

THE HIGH COURT
JUDICIAL REVIEW

[2022] IEHC 7

Record No. 2020/816JR

In the matter of Section 50, 50A and 50B of the Planning and Development Act 2000 and in the
matter of the Planning and Development (Housing) and Residential Tenancies Act 2016

Between

Ballyboden Tidy Towns Group

Applicant

And

An Bord Pleanála,
The Minister for Housing, Local Government and Heritage,
Ireland
and
the Attorney General

Respondents

And

Shannon Homes Construction ULC
and
South Dublin County Council

Notice Parties

JUDGMENT of Mr Justice Holland, delivered on 10 January 2022

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INTRODUCTION & THE IMPUGNED DECISION

1. In these proceedings the Applicant, a community group set up to protect the environment and amenity of Ballyboden and the greater Rathfarnham areas in Dublin, impugns the decision (the “Impugned Decision” or the “Impugned Permission”) made by An Bord Pleanála (“the Board”) on 14 September 2020 to grant planning permission ABP-307222-20 to Shannon Homes Construction ULC (“Shannon Homes”), for a Strategic Housing Development (“SHD” and “the Proposed Development”) on a site at Taylor’s Lane and Edmondstown Road, Ballyboden, Dublin 16 in the functional area of South Dublin County Council (“SDCC”) on foot of a planning application (“the SHD Application”) made to the Board on 25 May 2020.

2. The Proposed Development essentially comprises demolition of a disused religious house and the construction of 496 apartments in 3 blocks, a creche and 2 retail units and associated development.

3. The site fronts onto Taylor’s Lane to the north and Edmondstown Road to the west and they meet at a roundabout adjacent the northwest corner of the site. The “red line” site for purposes of the planning regulations measures 3.8 hectares. The net area (excluding public roads and lands – essentially the lands owned by Shannon Homes) is 3.5 hectares. It is in a suburban area about 7.5 km south west of Dublin city centre. The area generally is characterised by 1-2 storey housing, retail and community uses. The site is zoned for residential use in the South Dublin County Development Plan 2016 - 2022 (“the Development Plan”) and the principle of its residential development is agreed by all. The site location, in its current state, is illustrated below.



Figure 1 - the Site¹

Note: The red line encloses the lands in respect of which the planning application is made.

¹ extract from McGill Planning Report Fig 1 – submitted to the Board with the planning application

4. The site comprises the former Augustinian “Good Counsel” seminary and chapel to the west and, to the east, part of a disused pitch and putt course. The remainder of the course lies south of the site. The statutory report in the SHD application of the chief executive of SDCC (“SDCC Report”) describes it as “the Good Counsel former pitch and putt course”. It is similarly described in the EIAR². I infer that, as with many such institutions, some of the Augustinian “Good Counsel” lands were devoted to community/sporting activities and that, at some point at least, the pitch and putt course lands were part of the seminary lands. It would seem clear therefore, and it is agreed by the parties, that a considerable part, and likely all, of the development site owed by Shannon Homes is on “Institutional Lands” within the meaning of both the Development Plan and the Sustainable Residential Development in Urban Areas Guidelines 2009, (“Urban Residential Guidelines 2009” and “2009 Guidelines”) issued under S.28 of the Planning and Development Act 2000 (“PDA 2000”).

5. It is important to note that while the Inspector and the Board and SDCC considered the lands fell into the category of Institutional Lands, as to residential density (“Density”) the Inspector and the Board considered that they fell also and more importantly into the category of lands on a “Public Transport Corridor”. I return to this issue below.

6. The proposed development is illustrated below. Blocks A and C are 6-7 storey buildings. Block B consists of three 6 to 7 storey buildings and Block A of two 2 storey buildings.



Figure 2 - the Proposed Development³

Note: The blue line encloses the Shannon Homes lands. The red line encloses the lands in respect of which the planning application is made.

² P5.4

³ extract from McGill Planning Report Fig 13

7. 496 apartments on a net site area of 3.5ha represents a density across the entire site (or an “average” density) of 141.7 dwellings/units per hectare (“142 dph”). 28% of the site will be Public Open Space comprising a public park along Taylor’s Lane, the central street and a public woodland walkway to the south and east of the site. 11% of the site will be Communal Open Space – essentially the open areas surrounded by each block of apartments.

8. The “red line” in the planning application drawings, by regulation denoting the area to which the Shannon Homes planning application related, encompasses areas outside, and generally west of, the area enclosed by the blue line which identifies the lands owned by Shannon Homes. The difference is generally explained by Shannon Homes’ intention to do work on the public roads to facilitate the development. The Applicants assert that this difference is significant as to the case they make regarding otters.

9. The Tree Survey Report submitted with the SHD Application records that the site is characterised by a large number of trees: the vast majority being of comparatively low value/quality as individual trees. There are 95 trees and 22 tree groups on site. An appreciable number represent past planting for the pitch and putt course. Only 2 trees are in category A (high value) – and will be preserved. 18 trees are in category B (moderate value), 58 in category C (low value) and 17 in category U (unsuitable for long term retention). Assessed collectively, all 22 tree groups are in category C - though some groups contain stems in Category U. SDCC estimates loss of 90% of the existing tree cover, which they describe as “massive”. The Tree Survey Report records intended removal of 18 tree groups (17 category C and 1 category U) and 89 trees – all but 6 of 95. Trees to be removed include 16 category B, 56 category C and 17 category U trees. So 73 out of the 89 trees for removal (>80%) are of relatively low value or unsuited to long term retention (categories C and U). The Developer proposes to landscape and plant trees in mitigation. The Tree Survey Report considered trees in terms of their intrinsic value but for purposes of the issues in these proceedings they are relevant primarily as potential bat roosts.

10. The Impugned Decision granted permission for the Proposed Development on foot of a planning application made directly to the Board for permission for a Strategic Housing Development pursuant to Section 4 of the Planning and Development (Housing) and Residential Tenancies Act, 2016 (“PD(H)A 2016”). That application had been preceded by the pre-application consultation procedure between Shannon Homes and the Board for which PD(H)A 2016 provides. The Board’s Inspector’s report is dated 26 August 2020.

11. The Impugned Decision, records that the Board had regard to various listed matters as follows:

- a) the location of the site in an established urban area, in an area zoned for residential,*
- b) the policies and objectives of the South Dublin County Development Plan 2016-2022,*

- d) *the National Planning Framework, Project Ireland 2040 which identifies the importance of compact growth, (“the NPF”)*
- e) *The Guidelines for Sustainable Residential Developments in Urban Areas and the accompanying Urban Design Manual – a Best Practice Guide, issued by the Department of the Environment, Heritage and Local Government in May 2009, (“Urban Residential Guidelines 2009”)*
- f) *The Urban Development and Building Heights Guidelines for Planning Authorities, prepared by the Department of Housing, Planning and Local Government in December 2018 (the “Height Guidelines 2018”) and particularly Specific Planning Policy Requirement 3, (“SPPR3”)*
- g) *The Sustainable Urban Housing: Design Standards for New Apartments, Guidelines for Planning Authorities issued by the Department of the Environment, Community and Local Government in March 2018, (the “Apartment Guidelines 2018”)*
- k) *The nature, scale and design of the proposed development and the availability in the area of a wide range of social, transport and water services infrastructure,*
- l) *The pattern of existing and permitted development in the area,*
- m) *Section 37(b)(2) of the Planning and Development Act 2000, as amended, whereby the Board is not precluded from granting permission for a development which materially contravenes a Development Plan,*
- n) *The submissions and observations received,*
- o) *The Chief Executive Report from the planning authority,*
- p) *The report of the inspector.”*

12. The Impugned Decision records that the Board screened for Appropriate Assessment for Habitats Directive purposes, adopting the Inspector’s report in that regard, and deemed Appropriate Assessment unnecessary.

13. The Impugned Decision records that the Board did an Environmental Impact Assessment (“EIA”), agreeing with the Inspector’s report in that regard, and by the necessary reasoned conclusion, inter alia recording:

Traffic and transportation Impacts - These will be mitigated by the reduced level of car parking, the availability of bus services, and by the completion of road, cycle and footpath infrastructure, as well as upgrade of existing roads infrastructure.

Biodiversity - Biodiversity impacts will be mitigated on the subject site by a range of measures identified in the Environmental Impact Assessment Report, including construction management measures, protection of trees to be retained, landscaping including the provision of an ecological corridor to the south of the site, and the provision of bat and bird boxes. These are not mitigation measures for the purposes of Appropriate Assessment and are not designed to avoid likely significant effects on any Natura 2000 sites.

14. It is necessary to set out in full the Board’s record, set out in the Impugned Decision, of its Conclusions on Proper Planning and Sustainable Development:

“The Board considered that, subject to compliance with the conditions set out below that (sic) the proposed development would constitute an acceptable quantum and density of development in this accessible urban location, would not seriously injure the residential or visual amenities of the area, would be acceptable in terms of urban design, height and quantum of development and would be acceptable in terms of pedestrian safety. The proposed development would, therefore, be in accordance with the proper planning and sustainable development of the area.

The Board considered that, while a grant of permission for the proposed Strategic Housing Development would not materially contravene a zoning objective of the statutory plans for the area, a grant of permission could materially contravene the South Dublin County Development Plan 2016-2022 in relation to building height. The Board considers that, having regard to the provisions of section 37(2) of the Planning and Development Act 2000, as amended, the grant of permission in material contravention of the South Dublin County Development Plan 2016-2022 would be justified for the following reasons and consideration.

In relation to section 37(2)(b)(i)⁴ of the Planning and Development Act 2000 (as amended): The current application has been lodged under the Strategic Housing legislation and the proposal is considered to be strategic in nature. National policy as expressed within Rebuilding Ireland – The Government’s Action Plan on Housing and Homelessness 2016 and the National Planning Framework, Project Ireland 2040 fully support the need for urban infill residential development, such as that proposed on this site.

In relation to section 37(2)(b)(ii)⁵ of the Planning and Development Act 2000 (as amended): It is the view of the Board that the objectives of Housing Policy H8⁶, to support higher densities, conflict with the limitations in height contained within Housing Policy 9 Objective 4⁷. While the objectives contained within Housing Policy H8 generally encourage higher densities and efficient use of lands, at appropriate locations, Policy 9 objective 4 seeks to direct tall buildings that exceed five storeys in height to strategic and landmark locations in Town Centres, Mixed Use zones and Strategic Development Zones and subject to an approved Local Area Plan or Planning Scheme. Given that higher densities are generally associated with increased heights, restricting developments that exceed 5 storeys to the limited number of sites that fulfil Policy 9 Objective 4, conflicts with the objective to maximise the most efficient use of remaining sites, which may also be suitable for higher densities.

In relation to section 37(2)(b)(iii)⁸ of the Planning and Development Act 2000 (as amended):

4 (i) the proposed development is of strategic or national importance, (Footnote not part of Board Decision)

5 (ii) there are conflicting objectives in the development plan or the objectives are not clearly stated, insofar as the proposed development is concerned, (Footnote not part of Board Decision)

6 Of the Development Plan (Footnote not part of Board Decision)

7 Of the Development Plan (Footnote not part of Board Decision)

8 (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, (Footnote not part of Board Decision)

The Eastern and Midland Regional Assembly – Regional Spatial and Economic Strategy 2019-2031, seeks to increase densities on appropriate sites within Dublin City and Suburbs. In relation to Section 28 Guidelines, of particular relevance are the Urban Development and Building Height Guidelines for Planning Authorities, prepared by the Department of Housing, Planning and Local Government in December 2018 which state, inter alia, that building heights must be generally increased in appropriate urban locations, subject to the criteria as set out in Section 3.2 of the Guidelines. The proposal has been assessed against the criteria therein. The Sustainable Residential Development in Urban Areas and the accompanying Urban Design Manual, A Best Practice Guide, issued by the Department of the Environment, Heritage and Local Government in May 2009, support increased densities in appropriate locations and the proposal has been assessed in relation to same.

In relation to section 37(2)(b)(iv)⁹ of the Planning and Development Act 2000 (as amended): The Board notes the recent approval for a strategic housing development application on the Scholarstown Road ('Beechpark' and 'Maryfield', Scholarstown Road, Dublin 16) for a development of 590 number residential units, up to six-storeys in height (ABP-305878-19). This is located approximately one kilometre to the west of this site. As such, precedent for higher buildings (and higher densities) than currently exist has been established in this area.

15. The Board, in its Order, explicitly agreed with the Inspector's report as to AA Screening and EIA. In notable contrast, it did not in its Order explicitly agree with the Inspector's report as to the planning issues. The advice of Clarke CJ in in **Connelly v An Bord Pleanála**¹⁰ that it would be preferable in all cases if the Board made expressly clear in its order whether it accepts all of the findings of an inspector, should be followed as a matter of consistent routine. However, in this case the Board in substance took the same view as the inspector as to the planning issues which I must consider. And the Board's Direction - the precursor based on which the Board's Order making the Impugned Decision is drafted - records that "*The Board decided to grant permission generally in accordance with the Inspector's recommendation.*" Simons J found himself in a similar position in **Redmond v An Bord Pleanála**¹¹ and, as he did in that case, I conclude in this case that as to the planning issues which I must consider, the Board agreed with its inspector such that his views can be attributed to it. No-one dissented from the Boards' counsel's view that there were no significant differences between the Inspector's suggested order and the Board's actual order. I will refer to the inspector's report further in considering the issues addressed below.

