise city. It allows for buildings of up to 24 metres in height near rail and Dart and Luas stations and only allows buildings of up to 28 metres in height in the inner city. Mid-rise buildings of up to 50 metres in height are allowed in 10 specific areas. High-rise buildings are only allowed in Docklands, Connolly, Heuston and George's

Quay areas. The proposed development at Herbert Park would involve a contravention of this element of the development plan as it is marginally outside the 500-metre catchment of rail hubs. The maximum height of the buildings is 45.1 metres over the OD. The site is within the 16 metre height limit prescribed by the development plan.

99. Section 28 of the 2000 Act, as amended, deals with ministerial guidelines. Section 28(1) specifies as follows:

> "The Minister may, at any time, issue guidelines to planning authorities regarding any of their functions under this Act and planning authorities shall have regard to those guidelines in performance of their functions."

This is supplemented by s.28(1C) which specifies as follows:

> "Without prejudice to the generality of subsection (1), guidelines under that subsection may contain specific planning policy requirements with which planning authorities, regional assemblies and the Board shall, in the performance of their functions, comply."

100. The following elements in subsections of s.9 of the 2016 Act, which sets out what the Board must consider before making a decision to grant or refuse permission under s.4 of that Act, are also relevant:

" (2) In considering the likely consequences for proper planning and sustainable development in the area in which it is proposed to situate the strategic housing development, the Board shall have regard to-

(a) the provisions of the development plan….for the area,
(b) any guidelines issued by the Minister under section 28 of the Act of 2000, …"

(3)(a) When making its decision in relation to an application under this section, the Board shall apply, where relevant, specific planning policy requirements of guidelines issued by the Minister under section 28 of the Act of 2000.

(b) Where specific planning policy requirements of guidelines referred to in paragraph (a) differ from the provisions of the development plan of a planning authority, then those requirements shall, to the extent that they so differ, apply instead of the provisions of the development plan.
(c) In this subsection 'specific planning policy requirements' means such policy requirements identified in guidelines issued by the Minister to support the consistent application of Government or national policy and principles by planning authorities, including the Board, in securing overall proper planning and sustainable development."

101. The final provision in s.9 dealing with the relationship between the powers of the Board and a development plan is contained in section 9(6). This subsection extends the power given by s.37(2) of the 2000 Act to the Board to grant permission for development which

materially contravenes a development plan. This power may be exercised by the Board in applications for permission under the 2016 Act.

102. Strictly speaking, exercise of this power should not arise where a provision of a development plan touching on any issue is over-ridden by a specific planning policy requirement in ministerial guidelines. This is because the effect of s.9(3) of the 2016 Act is that where a specific planning policy requirement must be applied, it replaces the relevant portion of the development plan. This is not a matter for exercise of discretion.

103. Section 9(6) provides as follows:

> "(a) Subject to paragraph (b), the Board may decide to grant a permission for a proposed strategic housing development in respect of an application under section 4 even where the proposed development, or a part of it, contravenes materially the development plan or a local area plan relating to the area concerned.
>
> (b) The Board shall not grant permission under paragraph (a) where the proposed development, or a part of it, contravenes materially the development plan or local area plan relating to the area concerned, in relation to zoning of the land.
>
> (c) Where the proposed strategic housing development would materially contravene the development plan or local area plan, as the case may be, other than in relation to the zoning of the land, then the Board may only grant permission in accordance with paragraph (a) where it considers that, if section 37(2)(b) of the Act of 2000 were to apply, it would grant permission for the proposed development."

104. Section 37(2)(b) of the 2000 Act provides as follows:

> "Where a planning authority has decided to refuse permission on the grounds that a proposed development materially contravenes the development plan, the Board may only grant permission in accordance with paragraph (a) where it considers that-
>
> (i) the proposed development is of strategic or national importance,
> (ii) there are conflicting objectives in the development plan or the objectives are not clearly stated, insofar as the proposed development is concerned, or
> (iii) permission for the proposed development should be granted having regard to regional spatial and economic strategy for the area, guidelines under section 28, policy directives under section 29, the statutory obligations of any local authority in the area, and any relevant policy of the Government, the Minister or any Minister of the Government, or
> (iv) permission for the proposed development should be granted having regard to the pattern of development, and permissions granted, in the area since the making of the development plan."