9 (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. (Footnote not part of Board Decision)

10 [2018] IESC 31; [2018] 2 I.L.R.M. 453

11 [2020] IEHC 151 from §105

THE CHALLENGE TO THE IMPUGNED DECISION – OUTLINE OF ISSUES

16. Leave to seek judicial review was granted on 5 October 2021 and an amended Statement of Grounds was filed on 20 January 2021 (the “Statement of Grounds”) on foot of an order made on 10 December 2020 permitting such amendment, deleting the Minister for Housing, Local Government and Heritage as a Respondent and adjourning with liberty to re-enter all claims for relief against the State. At trial the Applicant abandoned claims as to Appropriate Assessment and as to the material contravention decision regarding building height (“Height”) and that the assessment of Traffic Impacts breached the EIA Directive. Also abandoned was a Ground based on the Wildlife Act 1976. The net effect of these adjournments and abandonments was that, at the trial before me, the Applicant sought to quash the Impugned decision as invalid for the following reasons:

- **Grounds 3 & 4 – Bats & Otters** The Board erred in failing to have any, or adequate, regard for the protection of bats and otters for the purposes of Annex IV of the Habitats Directive.
- **Ground 5 – Material Contravention (Density)** The Developer and the Board erred in concluding that the density of the proposed development was not a material contravention of the Development Plan.
- **Ground 7 – Justification of Building Heights** The Board erred in its interpretation of section 3 of the Height Guidelines 2018 and/or failed to take into account a relevant consideration.
- **Ground 8 – Traffic** The Board acted irrationally or unreasonably and/or breached the Applicant’s rights to fair procedures and reasoned decision making in its assessment of traffic impacts from the proposed development on the greater Rathfarnham area.

I will consider the pleadings further when considering each of the issues listed above.

STATUTORY PROVISIONS

17. The procedures whereby, as to strategic housing developments (so defined that the Proposed Development is one), planning applications are made directly to the Board instead of to the Planning Authority are set out in PD(H)A 2016. The process is fully described in other judgments and I need not repeat that description here. But of that Act and the PDA 2000 the provisions set out below are particularly relevant to this case.

PD(H)A 2016 - Overview

18. Counsel for Shannon Homes points out that in **Dublin Cycling Campaign v An Bord Pleanála**¹² McDonald J observes that the long title to PD(H)A 2016 “expressly signals that the purpose of the Act is to “facilitate the implementation of ... “Rebuilding Ireland – Action Plan for Housing and Homelessness¹³” The Oireachtas intended that large housing developments should be prioritised over mixed developments.”. McDonald J described the procedure as “fast track”¹⁴ and “expedited”¹⁵. He referred to “..... the scale of strategic housing developments and the national policy to accelerate delivery of housing by this method which the 2016 Act was specifically enacted by Oireachtas to achieve ...”.

19. A key feature of the procedure is that, whereas normal planning applications are made to the Planning Authority and reach the Board only on appeal, SHD planning permission applications are made to An Bord Pleanála directly and are dealt with within the Board by a statutorily prescribed Strategic Housing Division¹⁶ of Board members. While the Board can hold an oral hearing in such cases, Simons¹⁷ comments that in practice, an oral hearing has rarely (if ever) been held. This may be understood in the context that, before it decides to hold an oral hearing in an SHD case, the Board, by S.18 PD(H)A 2016, “shall have regard to the exceptional circumstances requiring the urgent delivery of housing as set out in the Action Plan for Housing and Homelessness, and ... shall only hold an oral hearing if it decides, having regard to the particular circumstances of the application, that there is a compelling case for such a hearing.” Where no oral hearing is held the Board, by S.9(9) must decide the application within 16 weeks of its being made, in default of which it is not disabled from deciding it but must pay compensation to the applicant. By S.9(10), while the Minister may by regulation generally extend this period he may do so only in “exceptional circumstances”. That the housing developments the Act envisages are considered “strategic” is notable and the reference to “the exceptional circumstances requiring the urgent delivery of housing” is striking. So too is the temporary nature of the SHD process – the Act is time-limited - implying that the departure from normal planning processes is itself an exception warranted by the urgency described.

20. Albeit in the different context of whether to certify an appeal from his decision, in **Dublin Cycling** McDonald J said:

“There is no doubt that the 2016 Act was enacted in response to the housing crisis and that the Act is designed to facilitate largescale residential developments and to provide a fast-track planning procedure for that purpose. The long title to the Act states that its purpose is to facilitate the implementation of the Government Action Plan for Housing and Homelessness published in July, 2016. that document expressly stated that the accelerated delivery of housing for the private, social and rented sectors is a key priority for the Government. While

12 [2020] IEHC 587

13 2016

14 [2020] IEHC 587

15 [2021] IEHC 146

16 See S.11 of the 2016 Act

17 §7–316

bearing in mind that the specific point of law must be shown to be of exceptional public importance, I believe that the strategic importance of the 2016 Act is an important (albeit not a determinative) element of the background against which the question of public importance is to be assessed.”

S.9(3) & 9(6) PD(H)A 2016

21. S.9(3) PD(H)A 2016 requires the application of SPPRs to decision of planning applications where “relevant”. S.9(6) permits permissions in material contravention of the development plan if the criteria of S.37(2)(b) PDA 2000 are met. They read as follows:

(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.

.....

(6) (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 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 the 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.

S.37(2)(b) PDA 2000

22. S.37(2)(b) PDA 2000 reads as follows:

(2) (a) Subject to paragraph (b), the Board may in determining an appeal under this section decide to grant a permission even if the proposed development contravenes materially the development plan relating to the area of the planning authority to whose decision the appeal relates.

(b) 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 strategy¹⁸] 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.

(c) Where the Board grants a permission in accordance with paragraph (b), the Board shall, in addition to the requirements of section 34(10), indicate in its decision the main reasons and considerations for contravening materially the development plan.

S.28 PDA 2000

23. S.28 PDA 2000 reads as follows:

28. (1) *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 the performance of their functions.*

.....

[(1C) Without prejudice to the generality of subsection (1), guidelines under that subsection may contain specific planning policy requirements with which planning

¹⁸ Substituted (1.06.2014) by Local Government Reform Act 2014 (1/2014), s. 5(7) and sch. 2 part 4 ref. 75, S.I. No. 214 of 2014.

authorities, regional assemblies and the Board shall, in the performance of their functions, comply.^{19]}

(2) Where applicable, the Board shall have regard to any guidelines issued to planning authorities under subsection (1) in the performance of its functions.

THE DEVELOPMENT PLAN

24. The Development Plan is relevant to the Density and Height issues. The discussion of the Plan ranged widely but I set out the most relevant content below by way of edited extracts.

Chapter 2 Housing

2.0 INTRODUCTION

A core objective of the National Housing Policy Statement, DECLG (2011) is “to enable each household to have access to good quality housing that is appropriate to its circumstances and in a community of its choice”.

In a predominantly urban county such as South Dublin, new housing will be delivered in established areas through sustainable intensification, infill development and the re-use of brownfield lands while respecting the amenity value of existing public open spaces.

Expansion will focus on the creation of sustainable new communities at locations that can be served by high quality public transport. This approach will make the best use of the County’s land and infrastructure resources by ensuring that in the first instance, new development is linked to existing transport services, physical and social infrastructure and amenities.

2.2.0 Sustainable Neighbourhoods

HOUSING (H) Policy 6 - Sustainable Communities

It is the policy of the Council to support the development of sustainable communities and to ensure that new housing development is carried out in accordance with Government policy in relation to the development of housing and residential communities.

2.2.1 URBAN DESIGN IN RESIDENTIAL DEVELOPMENTS

.....

19 Substituted (22.10.2018) by Planning and Development (Amendment) Act 2018 (16/2018), s. 20(a), S.I. No. 436 of 2018.

The Guidelines for Planning Authorities on Sustainable Residential Development in Urban Areas, DEHLG (2009) set out urban design criteria that should be used in the design of all residential areas.

.....

<u>HOUSING (H) Policy 7 - Urban Design in Residential Developments</u>
It is the policy of the Council to ensure that all new residential development within the County is of high quality design and complies with Government guidance on the design of sustainable residential development and residential streets including that prepared by the Minister under Section 28 of the Planning & Development Act 2000 (as amended).
<u>H7 Objective 1:</u> To ensure that residential development contributes to the creation of sustainable communities in accordance with the requirements of the Guidelines for Planning Authorities on Sustainable Residential Development in Urban Areas, DEHLG (2009) (or any superseding document) including the urban design criteria as illustrated under the companion Urban Design Manual – A Best Practice Guide, DEHLG (2009).
<u>H7 Objective 4:</u> That any future development of both residential and/or commercial developments in Palmerstown Village and the greater Palmerstown Area shall not be higher than or in excess of three stories in height.

2.2.2 RESIDENTIAL DENSITIES

Government policy as outlined in the Sustainable Residential Development in Urban Areas Guidelines recognises that land is a scarce resource that needs to be used efficiently. These guidelines set out a range of appropriate residential densities for different contexts based on site factors and the level of access to services and facilities, including transport.

Densities should take account of the location of a site, the proposed mix of dwelling types and the availability of public transport services. As a general principle, higher densities should be located within walking distance of town and district centres and high capacity public transport facilities.

<u>HOUSING (H) Policy H8 - Residential Densities</u>
It is the policy of the Council to promote higher residential densities at appropriate locations and to ensure that the density of new residential development is appropriate to its location and surrounding context.
<u>H8 Objective 1:</u> To ensure that the density of residential development makes efficient use of zoned lands and maximises the value of existing and planned infrastructure and services, including public transport, physical and social infrastructure, in accordance with the Guidelines for Planning Authorities on Sustainable Residential Development in Urban Areas, DEHLG (2009).

<u>HOUSING (H) Policy H8 - Residential Densities</u>
<p><u>H8 Objective 2:</u> To consider higher residential densities at appropriate locations that are close to Town, District and Local Centres and high capacity public transport corridors in accordance with the Guidelines for Planning Authorities on Sustainable Residential Development in Urban Areas, DEHLG (2009).</p>
<p><u>H8 Objective 3:</u> To encourage the development of institutional lands subject to the retention of their open character and the provision of quality public open space in accordance with the Guidelines for Planning Authorities on Sustainable Residential Development in Urban Areas, DEHLG (2009).</p>
<p><u>H8 Objective 6:</u> To apply the provisions contained in the Guidelines for Planning Authorities on Sustainable Residential Development in Urban Areas, DEHLG (2009) relating to Outer Suburban locations, including a density range of 35-50 units per hectare, to greenfield sites that are zoned residential (RES or RES-N) and are not subject to a SDZ designation, a Local Area Plan and/or an approved plan, excluding lands within the M50 and lands on the edge or within the Small Towns/ Villages in the County.</p>
<p><u>H8 Objective 7:</u> To facilitate, in limited locations, four and five bed detached homes on lands that are appropriate to low density residential development.</p>

25. The repeated commitment to the Urban Residential Guidelines 2009 as the source of policy as to residential density will be very apparent from the objectives associated with Policy H8.

2.2.3 RESIDENTIAL BUILDING HEIGHT

A policy shift towards more compact and sustainable forms of development over the past two decades has resulted in increased building heights in the County. Varied building heights are supported across residential and mixed use areas in South Dublin County to promote compact urban form, a sense of place, urban legibility and visual diversity (see also Chapter 5 Urban Centres & Retailing and Chapter 11 Implementation).

<u>HOUSING (H) Policy 9 - Residential Building Heights</u>
It is the policy of the Council to support varied building heights across residential and mixed use areas in South Dublin County.
<p><u>H9 Objective 1:</u> To encourage varied building heights in new residential developments to support compact urban form, sense of place, urban legibility and visual diversity.</p>
<p><u>H9 Objective 2:</u> To ensure that higher buildings in established areas respect the surrounding context.</p>
<u>H9 Objective 3:</u>

<u>HOUSING (H) Policy 9 - Residential Building Heights</u>
To ensure that new residential developments immediately adjoining existing one and two storey housing incorporate a gradual change in building heights with no significant marked increase in building height in close proximity to existing housing (see also Section 11.2.7 Building Height).
<u>H9 Objective 4:</u> To direct tall buildings that exceed five storeys in height to strategic and landmark locations in Town Centres, Mixed Use zones and Strategic Development Zones and subject to an approved Local Area Plan or Planning Scheme.
<u>H9 Objective 5:</u> To restrict general building heights on 'RES-N' zoned lands south of the N7 to no more than 12 metres where not covered by a current statutory Local Area Plan.

2.3.0 Quality Of Residential Development

.....

Standards in relation to the quality of residential development including public open space, private open space, dwelling unit sizes, privacy and aspect are set out under Section 11.3.1 of this Plan. The standards are framed by the policies and objectives set out below.

2.3.1 RESIDENTIAL DESIGN & LAYOUT

<u>HOUSING (H) Policy 11 - Residential Design and Layout</u>
It is the policy of the Council to promote a high quality of design and layout in new residential development and to ensure a high quality living environment for residents, in terms of the standard of individual dwelling units and the overall layout and appearance of the development.
<u>H11 Objective 1:</u> To promote a high quality of design and layout in new residential development and to ensure a high quality living environment for residents, in terms of the standard of individual dwelling units and the overall layout and appearance of the development in accordance with the standards set out in Chapter 11 Implementation.

2.3.4 INTERNAL RESIDENTIAL ACCOMMODATION

Dwellings should be of sufficient size and sufficiently adaptable to enable people to live comfortably through different stages of their lives and changing household needs.