105. The general statements of "Background and Context" set out at Chapter 1 of the ministerial guidelines are important.

106. The context of the regulations is a policy view of the Minister that inflexible or unreasonable application of generic maximum height limits: "…can undermine wider national policy objectives to provide more compact forms of urban development as outlined in the National Planning Framework and instead continue an unsustainable pattern of development whereby many of our cities and towns continue to grow outwards rather than consolidating and strengthening the existing built up area. Such blanket limitations can also hinder innovation in urban design and architecture leading to poor planning outcomes." (para. 1.4 of Chapter 1) "In this regard, these guidelines outline wider and strategic policy considerations and a more performance criteria driven approach that planning authorities should apply alongside their statutory development plans in securing the strategic outcomes of the National Planning Framework." (para. 1.6 of Chapter 1)

107. The ministerial guidelines make clear that they are formulated to assist in carrying forward Government policy as set out in the National Planning Framework. "The Government's National Planning Framework, together with the National Development Plan as part of Project Ireland 2040, will ensure our country's development is planned for appropriately in strategic terms and that there is effective integration between strategic planning and investment in the necessary enabling infrastructure."(para. 1.15 of Chapter 1)

108. "The first of the 10 National Strategic Outcomes in the National Planning Framework that the Government is seeking to secure relates to compact urban growth, with the associated objective that at least half of the future housing growth of the main cities will be delivered within their existing built-up areas through infill and brownfield development… The Government is determined to ensure that the realisation of this objective is a shared priority across Government, the wider public sector and through private investment and it will therefore be a key driver for investment and policy delivery at national, regional and local levels." (para. 1.16 of Chapter 1)

109. "In addition, the National Planning Framework has a number of directly relevant national policy objectives that articulate delivering on a compact urban growth programme... In particular, NPO 13 (text below) identifies building height as an important measure for urban areas to deliver and achieve compact growth as required:

> 'In urban areas, planning and related standards, including in particular building height and car parking will be based on performance criteria that seek achieve well designed high quality outcomes in order to achieve targeted growth. These standards will be subject to a range of tolerance that enables alternative solutions to be proposed to achieve stated outcomes, provided public safety is not compromised and the environment is suitably protected.'" (para. 1.18 of Chapter 1)

110. "A key objective of the NPF is therefore to see that greatly increased levels of residential development in our urban centres and significant increases in the building heights and overall density of development is not only facilitated but actively sought out and brought forward by our planning processes and particularly so at local authority and An Bord

Pleanála levels." (para. 1.20 of Chapter 1) "Increasing prevailing building heights therefore has a critical role to play in addressing the delivery of more compact growth in our urban areas, particularly our cities and large towns through enhancing both the scale and density of development and our planning process must actively address how this objective will be secured." (para. 1.21 of Chapter 1)

111. The focus of the argument made by Pembroke Road Association relates to para. 3.1 of Chapter 3 of the ministerial guidelines. The general heading of Chapter 3 of the guidelines is "Building Height and the Development Management process". Pembroke Road Association asserts that the decision to grant permission is invalid because there is nothing to show that the Board had regard to the third point set out in para. 3.1 of Chapter 3 of the ministerial guidelines. This is headed "Development Management Principles", and it states as follows:

> "In relation to the assessment of individual planning applications and appeals, it is Government policy that building heights must be generally increased in appropriate urban locations. There is therefore a presumption in favour of buildings of increased height in our town/city cores and in other urban locations with good public transport accessibility. Planning authorities must apply the following broad principles in considering development proposals for buildings taller than prevailing building heights in urban areas in pursuit of these guidelines:
>
> - Does the proposal positively assist in securing National Planning Framework objectives of focusing development in key urban centres and in particular, fulfilling targets related to brownfield, infill development and in particular, effectively supporting the National Strategic Objective to deliver compact growth in our urban centres?
> - Is the proposal in line with the requirements of the development plan in force and which plan has taken clear account of the requirements set out in Chapter 2 of these guidelines?
> - Where the relevant development plan or local area plan pre-dates these guidelines, can it be demonstrated that implementation of the pre-existing policies and objectives of the relevant plan or planning scheme does not align with and support the objectives and policies of the National Planning Framework?"