HOUSING (H) Policy 14 - Internal Residential Accommodation
It is the policy of the Council to ensure that all new housing provides a high standard of accommodation that is flexible and adaptable, to meet the long term needs of a variety of household types and sizes.
H14 Objective 1: To ensure that all residential units and residential buildings are designed in accordance with the relevant quantitative standards, qualitative standards and recommendations contained in Sustainable Urban Housing: Design Standards for New Apartments (2015), the Guidelines for Planning Authorities on Sustainable Residential Development in Urban Areas (2009),

Chapter 11 - Implementation

11.0 OVERVIEW

This Chapter sets out development standards and criteria that arise out of the policies and objectives of the County Development Plan, to ensure that development occurs in an orderly and efficient manner and that it is in accordance with proper planning and sustainable development. Proposals for development will need to take account of all of the standards and criteria that apply to the particular development, in addition to being assessed for consistency with the policies and objectives set out in the preceding chapters of the Plan and compliance with relevant legislative requirements.

11.3 LAND USES

11.3.1 RESIDENTIAL

(ii) Residential Density

In general the number of dwellings to be provided on a site should be determined with reference to the Departmental Guidelines document Sustainable Residential Development in Urban Areas – Guidelines for Planning Authorities (2009).

As a general principle and to promote sustainable forms of development, higher residential densities will be promoted within walking distance of town and district centres and high capacity public transport facilities.

In accordance with Departmental Guidance, the residential density (net) of new development should generally be greater than 35 dwellings per hectare, save in exceptional circumstances. Local Area Plans, SDZ Planning Schemes and Framework Plans will set out density bands in growth areas.

(iii) Public Open Space/Children’s Play

The Planning Authority will require public open space to be provided as an integral part of the design of new residential and mixed use developments.

- On institutional lands a minimum requirement of 20% is recommended to maintain an open setting.

URBAN RESIDENTIAL GUIDELINES 2009

26. As will have been seen, the Development Plan repeatedly invokes and adopts in its objectives, not least as to density, the Urban Residential Guidelines 2009, issued under S.28 PDA 2000. Ground 5 asserts that the Developer and the Board erred in law in concluding that the density of the proposed development was not a material contravention of the Development Plan.

27. It was ultimately not in dispute but that relevant elements of the Development Plan fell to be interpreted with the Urban Residential Guidelines 2009. Much of the relevant content of the Development Plan can be understood only if it is interpreted with those Guidelines. They were much discussed at trial and so it is necessary to set out sufficient relevant edited content below.

- The Guidelines espouse²⁰ a common goal to create high quality places which inter alia, prioritise walking, cycling and public transport, and minimise the need to use cars and deliver a quality of life ... in terms of amenity, safety and convenience;
- 3.1 A key design aim in delivering sustainable communities is to reduce, as far as possible, the need to travel, particularly by private car, by facilitating mixed-use development and by promoting the efficient use of land and of investment in public transport.
- Chapter 4 – Planning for Sustainable Neighbourhoods
 - Amenity / quality of life issues - (a) Public open space
 - 4.15 Public open space can have a positive impact It is one of the key elements in defining the quality of the residential environment. Well-designed open space is even more important in higher density residential developments.
 - Recommended Quantitative Standards
 - 4.19 Most planning authorities include quantitative standards for public open space in their development plans

- 4.20 To ensure that there are adequate safeguards in place to avoid overdevelopment and to assist the planning authority in their assessment of planning applications, in general the following standards are recommended:
 - In institutional lands often characterised by a large private or institutional building set in substantial open lands and which in some cases may be accessible as an amenity to the wider community, any proposals for higher density residential development must take into account the objective of retaining the “open character” of these lands, while at the same time ensuring that an efficient use is made of the land. In these cases, a minimum requirement of 20% of site area should be specified; the amount of residential yield should be no less than would be achieved on any comparable residential site. Increasing densities in selected parts of the site subject to the safeguards expressed elsewhere may be necessary to achieve this.

- Chapter 5 Cities and larger towns
 - Introduction - 5.0 it remains Government policy to promote sustainable patterns of settlement, particularly higher residential densities in locations which are, or will be, served by public transport

 - Design safeguards - 5.1 - Firm emphasis must be placed by planning authorities on the importance of qualitative standards in relation to design and layout in order to ensure that the highest quality of residential environment is achieved. The objective should be the achievement of an efficient use of land appropriate to its context, while avoiding the problems of over-development.

 - 5.2 the criteria to be considered in the design and assessment of higher density residential development is provided in the Department’s companion design manual. In summary, these factors include:
 - acceptable building heights (see below);
 - avoidance of overlooking and overshadowing;
 - provision of adequate private and public open space, including
 - landscaping where appropriate and safe play spaces;
 - adequate internal space standards in apartments;
 - suitable parking provision close to dwellings; and
 - provision of ancillary facilities, including child care.

 - 5.4 Appropriate locations for increased densities -
 - Where there is good planning, good management, and the necessary social infrastructure, higher density housing has proven capable of supporting sustainable and inclusive communities. In general, increased densities should be encouraged on residentially zoned lands and particularly in the following locations:

- **(a) City and town centres** - 5.6 there should, in principle, be no upper limit on the number of dwellings that may be provided within any town or city centre site, subject to the following safeguards:
- **(b) 'Brownfield' sites (within city or town centres)** - 5.7 Where such significant sites exist and, in particular, are close to existing or future public transport corridors, ... their re-development to higher densities, subject to the safeguards expressed above should be promoted, as should the potential for car-free developments at these locations.
- **(c) Public transport corridors** - 5.8 - The State has committed very substantial investment in public transport To maximise the return on this investment, it is important that land use planning underpins the efficiency of public transport services by sustainable settlement patterns – including higher densities – on lands within existing or planned transport corridors. Walking distances from public transport nodes (e.g. stations / halts /bus stops) should be used in defining such corridors. It is recommended that increased densities should be promoted within 500 metres walking distance of a bus stop, or within 1km of a light rail stop or a rail station. The capacity of public transport (e.g. the number of train services during peak hours) should also be taken into consideration in considering appropriate densities. In general, minimum net densities of 50 dwellings per hectare, subject to appropriate design and amenity standards, should be applied within public transport corridors, with the highest densities being located at rail stations / bus stops, and decreasing with distance away from such nodes. Minimum densities should be specified in local area plans, and maximum (rather than minimum) parking standards should reflect proximity to public transport facilities.
- **(d) Inner suburban / infill** - 5.9
- **(e) Institutional lands** - 5.10 - A considerable amount of developable land in suburban locations is in institutional use and/or ownership. Such lands are often characterised by large buildings set in substantial open lands which in some cases may offer a necessary recreational or amenity open space opportunity required by the wider community. In the event that planning authorities permit the development of such lands for residential purposes, it should then be an objective to retain some of the open character of the lands, but this should be assessed in the context of the quality and provision of existing or proposed open space in the area generally. In the development of such lands, average net densities at least in the range of 35-50 dwellings per hectare should prevail and the objective of retaining the open character of the lands achieved by concentrating increased densities in selected parts (say up to 70 dph).
- **(f) Outer Suburban / 'Greenfield' sites** - 5.11 - the greatest efficiency in land usage on such lands will be achieved by providing net residential densities in the general range of 35-50 dwellings per hectare and such densities (involving a variety

of housing types where possible) should be encouraged generally. Development at net densities less than 30 dwellings per hectare should generally be discouraged in the interests of land efficiency.

- Chapter 5: Checklist
 - Are residential densities sufficiently high in locations which are, or will be, served by public transport?
 - Have proposals for higher densities been accompanied in all cases by high qualitative standards of design and layout?
 - Does the design and location respect the amenities of existing adjacent houses in terms of sunlight and overlook?

- Appendix A: Measuring residential density
 - Density assumptions play an important part in estimating the development land requirements arising from a new dwelling requirement/forecast.
 - At the site-specific level, if density controls are to produce the expected results, a density standard must be carefully related to the area accommodating the development.
 - (Net density is defined a measurement based on only those areas which will be developed for housing and directly associated uses and as excluding such as roads, schools, local shops etc.)
 - A net density ... approach ... is appropriate for development on infill sites where the boundaries of the site are clearly defined and where only residential uses are proposed.
 - However, dwellings per hectare is not effective in predicting or controlling the built form of development on a site - planning standards or plot ratio are more effective.

28. As will have been seen, recurring themes of Urban Residential Guidelines 2009 include the efficient use of land (by which is meant, in effect, higher residential density) and higher densities close to public transport corridors. In the Guidelines numerical densities tend to be explicit as to minima but not as to maxima – though much of the dispute as to density in the case is as to whether a maximum applies in the case of Institutional Lands. Notably as to density, the phrase “*no upper limit on the number of dwellings*” is not used as a general observation and appears only once – specifically as to town and city centre sites, which the site is not. One could, I suppose, read this phrase as a reference to the total population, as opposed to residential density, of a city or town centre but reading the text in context – and the context is explicitly that of density – I do not think, even on a lawyerly interpretation, that would be correct and all the less so interpreting as an intelligent layperson (whose significance I will address below). And by the Guidelines the success of higher densities is to be via design safeguards - high qualitative standards of design and layout – generally a matter of planning rather than legal judgment.

THE APARTMENT GUIDELINES 2018

29. These post-date the Development Plan. Chapter 2, as to Apartments and Statutory Development Plans, includes the following:

- 2.1 *To meet housing demand in Ireland, it is necessary to significantly increase supply. This is a key pillar of the overarching Rebuilding Ireland Housing Action Plan. The National Planning Framework targets increased housing supply in Ireland's cities and urban areas in particular. For the reasons outlined earlier, increased housing supply must include a dramatic increase in the provision of apartment development.*
- 2.2 *In general terms, apartments are most appropriately located within urban areas. As with housing generally, the scale and extent of apartment development should increase in relation to proximity to core urban centres and other relevant factors. Existing public transport nodes or locations where high frequency public transport can be provided, that are close to locations of employment and a range of urban amenities including parks/ waterfronts, shopping and other services, are also particularly suited to apartments.*
- 2.4 *Identification of the types of location in cities and towns that may be suitable for apartment development, will be subject to local determination by the planning authority, having regard to the following broad description of proximity and accessibility considerations:*
 - **1) Central and/or Accessible Urban Locations**
Such locations are generally suitable for small- to large-scale (will vary subject to location) and higher density development (will also vary), that may wholly comprise apartments, including:
 - *Sites within walking distance (i.e. between 10-15 minutes or 1,000-1,500m) of high capacity urban public transport stops (such as DART, commuter rail or Luas) or within reasonable walking distance (i.e. between 5-10 minutes or up to 1,000m) of high frequency (i.e. min 10 minute peak hour frequency) urban bus services or where such services can be provided;*
 - *Sites within easy walking distance (i.e. up to 5 minutes or 400-500m) to/ from high frequency (i.e. min 10 minute peak hour frequency) urban bus services.*
 - **2) Intermediate Urban Locations**
Such locations are generally suitable for smaller-scale (will vary subject to location), higher density development that may wholly comprise apartments, or alternatively, medium-high density residential development of any scale that includes apartments to some extent (will also vary, but broadly >45 dwellings per hectare net) including:
 - *Sites within walking distance (i.e. between 10-15 minutes or 1,000-1,500m) of high capacity urban public transport stops (such as DART, commuter rail or Luas) or within reasonable walking distance (i.e. between 5-10 minutes or up to 1,000m) of high frequency (i.e. min 10 minute peak hour frequency) urban bus services or where such services can be provided;*

- *Sites within easy walking distance (i.e. up to 5 minutes or 400-500m) of reasonably frequent (min 15 minute peak hour frequency) urban bus services.”*

30. Notably, these Guidelines distinguish between capacity and frequency in characterising public transport. It seems unlikely that this is particular to the Guidelines and more likely that it reflects general planning concepts which also informed earlier documents.

NATIONAL PLANNING FRAMEWORK 2018

31. This is a very wide-ranging document – much of it here irrelevant. It is the underlying basis of the Height Guidelines 2018²¹. It also addresses density. National Planning Objectives (“NPO”) include:

- NPO27 seeks to ensure the integration of safe and convenient alternatives to the car by prioritising walking, cycling and physical activity.
- NPO33 prioritises providing new homes at locations that can support sustainable development and at an appropriate scale of provision relative to location.
- NPO35 seeks to *“Increase residential density in settlements, through a range of measures including ... increased building heights.”*

32. NPO13 reads:

‘In urban areas, planning and related standards, including in particular building height and car parking will be based on performance criteria that seek to 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.’

The accompanying narrative, headed “Performance-based Design Standards”²², includes:

“To enable brownfield development, planning policies and standards need to be flexible, focusing on designed and performance-based outcomes, rather than specifying absolute requirements in all cases.”

“In particular, general restrictions on building height may not be applicable in all circumstances in urban areas and should be replaced by performance-based criteria

²¹ See below

²² NPF p67

appropriate to general location, e.g. city/town centre, public transport hub, inner suburban, public transport corridor, outer suburban, town, village etc.”²³

A more dynamic performance-based approach appropriate to urban location type will also enable the level of public transport service to improve as more development occurs and vice-versa.”

THE HEIGHT GUIDELINES 2018 & SPPRs & Comment thereon

33. As will have been seen, the Board decided to grant permission in material contravention of the Development Plan as to building height. A considerable part in that decision, and in discussion at trial, was played by the Height Guidelines 2018. Ground 7 asserts that the Board erred in its interpretation of section 3 of those Guidelines. And so it is necessary to set out relevant content below. The Height Guidelines 2018 were made under S.28 PDA 2000. They are based in important part on the NPF.

34. It is important first to acknowledge that the clear thrust of the Height Guidelines 2018 is to advocate increased building height in appropriate urban and suburban locations – not least to optimise the effectiveness of public transport. They contain, inter alia, the following – again, edited rather than verbatim.