112. It is self-evident from the relevant elements of Dublin City development plan relating to height of buildings in Ballsbridge, that the objectives of that plan do not align with or support the objectives and policies of the National Planning Framework as set out in Chapter 1 of the ministerial guidelines. The Board was fully aware of this. It was unnecessary to state this in its direction or order. The purpose of para. 3.1 of Chapter 3 of the ministerial guidelines is to require planning authorities to apply broad principles, having regard to a presumption in favour of increased height in city cores and urban areas with good public transport accessibility. Dublin City development plan sets out blanket height rules. The National Planning Framework requires higher buildings and that

determinations of whether permission should be granted or refused where height of buildings is relevant should use performance criteria.

113. Paragraph 3.2 of Chapter 3 fleshes out this move to use of performance criteria in dealing with height of proposed developments. This paragraph sets out detailed criteria at the scales of the relevant city, district, neighbourhood or street and the specific site or building. An applicant is obliged to demonstrate that any proposed development meets these criteria.

114. Where a planning authority or the Board considers that the specific criteria are appropriately incorporated into the development proposals, the ministerial directive requires at para. 3.2 that the planning authority and the board in exercising their functions "shall apply the following Strategic Planning Policy Requirement under Section 28(1C) of the Planning and Development Act 2000 (as amended). SPPR3: 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."

115. All of the issues were fully taken into account in the report of the inspector which addressed the criteria set out in s.37(2)(b) of the 2000 Act. She considered on that basis that the permission should be granted, notwithstanding material contravention of the development plan as sub-paragraphs (i) and (iii) of that subsection had been complied with. The Board in its direction also considered that these criteria were satisfied and states the following in its order:

> "The Board considers that, while a grant of permission for the proposed Strategic Housing Development would not materially contravene a zoning objective of the Development Plan, it would materially contravene the Plan with respect to building height limits. The Board considers that, having regard to the provisions of section 37(2)(b)(i) and (iii) of the Planning and Development Act 2000, as amended, the grant of permission in material contravention of the development plan would be justified for the following reasons and considerations:
>
> ` In relation to section 37(2)(b)(i) of the Planning and Development Act 2000 (as amended):
>
> The proposed development is considered to be of strategic or national importance by reason of its potential to contribute to the achievement of the Government's policy to increase delivery of housing set out in Rebuilding Ireland – Action Plan for Housing and Homelessness issued in July 2016, and to facilitate the achievement of greater density and height in residential development in an urban centre close to public transport and centres of employment.

In relation to section 37(2)(b)(iii)of the Planning and Development Act 2000 (as amended):

Permission for the development should be granted having regard to guidelines under section 28 of the Act, specifically SPPR 3 of the Building Height Guidelines which states that where a development complies with the Development Management Criteria in section 3.2, it may be approved, even where specific objectives of the relevant development plan or local area plan may indicate otherwise and national policy in Project Ireland 2040 National Planning Framework (in particular objectives 13 and 35). An assessment of the proposed development was carried out to determine that the proposed development conforms with the development management criteria in section 3.2 of those guidelines.

In accordance with section 9(6) of the 2016 Act, the Board considered that the criteria in section 37(2)(b)(i) and (iii) of the 2000 Act were satisfied for the reasons and considerations set out in the decision."