Chapter 1 - Introduction

35. The Introductory Chapter inter alia records that the guidelines set out national planning policy on building heights in relation to urban and suburban areas, building on the NPF – which it briefly describes²⁴. It acknowledges that, as reflected in the statutory framework, building heights are a long-established matter for the planning process to manage.²⁵ It states that determining planning policy and making planning decisions around appropriate building heights requires a careful balance - enabling long-term and strategic development of relevant areas, and ensuring the highest standards of urban design, architectural quality and place-making outcomes²⁶.

36. Chapter 1 records that local authorities have set “*generic maximum height limits across their functional areas*”²⁷. It says that if inflexibly or unreasonably applied, these can undermine wider national policy objectives to provide more compact forms of urban development as outlined in the NPF and instead continue an unsustainable pattern of outward growth instead of consolidating

23 Emphases added

24 Inter alia, §1.11

25 §1.2

26 §1.3

27 §1.4

existing built up areas. Such “*blanket limitations*” (i.e. “such” equating the “generic” with the “blanket” limitations) also hinder innovation in urban design and architecture leading to poor planning outcomes.” So the 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.*”²⁸

37. Chapter 1²⁹ says that, reflecting the NPF strategic outcomes as to compact urban growth, there is significant scope to accommodate anticipated population growth and housing by building up and consolidating existing urban areas. Therefore, these guidelines require that the scope to consider general building heights of at least three to four storeys, coupled with appropriate density, including in suburban and wider town locations, must be supported in principle. Chapter 1 asserts that a key objective of the NPF and NPF Objective 13 (“NPO13”) is 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 ...*” Chapter 1 cites NPO13 as identifying building height as an important measure for urban areas to deliver and achieve compact growth as required.

Chapter 2 - Building Height and the Development Plan & SPPR1

38. Chapter 2 records that implementing the NPF “*requires increased density, scale and height of development in our town and city cores*” and reusing ‘brownfield’ land, urban infill sites and sites that may not be in optimal usage. Increased building height is a significant component in making optimal use of the capacity of urban sites where transport, employment, services or retail development can achieve a requisite level of intensity for sustainability. Development plans must include the positive disposition to increased building height linked to greater density of development – inter alia to optimise the effectiveness of public transport in sustainable mobility corridors and networks. Development plan implementation in city, metropolitan and wider urban areas must proactively and flexibly secure compact urban growth by facilitating increased densities and building heights, while also being mindful of the quality of development and balancing amenity and environmental considerations. Appropriate identification and siting of areas suitable for increased densities and height will need to consider the environmental sensitivities of the receiving environment. It is said, in the particular context of “historic environments”, that Planning Authorities must determine if increased height is appropriate in particular settings.

39. Chapter 2 deems it “*critically important that development plans support specific geographic locations or precincts where increased building height is not only desirable but a fundamental policy requirement.*” It states that areas to be included in this assessment are central and/or accessible

28 §1.6

29 §1.9

locations and also intermediate urban locations where medium density residential development in excess of 45 residential units per hectare would be appropriate. Additional matters to be considered in such an assessment include:

- Proximity to high quality public transport connectivity, particularly key public transport interchanges or nodes;
- The ecological and environmental sensitivities of the receiving environment³⁰; and
- The visual, functional, environmental and cumulative impacts of increased building height.

SPPR1

40. §2.13 provides “taking account of the foregoing” Specific Planning Policy Requirement 1 (“SPPR1”) as follows;

“In accordance with Government policy to support increased building height and density in locations with good public transport accessibility, particularly town/ city cores, planning authorities shall explicitly identify, through their statutory plans, areas where increased building height will be actively pursued for both redevelopment, regeneration and infill development to secure the objectives of the National Planning Framework and Regional Spatial and Economic Strategies and shall not provide for blanket numerical limitations on building height.”

Chapter 3 - Building Height and the Development Management Process & SPPR3

41. Chapter 3 was the subject of particular and focussed debate at trial. It recites at §31 “Development Management Principles” and at §3.2 “Development Management Criteria” – both for the assessment of individual planning applications. The Applicants asserted an unlawful failure to apply the former in applying SPPR3 to the Impugned Decision.

42. §3.1 sets out the principles³¹:

- *“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:”*

³⁰ §2.7 2.8

³¹ Layout altered for exposition

- *Does the proposal positively assist in securing NPF objectives of focusing compact growth in key urban centres?*
- *Is the proposal in line with a development plan which has taken clear account of the requirements of Chapter 2?*
- *Where the development 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 NPF?*

This last, the “misalignment” issue, was a particular focus at trial.

43. §3.2 sets out criteria the satisfaction of which the planning applicant “shall demonstrate”. They include that the site be “well served by public transport with high capacity, frequent service and good links to other modes of public transport.” A posited distinction between public transport capacity and public transport frequency was also a particular focus at trial.

44. §3.2 also states design criteria to maximise access to natural daylight, ventilation and views and minimise overshadowing and loss of light and the necessity of considering proximity to sensitive bird and/or bat areas.

SPPR3

45. §3.2 provides that where the Board (in this case) “considers that such criteria are appropriately incorporated into development proposals” it “shall apply” the following 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.”

(B) & (C) These address the review and amendment of planning schemes to articulate “Government policy that building heights be generally increased in appropriate urban locations”.³²

Notably, application of SPPR3 is mandatory but, as applied, its substance is discretionary.

³² Emphases added

Note also that SPPR3 cites policy that heights be generally increased “*in appropriate urban locations*”, not “*in urban locations*”. This implies that there are urban areas which are inappropriate for generally increased heights.

DENSITY, HEIGHT & PUBLIC TRANSPORT

46. These three issues arise in overlapping ways under Grounds 5, 7 and 8 of the Statement of Grounds. It is convenient to deal with certain aspects of these grounds together.

47. In residential development, residential density and building height are distinct and raise distinct issues. Nonetheless, they are closely connected. NPO35³³ explicitly links them. *Ceteris paribus*, density increases with height. Density and height both are closely connected to the efficient use of land (in the sense of maximising its provision of housing – not least in a housing shortage) advocated in national policy. In the present case one may add that the justification of both increased height and density is closely connected to the disputed issue of the availability of public transport to serve those who will live in the Proposed Development and the avoidance of car dependency. Accordingly, it is useful to set out together the views as to Density and Height of SDCC and the Inspector.

48. In brief, Shannon Homes (per its Material Contravention Statement and Statement of Consistency), the inspector and the Board agreed that there was no material contravention of the Development Plan as to density and that there was a permissible material contravention as to height. SDCC and the Applicants considered that there were material contraventions as to both density and height and recommended refusal of permission on both accounts.

SDCC on Density & Height

49. SDCC recommended refusal of permission by reason of excessive density in contravention of national policy and also as in material contravention of the Development Plan.

50. SDCC noted that submissions and observations had asserted that “*Public Transport does not have capacity in the area*”. Recorded councillors’ contributions include “*No transport capacity*” “*Poor transport connections*” and the like. SDCC did not see that 140 dph was “*sustainable on the strength of a single high frequency bus route*”. This observation was prefigured earlier in the report by a view that “*The relevant services of concern are transport services Whilst the site is served by a number of bus routes the level of access to frequent public transport is very low at this location.*”

³³ NPO35 sets out to “Increase residential density in settlements, through a range of measures including ... increased building heights.”

*It is the view of the Planning Authority that development at this site would be car dependent.” ...
“and therefore unsustainable, and therefore not in accordance with proper planning.”*

51. SDCC also cited the Apartment Guidelines 2018 as listing the appropriate densities for large scale developments in various listed locations. It characterises the site as an Intermediate Urban Location within the meaning of those Guidelines and so as suitable for medium density. That is not quite correct: as has been seen above, for this Intermediate Urban Location, the development not being “smaller scale”, the Apartment Guidelines 2018 endorse “medium-high” density, not medium. However the reference may be understandable as the Height Guidelines (also) 2018 Chapter 2, arguably inconsistently with the Apartment Guidelines 2018, refers to “*intermediate urban locations where medium density residential development in excess of 45 residential units per hectare would be appropriate*”. While little may turn on the issue in the end, it is difficult not to be reminded of Collins J’s plea in **Spencer Place**³⁴ for clear and careful drafting of ministerial guidelines.

52. In any event, SDCC opines that the site “*does not fulfil the criteria for a central and/or accessible urban location. The Planning Authority assessed the amenities of the location, and the existing and proposed public transport links at the site have been assessed.*” I read this as of a piece with their view, recorded above, that “*the level of access to frequent public transport is very low at this location*”. SDCC continues, by reference initially to the Apartment Guidelines 2018:

“The area fulfils the requirements of an intermediate urban location, suitable for densities of >45 dph, however significant concerns are raised at the suitability of the site to accommodate the density level currently proposed by the applicant. Under the [Urban Residential Guidelines 2009] institutional sites are recommended as being suitable for residential densities of 35-50 D/Ha, provided in pockets of higher density development (70 Dw/ Ha.), allowing for the retention of significant open spaces as part of their development.”

53. Incidentally, the SDCC report cites the Apartment Guidelines 2018 as recommending “*density of >45 dph in such areas, but not more than 100 dph*³⁵.” I failed to find mention of a maximum of 100 dph in the Apartment Guidelines 2018 and asked the parties to check. They did not find it either and so I have ignored the reference as made in error.

54. In considering the SDCC report and the question of material contravention of the Development Plan as to density, I must bear in mind that the intelligent layperson interpreting the Development Plan is not an expert planner and so is not presumed familiar with the Apartment Guidelines 2018: and of course those 2018 Guidelines were not in being when the 2016 Development Plan was written. However those Guidelines are part of the context in which SDCC expressed its view as to the paucity of public transport serving the site.

³⁴ Spencer Place Development Company v Dublin City Council [2020] IECA 268

³⁵ Emphasis in original

55. The Apartment Guidelines 2018 may also shine a little light on the elusive concept of “higher” densities. “Higher” is a relative term. It naturally prompts the questions, higher than what? And how high is higher? And how much higher does higher go? It is perhaps notable then that the Apartment Guidelines 2018 posit three broad categories of density. The first is “higher density” – for which no numerical limit is set or even indicative figures given. The second is “medium-high density” which the Guidelines say will vary but broadly >45dph and no numerical upper limit, range or indication is given. The third is “low-medium density” which the Guidelines say will vary but broadly <45dph. It is readily apparent that, no doubt legitimately and for good reason given the nature of guidelines and the multifarious circumstances to which they are applicable, a high level of flexibility has been at the heart of the drafting approach here. It is equally apparent that this has come at a considerable price in terms of informing the community as to what actual outcomes of particular planning applications they can expect. This is an example of the tension at the heart of the dispute in these proceedings as to both density and height. Though this example doesn’t apply to the interpretation of the Development Plan, similar comment can be made as to the Urban Residential Guidelines 2009 by reference to which much of the Development Plan is framed.

56. How then is the intelligent layperson to discern, even in a general sense, where medium-high ends and higher begins or how much higher does higher go? It may also be that over the appreciable timespan between, for example, 2009 Guidelines and 2018 Guidelines, views of what is or is not higher density may have changed. While definitions would have eased the task of answering those questions, if at the expense of flexibility, what we have are indications. And the Board say these are the wrong questions – that density is limited not by numerical limits but by the application of qualitative planning standards. Notably, SDCC consider that “higher density” has been reached at the figure of 70 dph instanced in the Urban Residential Guidelines 2009 as to Institutional Lands. While, as ever, one must not attribute planning expertise to the intelligent layperson, it may be of some comfort as a cross-check to know that SDCC consider 70 dph to be high density, if one concluded that the intelligent layperson had also formed that view. As will be seen, the Urban Residential Guidelines 2009 as to Institutional Lands consider even the range 35 – 50 dph to be high density. And they consider 50 dph to be high density as to Public Transport Corridors.

57. As to Height, SDCC notes the Height Guidelines 2018 *“regarding hard limits on building height”* – without elaborating on what this phrase means. SDCC says that the 2016 Development Plan seeks to direct taller development above 5 storeys into appropriate urban centres across the county as provided for in SDZs and Local Area Plans. SDCC opines that *“7-storey development at this location, on lands which have formerly been open space with some communal use, would be excessive.”*

58. In recommending reasons for refusal as to Height and Density SDCC opined that:

- a. *The development would be a material contravention of [the Development Plan as] to height and residential density. The proposed height of the development does not have regard to the existing character of the area, and there is inadequate transition of height at the site edges.*
- b. *Notwithstanding its location within the built-up area of Dublin, and proximity to certain bus routes, this development on former institutional lands would, by virtue of its scale and density, and the proposed provision of 371 no. car parking spaces in an outer suburban area, be unsustainable development. The development would therefore contradict national and regional policy, and would not accord with the 'RES' land-use zoning objective and the [Development Plan] and would therefore not accord with the proper planning and sustainable development of the area.*

The Inspector on Density & Height

59. As to Density the inspector notes, inter alia, that:³⁶

- A significant number of submissions have stated that the density is excessive and represents overdevelopment of the site and cite the lack of available capacity of existing transport infrastructure.
- SDCC recommend refusal for reasons relating to *inter alia* density and height.
- S.28 guidelines such as the Apartment Guidelines 2018 and the Building Height Guidelines 2018 articulate national policy to increase residential density at appropriate locations to ensure the efficient use of zoned and serviced land. He cites NPF objectives 27, 33 and 35 and the relevant RSES³⁷ and DMASP³⁸ - which advocate compact sustainable growth and accelerated housing delivery, integrated transport and land use and alignment of growth with enabling infrastructure.
- The Apartment Guidelines 2018 state that the scale and extent of apartment developments should increase with proximity to public transport and define the types of location that may be suitable for increased densities. The Inspector says, *"In my view, the site lies within the category of an 'Intermediate Urban Location', given its location within approximately 130m (at its closest point) to the bus stops on Ballyboden Way and Ballyboden Road, both of which are served by the 15b Bus Route, which is a reasonably frequent bus service (at least every 15 minute peak hour frequency). The site also served by numerous other bus routes..."* He says, *"The guidelines note that such locations are generally suitable for smaller-scale (will vary subject to location), higher density development that may wholly comprise apartments, or alternatively, medium-high density residential development of any scale that includes apartments to some extent (will also vary, but broadly >45 dwellings per hectare net)."*

³⁶ §12.2.5 et seq

³⁷ Regional Spatial & Economic Strategy (RSES) 2013-2031 for the Eastern & Midland Region

³⁸ Dublin Metropolitan Area Strategic Plan

60. I pause to note that the Inspector deems the site 'Intermediate Urban Location', at least in important part, by reason of its proximity to public transport.

Also, 2018 Guidelines are not relevant to whether there is a material contravention of a 2016 Development Plan though no doubt relevant to a justification of such a material contravention.

61. It will have been seen that the Apartment Guidelines 2018 provide that on Intermediate Urban Location sites only "*smaller-scale (will vary subject to location)*" developments are identified for "*higher density*" - whereas residential development of any scale can be "*medium-high density*" (*will also vary, but broadly >45 dwellings per hectare net*).

62. As to scale, these guidelines offer little to numerically distinguish "smaller" from larger. While the Proposed Development is not build-to-rent, the Apartment Guidelines 2018 notably refer in that regard to "*Larger-scale Apartment Developments that typically include several hundred units*". I confess that I feel safe in considering that no one, and certainly no intelligent layperson, on even a brief glance at figure 1 above would identify the Proposed Development, of 496 apartments in 3 "blocks" – in fact five 6 to 7 storey buildings, including block C a 6-storey pentagon - as "*smaller scale*". On that view, the Apartment Guidelines 2018 envisage for this site only "*medium-high density*" - "*(will also vary, but broadly >45 dwellings per hectare net)*" and development which "*includes apartments to some extent*".

63. I do think that the intelligent layman would read "*medium-high density*" as broadly conveying a density range in the upper range of medium and lower range of high and the words "*broadly >45 dwellings per hectare*" give at least some sense of where the base of the upper range of medium lies. Wherever the lower range of high may be found, it must be generally below the middle range of "*higher density*".

64. But the Inspector does not address whether the Proposed Development is "*smaller-scale*" and hence suitable for "*higher density*" development, or is not smaller scale and hence suitable for "*medium-high density*" development. Further, it has not been suggested to me that 142 dph constitutes "*medium-high density*" and the Inspectors' Conclusion and Recommendation³⁹ that permission be granted, explicitly describes the development as "*higher density*" – a description entirely consistent with the overall impression created by his report.

65. While the Inspector correctly notes that "*the scale and extent of apartment development should increase in relation to ... other relevant factors*", which he lists as applicable to this case and include "*high frequency transport*", it is not apparent on his report or on the various planning policy

³⁹ Inspector's report

documents to hand, and he does not explain, why, on an intermediate urban site, this consideration should lift a large scale development from “medium-high” density into the “higher density” appropriate to “smaller scale” developments. No doubt these factors would push the density higher within “medium-high”.

66. As the Apartment Guidelines 2018 are primarily relevant to the question of proper planning and development generally and the planning judgment of the Board, as opposed to the questions of interpretation of, and material contravention of, the Development Plan, I do not rest my conclusions on these observations. However, they may assist in any remitted consideration of the planning application.

67. As to Density, the Inspector moves to the Urban Residential Guidelines 2009:⁴⁰

- By reference to categories of site identified in those guidelines, he considers the site as “Institutional Lands”⁴¹ and also as a “Public Transport Corridor”⁴² – the latter “*given its location relevant to the nearest bus stops*”.
- As to public transport corridors, he notes that the 2009 Guidelines state that increased densities should be promoted within 500 metres walk of a bus stop, and that capacity of public transport is also relevant in considering appropriate densities. In general, a minimum of 50 dph, subject to appropriate design and amenity standards, should be applied within public transport corridors, with the highest densities being located at rail stations/bus stops.
- The nearest 15B bus stop is about 130m from the site and bus stops of other routes are immediately nearby.
- He observes that frequency of public transport “*is related to capacity*” and the 15B bus is relatively frequent - at least a 15m frequency at peak hours. He does not otherwise address capacity, as distinct from frequency, of public transport.
- He notes that these guidelines state as to Institutional Lands that “*average net densities at least in the range of 35-50 dwellings per hectare should prevail and the objective of retaining the open character of the lands achieved by concentrating increased densities in selected parts (say up to 70 dph)*”.
- The Inspector opines on the passage next above as to density on Institutional Lands: “*In my view, a density in the range cited above, would not be in line with that envisaged for a site on a public transport corridor in close proximity to bus stops, and would not be in line with other relevant national and regional guidelines, including that set out in Design Standards for New Apartments Guidelines for Planning Authorities (2018).*”

40 Inspector’s Report §12.2.14 et seq

41 Urban Residential Guidelines 2009 §5.10

42 Urban Residential Guidelines 2009 §5.8

68. I pause here to observe that, whatever view one takes, or the Inspector took, of the meaning of the 2009 Guidelines as to densities on Institutional Lands, and given the effective incorporation of those Guidelines as to densities in the Development Plan, the observations just cited are strongly resonant of a justification of a material contravention of the Development Plan on grounds permitted by:

- S.37(2)(b)(ii) as to Development Plan Objectives conflicting as between Institutional Lands and Public Transport Corridors or lacking clarity in their application to the site and
- S.37(2)(b)(iii) as to planning policies and guidelines justifying material contravention.

69. In any event, in the 2009 Guidelines, *“Minimum net densities of 50 dwellings per hectare”* are recommended for “Public Transport Corridors”. That “minimum” figure of 50 is the same figure as the upper “at least” figure given for Institutional Lands. While I acknowledge the lower “at least” figure of 35 for Institutional Lands, these numbers suggest broadly similar density expectations for both categories: Public Transport Corridors higher perhaps, but not greatly so. Accordingly and as a matter of interpretation of the 2009 Guidelines, and hence the Development Plan, I respectfully disagree, as a matter of law, that Institutional Lands densities *“would not be in line with that envisaged for a site on a public transport corridor”*.

70. Whether Institutional Lands densities *“would not be in line with other relevant national and regional guidelines, including that set out in Design Standards for New Apartments Guidelines for Planning Authorities (2018)”* is, of course, a different matter and a matter for the judgement of the Board. I do not agree or disagree. But while the inspector’s view may justify a material contravention via S.37(2)(b), it does not affect the prior questions of interpretation of the Development Plan and whether there is a material contravention of it.

71. As to density, the Inspector continues by noting that the Proposed Development includes the significant open space provision and retention of open character of the site.⁴³ He concludes:

*“It is my view that, given the above factors, and having regard to national and regional policy as relates to density, the density of 141.7 unit/ha is not excessive given the need to deliver sufficient housing units, the need to ensure efficient use of land and the need to ensure maximum use of existing and future transport infrastructure, and in order to support and enhance the viability of existing and future services.”*⁴⁴

43 Inspector’s Report §12.2.15 et seq

44 I have amalgamated two passages here but I think not unfairly.

As a planning judgment simpliciter, the Applicants doubtless disagree with this crucial conclusion: but that is not the basis of their attack, nor would such an attack have availed them. They say rather that 142 dph is a material contravention of the Development Plan and must be justified as such.

72. The Inspector then notes that, nonetheless, the acceptability of 142 dph is subject to appropriate design and amenity standards, which he next considers. Under the heading “Urban Design including Height”⁴⁵ the Inspector notes the SDCC and Objectors’ concerns and Shannon Homes’ views and Material Contravention Statement on the issue of height. He recites the Development Plan provisions as to Height⁴⁶ and asserts that the Height Guidelines 2018 provide, and he has considered, “clear criteria” for assessing applications for increased height. As will have been seen, I disagree that they are clear. He records that “SPPRs” – plural – have informed his assessment. But he mentions only SPPR3 of the Height Guidelines 2018 which permits material contravention of the Development Plan where criteria set out in §3.2 of those Guidelines are met. He says he has considered other policy standards but here identifies only the NPF - particularly NPOs 13 and 35⁴⁷.

73. The Inspector notes that the first criterion of §3.2 of the Guidelines “relates to the accessibility of the site by public transport.” That is, of course correct, but it is worth setting out verbatim:

“The site is well served by public transport with high capacity, frequent service and good links to other modes of transport.”⁴⁸

74. The inspector notes that

“the site is well served by a number of bus services, providing access to the city centre, the docklands, Tallaght Town Centre and providing connections to Luas services. As such, I consider the site has good accessibility to public transport.”

Notably, while the Inspector factually records relevant public transport services this is the extent of the Inspector’s analysis of the actual practical accessibility of the site to public transport - apart arguably from his earlier description of the 15b as reasonably frequent and observation that frequency is “related to” capacity.

75. The Inspector cites objectors on the issue of public transport as follows:

- *“Insufficient public transport/ No rail link, no Luas, no improved Bus infrastructure/ Will swamp existing local public transport. – no confirmation of any increased services/ Lack of*

45 Inspector’s Report §12.3

46 See above

47 See above

48 Emphases added

connectivity to shops, schools and other facilities/Bus services are irregular - the 15b service does not have a stop close the site/Travel time to city centre is excessive/ Will not be addressed by Bus Connects/ Bus Connects proposal may not go ahead/This corridor will never be served by high capacity public transport/Will not see any improvement from the Bus Connects project/concern the service will deteriorate/Core Bus Corridor Route 12 terminates c2km north of the proposed development /Bus Route 15b is not a QBC.

- *Any approval should be made contingent on proper public transport services being put in place prior to commencement of development. A reduced quantum of units is a more suitable solution for the site*
- *SHDS of this scale have generally being permitted on sites adjacent to high quality public transport corridors and proximate to substantial social and community infrastructure and services – this site benefits from neither.”*

Despite this recitation, he does not here or elsewhere in his report engage with these objections as the relate to public transport capacity. As a matter of fact, three residents’ associations⁴⁹ raised the capacity issue⁵⁰. So too did the Applicant – albeit less forcefully.

76. While he recites it, the inspector does not here or elsewhere in his report engage with the SDCC view that 140 dph is not *“sustainable on the strength of a single high frequency bus route”* or its more general view that *“Whilst the site is served by a number of bus routes the level of access to frequent public transport is very low at this location.”*

77. It is not for me to resolve that disagreement whether one high frequency bus route makes a Public Transport Corridor: the Inspector and the Board are entitled to their view and to apply it to their decision-making. We can clearly infer that the Inspector disagrees with the Planning Authority best placed to know the practical realities of public transport in the area - but we do not in any meaningful way know why he disagrees. Given the importance he attributes to the site’s being on a Public Transport Corridor in justifying Height and Density, this is at least surprising. And the Applicants plead that the Board was obliged to and failed to give reasons, inter alia: *“Why did the Board prefer the Developer’s conclusions that the proposed site was well served by public transport over the observers’ objections that, even if correct, this is meaningless unless that public transport will have sufficient capacity once the 1000+ residential dwellings committed in the area are constructed?”*

49 Glendoher & District Residents Association, Palmer Park & Pearse Brothers Park Residents Association, Boden Park Residents Association 50 Marston Planning Consultancy to the Board 26 June 2020 - “Whilst there are a range of bus services within close proximity to the site they operate mostly at irregular intervals with the bus services no. 61 and 175 buses at half hourly intervals within the peak; and the 15b service, which does not contain a stop adjacent to the site, operating at 15 minute intervals. We submit therefore that the site does not provide a site that currently has or is proposed in the future to be served by a high capacity public transport network. The attractiveness is further diminished by the travel time of over 1 hour in off-peak and up to 90 minutes at peak hours for travel times into the city centre along this route.” Citing later “the lack of high capacity public transport connectivity” and “poor public transport Connectivity” and “inadequate high capacity public transport;”

78. Having considered other §3.2 criteria the Inspector moves to the questions of material contravention of the Development Plan on Height and Density⁵¹. He disagrees with objectors and SDCC. He agrees there may be a material contravention as to Height and analyses that issue as such with a view to application of S.9(6) of the 2016 Act and S.37(2)PDA 2000. That is not of itself in dispute. He considers that there is no material contravention as to density, *“as there are no specific limits on densities contained in any of the objectives of the Development Plan, as pertains to sites within the M50, and in fact higher densities are encouraged in appropriate locations”*.

79. He also concurs with Shannon Homes’ view that the Development Plan objectives of Housing Policy 8, to support higher densities, conflict with the height limitations in Housing Policy 9 Objective 4 etc.⁵²

80. The Inspector addresses⁵³ the SDCC recommended reasons for refusal for Height and Density⁵⁴, saying only that he had considered them above.

81. The Inspector’s Conclusion and Recommendation⁵⁵ that permission be granted, includes the following as to Density and Height:

“The provision of a higher density residential development at this location is desirable having regard to its location within the Dublin Metropolitan Area, its proximity to public transport service and the existing high quality pedestrian and cycle infrastructure facilities. In addition, the site is located in an area with a wide range of social infrastructure facilities. The height, bulk and massing, detailed design and layout of the scheme are acceptable.”