116. The Board relied on s.9(6) of the 2016 Act in dealing with the issue of the height of the development and treated this as a material contravention of the development plan which it was prepared to disregard because it applied the provisions of s.37(2)(b)(i) and (iii) of the 2000 Act. The Board did not rely on s.9(3) of the 2016 Act. It was not necessary to come to any view that the policies and objectives of the height provisions in the Dublin City development plan did not align with the policies and objectives of the National Planning Framework on height of buildings in order to reach the Board's decision under section 9(6).

117. The next ground of challenge is the claim that the Board failed to consider adequately the impact of the proposed demolition of 40 Herbert Park, contrary to Article 3(1)(d) of the Directive. The complaint is that there is no evidence that the Board considered the cultural significance of 40 Herbert Park in its screening determination.

118. Article 3(1)(d) of the Directive sets out a requirement that an environmental impact assessment "identify, describe and assess in an appropriate manner, in the light of each individual case, the direct and indirect significant effects of a project" on "material assets, cultural heritage and the landscape;…".

119. The proposed development included the demolition of a house at 40 Herbert Park. The issue of the architectural and cultural significance of this building was the subject of extensive submissions. This was both a planning consideration and a relevant matter under Article 4(3) of the Directive, part of which provides as follows:

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

This was one of many matters which the Board was obliged to consider in determining whether or not there was a real likelihood that there would be a significant effect on the environment as a result of the proposed development.

120. Annex III of the Directive is transposed into Irish planning law in the form of Schedule 7 to the Regulations of 2001. The function of Schedule 7 is that it sets out "criteria for determining whether development listed in Part 2 of Schedule 5 (of those regulations) should be subject to an environmental impact assessment." Schedule 7 makes some changes to Annex III, including a change in Section 1, dealing with "Characteristics of proposed development" to include sub-para (c) "the nature of any associated demolition works,".

121. Section 2, dealing with "Location of proposed development" specifies amongst the relevant criteria "The environmental sensitivity of geographical areas likely to be affected by the proposed development, with particular regard to" a number of factors. The factors listed include, at (c) "the absorption capacity of the natural environment, paying particular attention to the following areas: … (viii) landscapes and sites of historical, cultural or archaeological significance."

122. The relevant provisions of the regulations are sub-articles 299B(2)(b) and 299C(1) of the Regulations of 2001 as inserted by article 94 of the Regulations of 2018.

123. Sub-article 299B(2)(b) provides as follows:

"(i) Where the information referred to in sub-article (1)(b)(ii)(II) was provided by the applicant, the Board shall carry out an examination of, at least, the nature, size or location of the development for the purposes of a screening determination.

(ii) The Board shall make a screening determination and-

(I) if such determination is that there is no real likelihood of significant effects on the environment arising from the proposed development, it shall determine that an EIA is not required, or

(II) if such determination is that there is a real likelihood of significant effects on the environment arising from the proposed development, it shall-

(A) determine that the development would be likely to have such effects, and
(B) refuse to deal with the application pursuant to section 8(3)(a) of the Act of 2016.

124. The relevant parts of sub-article 299C(1) flow from Article 4, paras. 3, 4, and 5 of the Directive and provide as follows:

"(a) The Board shall, in carrying out its screening determination under article 299B(2)(b) whether there is no real likelihood of significant effects on the environment arising from a proposed development or there is a real likelihood of

significant effects on the environment arising from the proposed development, have regard to-

(i) the criteria set out in Schedule 7,
(ii) the information submitted pursuant to Schedule 7A,
(iii) the information referred to in article 299B(1)(b)(ii)(II) and the description, if any, referred to in article 299B(1)(c),
(iv) the available results, where relevant, of preliminary verifications or assessments of the effects on the environment carried out pursuant to European Union legislation other than the Environmental Impact Assessment Directive, and ...."

(b) The Board shall-

(i) include, or refer to, in its screening determination under article 299B the main reasons and considerations, with reference to the relevant criteria listed in Schedule 7, on which the determination is based, ..."