Capacity of Public Transport – Grounds 7 & 8 - the Issues & Discussion

82. The Applicant asserts (Ground 7) that the Board failed, in justifying increased height by reference to SPPR3 of the Building Height Guidelines 2018, to address the capacity of public transport serving the development. That SPPR3 was applied is common case. The Statement of Grounds asserts error in the Board’s interpretation of Chapter 3 of the Height Guidelines 2018 and/or failure to take into account a relevant consideration. It asserts that:

- a. SPPR3 requires a developer proposing a material contravention in relation to height to justify it with respect to the criteria set out in §3.2 of the Height Guidelines 2018. In particular, a developer must set out how the site is well served by public transport with high capacity,

51 Inspector’s report §12.3.17

52 sic

53 Inspector’s report §12.8

54 See above

55 §13

frequent service and good links to other modes of transport. It asserts that frequency and capacity are distinct elements of this criterion.

- b. The Board in its pre-application opinion⁵⁶ specifically directed the Developer to update its justification of the proposed development by a Transport Impact Assessment having regard to the capacity of public transport services.
- c. But, by the Transport Assessment and Material Contravention Statement submitted with the application, the Developer addressed only frequency of services.
- d. The failure to analyse capacity was identified in a technical note by Traffic and Transport experts Martin Peters and Associates submitted to the Board by a group of observers.
- e. The inspector noted that the frequency of service was related to capacity and that the 15b was a relatively frequent bus route but he did not examine the capacity of the public transport services. He concluded, as to §3.2 of the Height Guidelines 2018, that the site had *“good accessibility to public transport”*.
- f. The Board adopted the Inspector’s report in this regard and thereby erred in that it had no information before it as to capacity (as opposed to the frequency) of public transport services - notably, this is stated to have been contrary to §A(1) of SPPR 3 and because *“good accessibility to public transport”* is not a criterion specified in §3.2 of the Height Guidelines 2018.

83. The Applicant pleads also (Ground 8) that where objectors’ material identifying specific and significant problems was before the Board, the Board in this case was obliged to give reasons for its conclusion that the proposed site was well served by public transport over the observers’ objections that this is meaningless unless that public transport will have sufficient capacity to serve the proposed development after the 1000+ residential dwellings committed by existing planning permissions in the area are constructed.

84. The Board’s Statement of Opposition is laconic on this issue. It pleads that *“there was no error in the manner in which the question of whether the site is well served by public transport was assessed. is focused on the language used rather than the substance of the assessment completed.”* And that *“The Inspector was satisfied that the proposed density, of 141.7 units per hectare was not excessive having regard to national and regional policy and that it was appropriate having regard to the need to ensure efficient use of land and the need to ensure the maximum use of existing and future transport infrastructure and in order to support and enhance the viability of existing and future services.”* Shannon Homes’ Statement of Opposition is more detailed, recites the inspector’s findings and asserts that the Applicant provides no evidence of deficiencies in respect of *“capacity”* and asserts that the *“Inspector was correct in considering that frequency is related to capacity. In the*

⁵⁶ pursuant to Article 285(5)(b) of the Planning and Development Regulations

circumstances there was sufficient evidence before the Inspector and the Board to support its conclusions that the criteria in Section 3.2 of the Guidelines were met”.

85. Shannon Homes’ Statement of Opposition asserts that *“it is instructive that the Martin Peters & Associates report actually stated that the public transport provision appears to be “reasonable”.* This observation related to an expert report/Technical Note submitted to the Board by objectors (see further below) and was repeated in written submissions that the report *“actually stated that the public transport provision appears to be “reasonable”.* This is, in my view, not based on a fair reading of the expert report/Technical Note. It is clear from the context that the point made in the expert report/Technical Note is that while the public transport provision might initially appear reasonable it is not in fact reasonable or has not been shown to be reasonable. I draw no conclusion that it is or is not reasonable: I merely point out that the view that public transport provision is reasonable cannot, in my view, be fairly attributed to Martin Peters & Associates.

86. The assertion in the Shannon Homes’ Statement of Opposition that *“It is instructive that the only reference made to “capacity” in the Martin Peters & Associates’ Technical Note appears to relate to local population”* is simply incorrect: I set out §3.2.12 of that note below.

87. As to the Material Contravention issue, (Ground 5) and as stated, the Inspector justifies the density of 142 dph in considerable part in public transport terms. The sites’ location on a public transport corridor was, as recorded above, one reason for the inspector’s view as to density that the site’s status as *“Institutional lands”* was overshadowed by its being on a public transport corridor *“... in close proximity to bus stops,”.*

88. Shannon Homes’ *“Traffic and Transport Assessment”* by DBFL Engineers (*“DBFL TTA”*) identified bus routes serving the area and their frequency and the locations of bus stops⁵⁷. The Shannon Homes Response to An Bord Pleanála Opinion⁵⁸ did likewise. Observers other than the Applicant commissioned and submitted to the Board an analysis by traffic engineers Martin Peters & Associates (the *“MPA Technical Note”*) which was critical as a *“fundamental issue”* of Shannon Homes’ failure to address public transport capacity as well as frequency - *“No evidence has been provided to show that the public transport services will remain within capacity once all of the committed and proposed developments have been completed. This needs to be considered fully before planning permission can be granted.”*⁵⁹

89. §3.2 of the Building Height Guidelines 2018 sets out criteria the satisfaction of which the planning applicant *“shall demonstrate”* - including that the site be *“well served by public transport*

57 §2.3.15

58 i.e. the Board’s opinion in the statutory pre application process.

59 See generally §3.2.8 et seq

*with high capacity, frequent service and good links to other modes of public transport*⁶⁰. The application of SPPR3 is predicated the Board's concurrence with the Shannon Homes' demonstration of satisfaction of this criterion, amongst others.

90. McDonald J in **O'Neill v An Bord Pleanála & Ruiside Developments**⁶¹, in which the height of proposed apartment blocks materially contravened development plan height limits, held as follows:

"145. Section 28(1C) imposes a very clear mandatory requirement that, where specific planning policy requirements are specified in ministerial guidelines, they must be complied with. It is not sufficient merely to have regard to them (which is a relevant requirement in relation to other aspects of the guidelines).

157 It is clear from the text of SPPR 3(A) that its application is dependent upon (a) an applicant for planning permission setting out how a development proposal complies with the "criteria above" and (b) an assessment by the Board concurring with that conclusion. The relevant criteria for this purpose are set out in para.3.2 of the Building Height Guidelines. Paragraph 3.2 requires that an applicant "shall demonstrate to the satisfaction of the [the Board] that the proposed development" satisfies a number of criteria which are set out over the next three pages of the Guidelines.

158 In the case of the criteria applicable at the scale of the relevant city or town, the Guidelines provide that the applicant must satisfy the Board that the proposed development satisfies the following criteria:

(a) The site is well served by public transport with high capacity, frequent service and good links to other modes of public transport;

.....
162. It is clear from a consideration of the text of the Guidelines (in particular from the passage quoted in para. 157 above) that these criteria must be satisfied if SPPR 3(A) is to apply. This is reinforced by the concluding sentence of para. 3.2 is in the following terms:

"Where ... [the Board] considers that such criteria are appropriately incorporated into development proposals, the relevant authority shall apply the following Strategic Planning Policy Requirement under Section 28 (1C) of the Planning and Development Act 2000 (as amended)".

.....
170. it is important to bear in mind that, as noted above, SPPR 3(A) of the Building Height Guidelines requires an applicant for permission to demonstrate compliance with the criteria set out in para. 3.2 of those guidelines. It also requires that the Board must consider that such criteria have been "appropriately incorporated into" the development proposals.

60 Emphases added
61 [2020] IEHC 356

The obligation on the Board to apply SPPR 3(A) will only arise where the Board considers that the criteria have been appropriately incorporated. This is reinforced by a consideration of the terms of SPPR 3(A) itself which make clear that the Board must concur that the development proposal complies with the criteria set out in para. 3.2. In turn, it would appear to follow that the Board's conclusions to that effect should be reflected in the main reasons and considerations for granting permission. That said, there is a measure of latitude given to a body such as the Board in relation to its obligation to state reasons and in relation to the extent of the reasoning to be given and as to the location of the reasons. It is clear from a number of authorities⁶² that there is generally no requirement for the Board to give a discursive decision and that the reasons given for a decision by the Board can be terse. Moreover, as a consequence of the decision of the Supreme Court in Connelly v. An Bord Pleanála (addressed further below) the reasons can be found in a variety of documents and it is not necessary that they should all be stated in the body of the Board's decision (or in the Inspector's report).

171. *In so far as height is concerned, material contravention is addressed in quite brief terms in s.12.4 of the Inspector's report. the Inspector referred to the Building Height Guidelines and correctly stated that the guidelines provide "the ability through SPPR3 for the Board to grant permission for a building height (notwithstanding where this breaches a cap set by a Development Plan) where this is justified" (emphasis added). In my view, the Inspector was correct to observe that justification was required. While that word is not used in the context of SPPR3 in the Building Height Guidelines, that is the effect of the closing sentence in para. 3.2 (addressed by me at para. 162 above). The criteria set out in para. 3.2 of the guidelines must be appropriately incorporated into any development proposal.*

.....

174. *Considered on its own, that reasoning on the part of the Inspector in paras. 12.4.4 and 12.4.6 of her report may appear to be quite sparse and lacking in detail. However, when read in conjunction with the reports of Stephen Little, O'Mahony Pike and IN2, it seems to me that the reasoning might arguably be sufficient to pass the Connelly⁶³ test but for the next matter which I address in paras. 175 to 178 below. That said, I would question whether, in a case involving satisfaction of the criteria set out in s.3.2 of the Building Height Guidelines, it is sufficient to approach the matter in such general terms. As noted above, SPPR 3(A) clearly requires that, if it is to apply, the specific criteria set out in para. 3.2 of the Guidelines must be complied with. It would, in my view, be advisable accordingly that, in any report of an inspector (or, in the absence of such report, in a decision of the Board) that an analysis should be carried out as to how the proposed development complies with the criteria set out in para. 3.2 of the Guidelines. At the very least, it seems to me that the Board or planning authority should specifically state that, on the basis of the relevant reports submitted, it considers that the criteria set out in para. 3.2 of the Guidelines have been appropriately incorporated into the development proposal. That seems to me to be a precondition before SPPR3 can be said to apply.*

62 McDonald J cites Mulholland v. An Bord Pleanála (No.2) [2006] 1 I.R. 453, O'Neill v. An Bord Pleanála [2009] IEHC 202, Stack Shannon v. An Bord Pleanála [2012] IEHC 571, Nee v. An Bord Pleanála [2012] IEHC 532 and Harten v. An Bord Pleanála [2018] IEHC 40
63 Connelly v. An Bord Pleanála [2018] IESC 31; [2018] 2 I.L.R.M. 453

91. The Applicant asserts that Shannon Homes demonstrated, and the Inspector and Board considered frequency of public transport but not capacity, despite the MPA Technical Note bringing the issue to their attention.

92. It is notable that the policy documents advocate residential development – denser and higher – along public transport corridors. The phrase “*high capacity public transport*” appears in the Inspectors’ account of the policy documents. Why that should be so hardly requires explanation. It makes obvious sense in terms of realising the value of investment in public transport, minimising car dependency and encouraging modal shift from cars to public transport. There can be no doubt that in a planning application such as this, the position as to public transport must feature amongst the “*Main Reasons and Considerations*” which the Board must articulate – as they did, citing “..... *the availability in the area of a wide range of transport infrastructure*”. And as I have said the Board’s Direction records that “*The Board decided to grant permission generally in accordance with the Inspector’s recommendation*” such that his views can be attributed to it.

93. But obviously, as to a particular planning application, public transport capacity is an intensely practical – as opposed to a theoretical - issue. Accordingly it is entirely to be expected that §3.2 of the Height Guidelines sets as its very first criterion that “*The site is well served by public transport with high capacity, frequent service and good links to other modes of transport.*” Though the comma after “capacity” is helpful in supporting what would in any event have been my view, I would not wish it thought that my decision on this issue hinges on a comma in a guideline as interpreted by the intelligent layperson. But this sentence, to my mind clearly identifies “capacity” and “frequency” as distinct concepts. Even without the comma and as a matter of ordinary meaning, they are distinct concepts. Shannon Homes point out that no guidelines define “capacity” as it relates to public transport and suggest that the closest to such a definition is found in §5.8 of the 2009 Urban Residential Guidelines as to Public Transport Corridors: “*The capacity of public transport (e.g. the number of train services during peak hours) should also be taken into consideration in considering appropriate densities*”. As I pointed out at trial “e.g.” is not “i.e.” and I accept the Inspector’s view that capacity is “related” to frequency and the implication that they are not the same thing. That apart, and as a matter of both simple English and practical planning, they are clearly related but equally clearly not the same thing. Why that should be so also hardly requires explanation. That busses are frequent is no consolation to the commuter standing at peak hour on the way to or from work at a bus stop at which busses pass every 15 minutes or more frequently if all are already full, or even if the first two are full. As I observed at trial, to assess public transport capacity at a bus stop serving the site requires information not merely as to the frequency of busses but as to how full or empty the bus will probably be arriving at the bus stop and how many people must be presumed to be standing at that bus stop already before you build the proposed development? No doubt one will not have perfect information in those regards and planning judgment will be called for but that is not a basis for ignoring these issues. The point was made in

O’Neill⁶⁴, in which an objector, one of many to similar effect, “*stated that she has to be on the bus by 7.30 a.m. to get into work for 9 a.m. because, if she leaves it any later, the buses travelling into the city centre are already full by the time they pass*”. Though I do not have similarly eloquent material in this case it is clear from the papers that multiple expressions of similar concern were made in the present case. Such unreliability of actually getting onto a bus is a recipe for car dependency – a considerable concern of the planning authority in recommending refusal of the planning application. Also, the criterion is that the site itself be “*well served*” – by which I understand well served actually as opposed to theoretically - and not just that the public transport corridor generally is well served.