125. These provisions are derived from Article 4(5) of the Directive which provides as follows:

"The competent authority shall make its determination, on the basis of the information provided by the developer in accordance with paragraph 4 taking into account, where relevant, the results of preliminary verifications or assessments of the effects on the environment carried out pursuant to Union legislation other than this Directive. The determination shall be made available to the public and:

(a) where it is decided that an environmental impact assessment is required, state the main reasons for requiring such assessment with reference to the relevant criteria listed in Annex III; or
(b) where it is decided that an environmental impact assessment is not required, state the main reasons for not requiring such assessment with reference to the relevant criteria listed in Annex III, ..."

126. It is important to keep in mind that the function of the Board here is to make a decision on whether, having regard to an extensive range of criteria and considerations set out in article 299C(1)(a), there is or is not a real likelihood of significant effects on the environment arising from the proposed development. Article 299C(1)(b) makes clear that it is not necessary for the Board to specifically refer in its determination to every matter on which the overall determination is based. It is sufficient that the Board includes in its screening determination or refers to "the main reasons and considerations, with reference to the relevant criteria listed in Schedule 7, on which the determination is based".

127. I can find nothing in the documentation which led to the decision of the Board which supports the complaint by Pembroke Road Association. There is no evidence that the Board failed to have regard to environmental issues relating to the house at 40 Herbert Park when deciding that there was no real likelihood of significant effects on the environment arising from the proposed development. The Board had sufficient material

before it to come to a conclusion that it was not necessary to require an environmental impact assessment. This included material in the "Environmental Impact Screening Report" which specifically deals with the architectural and cultural significance of 40 Herbert Park in the context of the proposal to demolish that building.

128. The issue of screening for environmental impact assessment is dealt with extensively in the inspector's report to the Board. While the architectural and historical significance of this building is not specifically mentioned in chapter 12 of that report which deals with environmental impact assessment, her general conclusion in para. 12.1.4 is that "…the application of the criteria in Schedule 7 to the proposed sub-threshold development demonstrates that it would not be likely to have significant effects on the environment and that an environmental impact assessment is not required before a grant of permission is considered. This conclusion is consistent with the EIA screening assessment report submitted with the application."

129. The Board direction and order relating to the grant of permission sets out its conclusion that the proposed development would not be likely to have significant effects on the environment. The Board provided the main reasons and considerations on which this conclusion was based. It is clear from the terms of the direction and order that the Board had regard to the content of the "Environmental Impact Screening Report" which specifically dealt with architectural and cultural heritage issues associated with the house at 40 Herbert Park. The text of the relevant element of the order and direction of the Board states the following:

> "The Board completed an environmental impact assessment screening of the proposed development and considered that the Environmental Impact Screening Report submitted by the applicant, identifies and describes adequately the direct, indirect, secondary, and cumulative effects of the proposed development on the environment."

130. There is no basis on which I can go behind this statement and conclude that the Board, in arriving at its decision on screening, failed to give due consideration to the status of 40 Herbert Park in the context of the environmental impact of demolition of that house.

131. The final ground on which judicial review is sought relates to condition 26 of the permission which reads as follows:

> "The developer shall pay to the planning authority a financial contribution as a special contribution under section 48(2)(c) of the Planning and Development Act 2000 in lieu of the provision of public open space within the site. The amount of the contribution shall be agreed between the planning authority and the developer or, in default of such agreement, the matter shall be referred to An Bord Pleanála for determination. The contribution shall be paid prior to commencement of development or in such phased payments as the planning authority may facilitate and shall be updated at the time of payment in accordance with changes in the

Wholesale Price Index – Building and Construction (Capital Goods), published by the Central Statistics Office.

Reason: It is considered reasonable that the developer should contribute towards the specific exceptional costs which are incurred by the planning authority which are not covered in the Development Contribution Scheme and which will benefit the proposed development."

132. Condition 27 of the permission obliges the developer to pay a financial contribution to the planning authority in accordance with the terms of the "Development Contribution Scheme made under section 48 of the Planning and Development Act 2000, as amended" in respect of public infrastructure facilities benefiting development in the area.