94. Lest the foregoing illustrations give the wrong impression, I should emphasise that I am approaching the public transport capacity question not in terms of the presence or absence of information before the Board adequate to the assessment of capacity: I am considering the matter by reference to the adequacy of reasons.

95. Also, as McDonald J pointed out in **O’Neill**, the requirement in the guidelines is expressed in the present tense - which clearly requires that the site is currently well served by public transport “*with high capacity*” . A plan to improve public transport service in the future does not satisfy this criterion.

96. The Board and Shannon Homes contrast **O’Neill** with the present case in that the inspector in **O’Neill** accepted that the capacity of the bus service was poor whereas the inspector in this case made no such finding. That is correct as far as it goes but it does not seem to me to go very far. Striking in the comparison of the present case and **O’Neill** is that the developer in **O’Neill** submitted, and it does not seem to have been disputed, that “*This site is currently on a high frequency serviced bus route with a bus stop directly adjacent the site. It is served by the following bus routes: 40, 40b, 40d & the 140.*” As to bus frequency therefore, it seems to have been broadly similar to the present case: it may even have been better, having up to four high frequency bus routes, not just one – though I do not read much into that. However, the decision clearly shows that the answer to the frequency question, while relevant, is not per se the answer to the capacity question. The inspector in **O’Neill** answered the capacity question – despite the frequency, he accepted that the capacity of the bus service was poor. The Board can hardly be better placed to defend these proceedings on the basis that the Inspector did not answer the capacity question. This may be especially so where the Planning Authority with presumably the best “*on the ground*” knowledge of the locus says, “*the level of access to frequent public transport is very low at this location*”.

97. I do not suggest that this site is not well-served – nor would I have the jurisdiction or expertise to decide that issue. However, the information before the Board was limited to lists (in themselves impressive to my inexpert eye) of bus services and their frequency. And I think I can take

64 *O’Neill v An Bord Pleanála & Ruirside Developments* [2020] IEHC 356 §157 et seq

judicial notice that from their frequency and knowledge of the capacity of a bus when empty, an Inspector can draw some conclusions about theoretical capacity. However, practical conclusions are a different matter and are what matters and are what the Board must address. The obvious question is as to what extent the theoretical capacity is already taken up by the needs of the population already using the busses in question and by the expected populations of developments already permitted in reliance on existing public transport – of which the MPA Technical Note⁶⁵ identifies 1,440 residential units. Perhaps precision is unattainable in this regard but neither, it seems to me, can the issue be ignored when the guidelines clearly require that it be addressed.

98. The Inspector notes that the lack of transport capacity was raised by a significant number of objectors. It was certainly raised in the objection to the Board of three residents associations⁶⁶ exhibited in these proceedings and, if less expansively, in the Applicant's objection. The Martin Peters expert report enclosed with the objection of the three residents associations squarely addresses the issue:

"3.2.12 In total the committed and proposed developments create 1,440 new residential units which will result in a significant increase in local population. This in turn will be a considerable strain on the operation of the current / proposed public transport services. This is a fundamental issue as the applicant has sought to justify a very low parking provision on the basis that future residents will use public transport rather than drive. This may not be the case if the public transport services are at capacity. No evidence has been provided to show that the public transport services will remain within capacity once all of the committed and proposed developments have been completed. This needs to be considered fully before planning permission can be granted."

99. The Inspector acknowledges (considering density not height) that *"In relation to 'Public Transport Corridors' the Guidelines (the Urban Residential Guidelines 2009) state that increased densities should be promoted within 500 metres walking distance of a bus stop, ... with the capacity of such services also taken into account."* However the Inspector's only finding on the issue of transport capacity is as follows: *"In relation to frequency of service (which is related to capacity) the 15b bus service is a relatively frequent route which runs at least a 15m frequency at peak hours and the closest stop that is served by this route is approximately 130m from the north-west of the site. There are also other stops that serve the other routes are immediately north of the site on Taylors Land and to the west of the site on Edmondstown Lane."* The Inspector is quite correct, of course, to record that frequency is related to capacity and no doubt that observation is relevant to the capacity issue. But frequency and capacity are not the same thing and both must be addressed before the first of the criteria set out in §3.2 of the Height Guidelines can be considered satisfied. Otherwise the analysis is merely theoretical and superficial as opposed to practical.

⁶⁵ See below

⁶⁶ Glendoher & District Residents Association, Palmer Park & Pearse Brothers Park Residents Association, Boden Park Residents Association

100. That this is so is notably illustrated by the view of the SDCC, who in this respect can be expected to be familiar with the realities of their functional area, that *“Whilst the site is served by a number of bus routes the level of access to frequent public transport is very low at this location.”* And SDCC did not see that 140 dph was *“sustainable on the strength of a single high frequency bus route”*. As between the Board and the Inspector on the one hand, and the Planning Authority on the other, this is not merely a difference of shade or degree or a minor difference of opinion. The distance between their opinions is wide and stark on an issue, public transport, on which the Inspector substantially rests his views as to density and height. Putting it at its mildest, it is very surprising that the Inspector did not engage with the opinion on this issue of the public authority best placed to have one.

101. Shannon Homes assert that the Applicants have not pointed to the availability of information which would provide the capacity information in question. I do not think that avails them. Objectors clearly raised the issue before the Board, as did SDCC. And §3.2 of the Height Guidelines required the Shannon Homes to “demonstrate” public transport capacity. It is for Shannon Homes to obtain that information. If the suggestion is implicit in their submission that surveys similar to traffic surveys and the like and other available information cannot address the capacity question, that is an inference which, for want of evidence, I do not draw.

Capacity of Public Transport - Conclusion

102. The policy documents identify capacity of the public transport network, as serving the site in question, as a consideration highly relevant to making the impugned decision. In my view, in this respect, the Board failed to take into account a relevant consideration – the capacity of the public transport network. The Board also failed to give an adequately reasoned decision as to the capacity of the public transport network. The decision must be quashed on this account.

DENSITY & MATERIAL CONTRAVENTION – Ground 5

Introduction, What is Not at Stake & Standard of Review

103. As recorded above, the average residential density of the proposed development is 142 dph. Shannon Homes, the Inspector and the Board say 142 dph is not in material contravention of the Development Plan. In the Impugned Decision the Board did not recognise or treat 142 dph as a material contravention of the Development Plan.

104. The Applicants and SDCC (in their statutory report to the Board) say 142 dph is a material contravention of the Development Plan. The Applicants assert contravention specifically of Policy H8, Objective 3 as to development of Institutional Lands⁶⁷. The Applicant makes two arguments.

- that the proposed density is incompatible *simpliciter* with the Development Plan.
- that density above that provided in the guidelines may only be permitted if it facilitates the objective of preserving the open character of the institutional lands.

The Applicant says that whether, in light of other Government policies or relevant considerations, 142 dph is in a general sense in accordance with good planning and sustainable development is beside the point as to material contravention of the Development Plan. Such considerations are provided for, specifically on the basis of material contravention, by S.37(2)(b)(ii) PDA 2000, which the Board did not apply.

105. It is important to state that what is at issue here is not the question whether a density of 142 dph is, in the general sense or in principle, permissible by the Board or in accordance with State planning policy or in accordance with principles of proper planning and sustainable development generally. What is at issue is the quite different question whether a density of 142 dph is in material contravention of the Development Plan. If it were in material contravention of the Development Plan that would not necessarily imply that the Board may not permit it. It would imply, rather, that to permit it, the Board would be obliged, first to acknowledge that the density of 142 dph is a material contravention and, second, to permit the development via the procedures stipulated by S.9(6) PD(H)A 2016 and S.37(2)(b) of PDA 2000.

106. This is not a matter of mere procedure. S.9(6) PD(H)A 2016 stipulates that in a case of material contravention the Board may “only” grant permission via S.37(2)(b). That statute specifies a mandatory process whereby the Board must justify a decision in material contravention of a development plan is no surprise. While such decisions are by no means unusual in practice, departure from the development plan democratically adopted by a local government organ having a constitutional status recognised by Article 28A of the Constitution (see generally, **Christian v. Dublin City Council (No. 1)**⁶⁸) and in pursuance of a statutory obligation to adopt a development plan is no small matter. Humphreys J has recently adverted to the importance of the development plan in **Cork County Council v Minister for Housing**⁶⁹.

107. So, as Simons J said in **Redmond v An Bord Pleanála**⁷⁰:

⁶⁷ See above – repeated here for convenience - H8 Objective 3: To encourage the development of institutional lands subject to the retention of their open character and the provision of quality public open space in accordance with the Guidelines for Planning Authorities on Sustainable Residential Development in Urban Areas, DEHLG (2009).

⁶⁸ [2012] IEHC 163; [2012] 2 I.R. 506, [17]. Cited in Redmond [2020] IEHC 151 from §115

⁶⁹ Cork County Council v Minister for Housing Local Government and Heritage et al. [2021] IEHC 683

⁷⁰ [2020] IEHC 151 §3 & §159

“In the case of a non-zoning objective, (of a Development Plan), the board has jurisdiction to grant planning permission in material contravention of the objective provided that certain prescribed statutory criteria are fulfilled.”

“The proposed development involves a material contravention of the development plan policies and objectives applicable to institutional lands in respect of (i) housing density and (ii) public open space. The decision to grant planning permission is invalid in circumstances where An Bord Pleanála did not seek to invoke its statutory power to grant planning permission in material contravention of the development plan (section 9(6)(c) of the PD(H)A 2016).”

108. Accordingly, if there is a material contravention on the density issue and a failure to apply the material contravention procedures of S.9(6) PD(H)A 2016 and S.37(2)(b) PDA 2000⁷¹ in that regard, the decision will be quashed. It is clear and agreed that the Board did not apply these material contravention procedures. So I need only determine the question of material contravention.

109. That issue requires of me the following:

- Interpretation of the Development Plan as to density and as it bears on this site
- Determination whether an average density of 142 dph is in contravention of the Development Plan as so interpreted
- If an average density of 142 dph is in contravention of the Development Plan, whether that contravention is material.

Interpretation of Development Plans & Ministerial Guidelines & Determining Material Contravention

110. S.10(1) PDA 2000 generally describes development plans as follows: *“A development plan shall set out an overall strategy for the proper planning and sustainable development of the area of the development plan and shall consist of a written statement and a plan or plans indicating the development objectives for the area in question”.*

Law not Planning Judgement

111. To do their work, Planning Authorities and the Board must take a view as to interpretation of a development plan. But the proper and objective interpretation of the Development Plan is

⁷¹ I have set these provisions out above.

ultimately a matter of law for the court. As Lord Reed said in a case cited by the Board, **Tesco Stores Limited v. Dundee City Council**⁷², “a planning authority must proceed upon a proper understanding of the development plan ... the planning authority is required by statute to have regard to the provisions of the development plan: it cannot have regard to the provisions of the plan if it fails to understand them.” **Harwood on Planning Permission**⁷³ describes this case as confirming the role of the court in interpreting planning policy as a matter of law rather than leaving its meaning to the decision maker subject to rationality review⁷⁴. In similar vein, Simons J in **Redmond v An Bord Pleanála**⁷⁵ held, that:

“It follows from this legislative scheme that the question of whether or not a proposed strategic housing development involves a material contravention of the development plan must be a question of law exclusively for the court. Were it otherwise—and were An Bord Pleanála to be allowed to determine conclusively whether or not a material contravention is involved — then this would set at naught the statutory restraints on An Bord Pleanála’s ability to grant planning permission which are imposed by section 9(6) of the PD(H)A 2016. The board would, in effect, be allowed to determine its own jurisdiction.”

“The misinterpretation of the development plan is an error of law which goes to jurisdiction.”

That is because the Board “is under an express statutory obligation to have regard to the development plan in determining an application for planning permission under the PD(H)A 2016 (see section 9(2)(a)). It is a necessary corollary of this obligation that the board must correctly interpret the development plan. A decision-maker cannot be said to have properly had regard to objectives or policies which it has misunderstood.”

The interpretation of ministerial guidelines is also a matter of law for the court – see **Eoin Kelly v An Bord Pleanála & Aldi**⁷⁶.

112. Importantly, the same is also true of whether a proposed development is in material contravention of the development plan. In **Redmond**⁷⁷ Simons J said:

“Where the interpretation of a development plan, and, in particular, the determination of whether or not a proposed development would involve a material contravention of the development plan, is a question of law for the court, then the views of neither the planning authority nor An Bord Pleanála can be decisive”.

113. These issues of interpretation of the Development Plan and whether it has been contravened, and, if so, whether materially, are matters of law for me to decide on a “full-blooded

72 [2012] UKSC 13 - quoted with approval by the High Court

73 2016 Professional Books §9.43

74 citing Lord Reed §§18 & 18

75 [2020] IEHC 151

76 [2019] IEHC 84

77 *Redmond v An Bord Pleanála* [2020] IEHC 151

review”⁷⁸ basis rather than the attenuated irrationality review standard set in *O’Keeffe v An Bord Pleanála*⁷⁹. And on these issues of interpretation, the views of the Board are entitled to appropriate weight but no particular deference on account of their source – *Cicol v An Bord Pleanála*⁸⁰.

114. The Board relies on *Tesco v Dundee*⁸¹ in which Lord Reed observed that:

“development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse ...”