133. Both of these conditions were inserted as a result of recommendations made by the inspector to the Board.

134. The Dublin City Council development contribution scheme has been made under s.48 of the 2000 Act. The scheme envisages development contributions in respect of public infrastructure, including open space, as provided for in paragraphs 7-9. Condition 27 of the permission relates to this and imposes an obligation to make financial contributions in respect of public infrastructure.

135. Paragraph 10 of the scheme provides as follows:

> "The Dublin City Development Plan provides the discretion to the Council to determine a financial contribution in lieu of all or part of the public open space requirement for a particular development. The Plan provides that in the event of the planning authority considering a site to be too small or inappropriate to fulfil Dublin City Development Plan requirements for public open space provision a financial contribution of €4,000 per unit towards provision of or improvements to a park and/or enhancement of amenities in the area in line with the City's Park strategy shall be required."
>
> I have been unable to locate any reference to €4,000 in extracts from the Dublin City development plan provided.

136. The scheme states the following in relation to "special development contributions:"

> "A special development contribution may be imposed under Section 48 of the Act where exceptional costs not covered by the Dublin City Council Development Contribution Scheme 2020-2023 are incurred by the Council in the provision of a specific public infrastructure or facility. (The particular works will be specified in the planning conditions when special development contributions are levied). Only developments that will benefit from the public infrastructure or facility in question will be liable to pay the special development contribution. Conditions imposing special contributions may be appealed to An Bord Pleanála."

137. Section 16.10.3 of the Dublin City development plan deals with public open space and provides that "In new residential developments, 10% of the site area shall be reserved as public open space." This is not an absolute requirement as is clear from a later paragraph which states as follows:

> "Public open space will normally be located on-site, however in some instances it may be more appropriate to seek a financial contribution towards its provision elsewhere in the vicinity. This would include cases where it is not feasible, due to site constraints or other factors, to locate the open space on site, or where it is considered that, having regard to existing provision in the vicinity, the needs of the population would be better served by the provision of a new park in the area (e.g. a neighbourhood park or pocket park) or the upgrading of an existing park. In these cases, financial contributions may be proposed towards the provision and enhancement of open space and landscape in the locality, as set out in the City Council Parks Programme, in fulfilment of the objective."

138. Pembroke Road Association asserts that the Board acted incorrectly in concluding that the proposed development did not contravene materially the Dublin City development plan because it did not provide 10% of the site area as public open space and that the Board failed to apply the provisions of s.9(7) of the 2016 Act and s.37(2)(b) of the 2000 Act in deciding to grant permission notwithstanding this breach of the Dublin City development plan. Pembroke Road Association also asserts that condition 26 is invalid.

139. The Board was entitled to take the view that the requirement in the Dublin City development plan that developments provide for 10% public open space is not an absolute requirement. Site constraints or other factors which may make it infeasible to locate public open space on site and existing provision of public open space in the vicinity is relevant. The Board took these matters into consideration and decided, in line with the inspector's report, that it was appropriate to impose a financial contribution in lieu of public open space in this case. This course of action was acceptable to the planning authority and to the applicant for permission which had offered a financial contribution.

140. Section 9(4), (7) and (8) of the 2016 Act deal with the powers of the Board to attach conditions to a permission for a strategic housing development. Subsection (7) provides as follows:

> "Without prejudice to the generality of the Board's powers to attach conditions under subsection (4), the Board may attach either or both of the following to a permission for the development concerned:
>
> (a) a condition with regard to any of the matters specified in section 34(4) of the Act of 2000;
> (b) a condition requiring the payment of a contribution or contributions of the same kind as the planning authority or authorities in whose area or areas the proposed strategic housing development would be situated could, but for this Part, require to be paid under section 48 or 49 (or both) of the Act of 2000

were that authority to grant the permission (and the scheme or schemes referred to in the said section 48 or 49, as appropriate, made by that authority shall apply to the determination of such contribution or contributions).

141. Section 9(8) allows for planning conditions to provide that points of detail be agreed between the person carrying out the development and the relevant planning authorities.

142. The inspector's report to the Board noted that the proposed development did not provide any public open space and that the Dublin City development plan "allows for the payment of a financial contribution in some circumstances where a shortfall arises." The inspector noted that the planning authority had no objection to payment of a financial contribution in lieu of public open space provision. The inspector agreed with this, having regard to the urban context of the site and the proximity of Herbert Park. The inspector recommended that the Board include a condition requiring a financial contribution. The draft condition produced by the inspector was adopted into the permission.

143. Section 48 of the 2000 Act deals with planning conditions imposing financial contributions in respect of infrastructure. The relevant provisions are subsections (1), (2), (12) and (17) which provide as follows:

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

(2) (a) Subject to paragraph (c), the basis for the determination of a contribution under subsection (1) shall be set out in a development contribution scheme made under this section, and a planning authority may make one or more schemes in respect of different parts of its functional area.

(b) A scheme may make provision for payment of different contributions in respect of different classes or descriptions of development.

(c) A planning authority may, in addition to the terms of a scheme, require the payment of a special contribution in respect of a particular development where specific exceptional costs not covered by a scheme are incurred by any local authority in respect of public infrastructure and facilities which benefit the proposed development.

(12) Where payment of a special contribution is required in accordance with subsection (2)(c), the following provisions shall apply-

(a) the condition shall specify the particular works carried out, or proposed to be carried out, by any local authority to which the contribution relates, …

(17) In this section –

'public infrastructure and facilities' means -

(a) the acquisition of land,
(b) the provision of open spaces, recreational and community facilities and amenities and landscaping works,
(c) the provision of roads, car parks, car parking places, surface water sewers and flood relief work, and ancillary infrastructure,
(d) the provision of bus corridors and lanes, bus interchange facilities (including car parks for those facilities), infrastructure to facilitate public transport, cycle and pedestrian facilities, and traffic calming measures,
(e) the refurbishment, upgrading, enlargement or replacement of roads, car parks, car parking places, surface water sewers, flood relief work and ancillary infrastructure,
(f) the provision of high-capacity telecommunications infrastructure, such as broadband,
(g) the provision of school sites, and
(h) any matters ancillary to paragraphs (a) to (g).

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

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

144. Condition 26 of the permission envisages payment of a financial contribution "as a special contribution under section 48(2)(c)" of the 2000 Act "in lieu of the provision of public open space within the site." The condition does not "specify the particular works carried out, or proposed to be carried out," by Dublin City Council "to which the contribution relates" as is required by section 48(12)(a).

145. There has been no input by Dublin City Council into what, if any, "specific exceptional costs" within s.48(2)(c), not covered by the development contribution scheme will be incurred by Dublin City Council in respect of infrastructure and facilities which will benefit the proposed development. There may not be any such costs. The result is that it is not possible to give effect to condition 26 of the permission under section 48(2)(c).

146. The reason given in the permission for the imposition of the condition strayed from the circumstances in which the Dublin City development plan and para. 10 of the development contribution scheme envisage that a financial contribution in lieu of provision of public open space will become payable. Condition 26 is an unsuccessful attempt to shoehorn this contribution into the framework of section 48(2)(c).

147. Paragraph 10 of the contribution scheme is not designed to cover "specific exceptional costs". It is concerned with provision or enhancement of public open space and amenities in the locality in line with the City Council Parks Programme. The thinking in the development plan is that the provision of public open space as part of a development may not be appropriate in some cases and in such cases the developer will provide a financial contribution in addition to the public infrastructure contribution. In that case a general

levy of €4,000 per unit is imposed as a development contribution towards improvement to a park and/or enhancement of amenities in the locality or area in line with the City's Park Strategy.

148. Whether the power to impose this condition for contribution should be regarded as coming within s.48(2)(a) of the 2000 Act may be doubtful. It is within the general power of the Board under s.9(4) of the 2016 Act to impose a condition that the developer pay a financial contribution in lieu of provision of public open space in line with the relevant provisions in the Dublin City development plan.