Lord Hope held similar views: that *“it was not unusual for development plan policies to pull in different directions”* and the proposition was untenable *“that if there was a breach of any one policy in a development plan a proposed development could not be said to be ‘in accordance with the plan’ the relative importance of a given policy to the overall objectives of the development plan was essentially a matter for the judgment of the local planning authority and that a legalistic approach to the interpretation of development plan policies was to be avoided.”*⁸²

The Board says it is for it to resolve such issues, subject only to *“O’Keeffe”* review for irrationality.

115. Of course, the UK Supreme Court’s caveat in *Tesco* should be noted: *“Nevertheless, planning authorities do not live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like it to mean.”* And the general observation by Lord Reed is presumably applicable only if irreconcilability remains despite interpreting the development plan as a whole. McGovern J in *Navan Co-Ownership v. An Bord Pleanála*⁸³ approved the observation in *Tesco* but also the necessity of an ‘holistic approach’ to the interpretation of a development plan - as did Barniville J in *Eoin Kelly*⁸⁴. Neither was a strategic housing case. And I’m not clear that either case concerned irreconcilable policies.

116. The Board cites Simons J in *Redmond* – a strategic housing case in which judgment was given in 2019. Simons J was entirely orthodox in his view that the interpretation of a development plan is a matter of law for the court and that the Board’s view on that issue is accorded no particular

78 Heather Hill Management Company clg v. An Bord Pleanála [2019] IEHC 450 (High Court (General), Simons J, 21 June 2019) §41; *Redmond v. An Bord Pleanála* [2020] IEHC 151 (High Court (Judicial Review), Simons J, 10 March 2020)§26

79 [1993] 1 I.R. 39

80 [2008] IEHC 146

81 *Tesco Stores Limited v. Dundee City Council* [2012] UKSC 13

82 §34

83 [2016] IEHC 181

84 *Eoin Kelly v. An Bord Pleanála & Aldi* [2019] IEHC 84

deference. However, he was not concerned with conflicting – or in Tesco terms, “mutually irreconcilable” – development plan objectives.

117. It seems to me that Tesco posits two scenarios: irreconcilable policies; and “provisions framed in language whose application to a given set of facts requires the exercise of judgment”. That decisions as to the latter should be reviewable only for irrationality is uncontroversial – though S.37(2)(b)(iii) PD(H)A 2016 may affect the issue. But it seems less obvious that the same approach should be taken in this jurisdiction to irreconcilable policies in the development plan. The Applicants, citing S.37(2)(b)(ii)⁸⁵, say that Irish statute and authority are directly to the contrary such that the Board cannot avoid finding a material contravention by preferring one element of a development plan to a contradictory one. Simons J, in **Heather Hill Management Company v. An Bord Pleanála**⁸⁶, a strategic housing case, said:

“The fact — if fact it be — that there is a conflict between two objectives of a development plan does not allow a decisionmaker to contravene one of the objectives and to dismiss that contravention as immaterial. Rather, the solution which the Oireachtas has put in place to address the contingency of conflicting objectives is that provided for under section 37(2)(b) of the Planning and Development Act 2000 (as applied to “strategic housing development” by section 9(6) of the PD(H)A 2016). More specifically, An Bord Pleanála is authorised to grant planning permission in material contravention of the plan where there are conflicting objectives in the development plan insofar as the proposed development is concerned.”

118. And as to the distinction posited by the Board between judicial review of the application of a development plan to the analysis of a particular planning application – reviewable only for irrationality - and the interpretation of a development plan, the lines seem to me further blurred by S.37(2)(b)(iii) which applies the material contravention procedure to circumstances in which development plan objectives are “not clearly stated, insofar as the proposed development is concerned”. This seems to imply at least some exercise of planning judgment but it is deemed to be material contravention – which is traditionally reviewable as a matter of law for the Court as opposed to on restricted irrationality grounds.

Interpretative Principles

119. The principles governing interpretation of planning documents are of considerable vintage and long-understood and applied in practice by a very broad constituency of stakeholders. So, while they are not without difficulty⁸⁷ and improvement is always possible and may be necessary, radical

85 (b) the Board may only grant permission in accordance with paragraph (a) where it considers that(ii) there are conflicting objectives in the development plan or the objectives are not clearly stated, insofar as the proposed development is concerned, 86 [2019] IEHC 450

87 Without endorsing the views of the author, I refer, as illustrating that grappling with the difficulties of interpretation of planning documents is not a solely Irish pursuit, to “Tesco Stores Ltd v Dundee CC: a form of non-statutory fiction?” Michael Bedford QC J.P.L. 2017, 9, 914-921

change should not be lightly undertaken. I do not consider that recent judgments fundamentally change long-established principles in this regard. The law goes back almost 40 years to *In re XJS Investments Ltd*⁸⁸. McCarthy J, for a unanimous Supreme Court, said:

“Certain principles may be stated in respect of the true construction of planning documents:–

(a) To 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.

(b) They are to be construed in their ordinary meaning as it would be understood by members of the public without legal training as well as by developers and their agents, unless such documents, read as a whole, necessarily indicate some other meaning ...”

McCarthy J was considering a decision refusing planning permission but, no doubt deliberately and more generally applies the principles to “*planning documents*”. It is also notable that his interpretative approach is informed by the characteristics of both the drafter and the addressees.

120. **Simons**⁸⁹ says that the Supreme Court “*famously*” (at least in legal and planning circles!), in **AG (McGarry) v Sligo County Council**⁹⁰ described the development plan as an “*environmental contract*” between the planning authority and the public. McCarthy J, again for a unanimous Supreme Court, said:

“The plan is a statement of objectives; it informs the community, in its draft form, of the intended objectives and affords the community the opportunity of inspection, criticism, and, if thought proper, objection. When adopted it forms an environmental contract between the planning authority, the council, and the community, embodying a promise by the council that it will regulate private development in a manner consistent with the objectives stated in the plan ...”.

In **Clonres CLG v. An Bord Pleanála**⁹¹ Humphreys J, described development plans as part of the People’s benefit under the social contract and as terms for the welfare of all, not penal clauses to be read *contra proferentem* and Society’s endeavours via development plans to ensure that development is proper, sustainable and lawful are not to be read narrowly and restrictively.

121. In **Byrne v Fingal County Council**⁹² McKechnie J. considered that:

88 [1986] IR 750

89 §1–12

90 [1991] 1 IR 99 at p 113

91 [2021] IEHC 303

92 [2001] 4 IR 565

“... a development plan, founded upon and justified by the common good and answerable to public confidence”, is a representation in solemn form, binding on all affected or touched by it, that the planning authority will discharge its statutory functions strictly in accordance with the published plan. This implementation will be carried out openly and transparently, without preference or favour, discrimination or prejudice. By so doing and by working the plan as the law dictates, the underlying justification for its existence is satisfied and those affected, many aversely, must abide the result. They must suffer the pain, undergo the loss and concede to the public good.”⁹³

Whether a planning permission has issued in material contravention of a development plan is a matter of law, not of planning judgment.

122. The **XJS** and **McGarry** excerpts above were quoted in **Tennyson v Dun Laoghaire Corporation**⁹⁴ in which Barr J, in their light, applied XJS principles of interpretation to a development plan which set numerical density limits allegedly materially contravened, as follows:

“In the light of these authorities it seems to me that a court in interpreting a development plan should ask itself what would a reasonably intelligent person, having no particular expertise in law or town planning, make of the relevant provisions?”⁹⁵

123. The **Tennyson** interpretative approach has been orthodoxy since. And, as recorded above, Barniville J in **Eoin Kelly**⁹⁶ and McGovern J in **Navan Co-Ownership**⁹⁷ emphasise the “holistic” interpretation of a development plan “as a whole” and that guidelines and planning strategies should not be interpreted in an excessively technical and over-legalistic manner.

124. In **Clonres v An Bord Pleanála**⁹⁸ **Tennyson** was criticised for extending the lack of expertise of the intelligent layperson to planning as well as law. But **Tennyson** was applied by Irvine J in **Cicol v An Bord Pleanála**⁹⁹ and was approved by Finlay-Geoghegan J in **North Wall Property Holding Company Ltd v Dublin Docklands Development Authority**¹⁰⁰ and in **O’Flynn Capital Partners v Dun Laoghaire Rathdown County Council**¹⁰¹ by Houghton J for application to the interpretation of a statutory planning scheme. In **Navan Co-Ownership**¹⁰² McGovern J interpreting a development plan explicitly applied **Tennyson**: “ *...the court must ask itself what a reasonably intelligent person having no particular expertise in law or town planning would make of the relevant provisions. That is the*

93 Emphases added

94 [1991] 2 IR 527

95 Emphasis added

96 Eoin Kelly v. An Bord Pleanála & Aldi [2019] IEHC 84

97 Navan Co-Ownership v. An Bord Pleanála [2016] IEHC 181

98 [2021] IEHC 303

99 [2008] IEHC 146

100 [2008] IEHC 305

101 [2016] IEHC 480

102 Navan Co-Ownership v. An Bord Pleanála [2016] IEHC 181

test I apply...” McKechnie J did likewise in **Byrne v Fingal County Council**¹⁰³. In **Redmond**¹⁰⁴ Simons J recently described exactly that approach as *“well established”*. He refused to interpret the development plan by reference to earlier such plans explicitly because to do so imputes to the reasonably intelligent person *“a level of knowledge which is the exclusive preserve of those with a professional role in town planning, i.e. planning consultants or lawyers”*.

125. Irvine J in **Cicol** framed Barr J’s reasoning as *“because they are not drawn up by skilled draftsmen, they should not be subjected to the tenets of construction would be applicable to legislation but should be properly construed in their ordinary meaning as would be understood by members of the public”*. Simons¹⁰⁵ adds the reasoning that a development plan’s purpose includes informing the public. I agree with both. Also, an intelligent developer, construction professional, planning authority, the Board, lawyer or other relevant expert can generally discern the meaning in which the intelligent layperson will understand a planning document and so is at no disadvantage: the converse is by no means necessarily true. And I suggest that it is likely at least in part because the converse is not true that McCarthy J adopted the XJS standard as applicable in a process characterised (even then and long before the Aarhus Convention arrived at these shores) by public participation. And the public participate not merely in planning decisions but also in the generation of development plans.

126. The environmental contract is between the planning authority and the community. The community includes many and various stakeholders in the planning process: planning authorities, property-owners, developers, builders, business interests, local residents, planning and other construction-related professionals, elected politicians, environmental activists, community organisations, those concerned to support and those concerned to object to planning applications and, no doubt, others. But the contract is with the community generally: not with any particular constituency within it. The observation that planning documents are not addressed to a cognoscenti may be somewhat idealistic given the complexities of the area – nonetheless it remains an important principle.

127. In my view Barr J properly understood XJS – including the phrase *“as well as by developers and their agents”*. The words *“as well as”* can mean *“also”* or have the sense *“just as well as”*. Whatever they mean, they cannot mean that a given document or part of it can have two valid meanings, one discerned by the intelligent layperson, the other by developers and their agents: there can be only one, objective, meaning of a planning document. Equally, the proposition that there is only one meaning but that it will be discerned by an unpredictable choice of one of two quite different standards applying to different parts of a document is a recipe for confusion and uncertainty. And as I have said, the intelligent layperson yardstick is no disadvantage to developers and their agents, whereas the converse may well not be true. So in my view McCarthy J, in saying *“They are to be construed in their ordinary meaning as it would be understood by members of*

103 [2001] 4 IR 565

104 [2020] IEHC 151

105 (Browne) Planning Law, 3rd Ed’n §1-129

the public without legal training as well as by developers and their agents”, was emphasising, not diluting, the intelligent layperson standard: the intelligent layperson should be as well able as a developer or his agent to understand a planning document. And those drafting such documents must, in doing so, keep the intelligent layperson interpretive standard in mind and draft accordingly.

128. One can logically criticise the view that the hypothetical interpreter should be the *“reasonably intelligent person, having no particular expertise in law or town planning”* – for example as an exception to the general rule (a legal fiction, but necessary) that everyone is deemed to know the law. But while the line between them is not bright and development plans have important legal effects, they are not “laws” in the ordinary sense and not to be construed as such. As Lord Reed said in **Tesco v Dundee**¹⁰⁶, *“Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract.”* In large part they are policy documents and drafted largely by planners, not lawyers, though no doubt carefully and with benefit of legal advice. No doubt it is also fair to say they have become more complex since **XJS, McGarry** and **Tennyson**¹⁰⁷ were decided. Particular approaches may be required, for example, to the use of technical words and words and content with specific provenance in such as the PDA 2000 - especially as explicitly adopted in a Development Plan. And, of course, as McCarthy J observed, a document may itself adopt a different interpretative yardstick should the need arise. One cannot be doctrinaire on the issue and much depends on context. But this seems to me an area in which, generally, experience outweighs logic and numerous, no doubt thousands, of planning permissions, development plans, planning schemes and like documents have been both drafted and understood on a basis long-understood. Additional uncertainty in their interpretation is unlikely to much assist.

129. In my view the *“reasonably intelligent person”* standard is and remains applicable and is of one having *“no particular expertise in law or town planning”*. I also accept the submission by Counsel for the Board that the layperson is not merely intelligent but careful. The concept can be abbreviated, I hope without loss, to the *“intelligent layperson”* – a phrase I have used above.

130. As Simons J accepted in **Heather Hill**¹⁰⁸ citing **Tesco v Dundee**¹⁰⁹, **Eoin Kelly**¹¹⁰, and **Navan Co-Ownership**¹¹¹ the logically prior question of interpretation of Development Plans is for the court - the subsequent application of the Plan, correctly interpreted, to the facts of the particular case, is for the planning authority/the Board in the exercise of planning expertise and judgement and is reviewable only for irrationality. But Barniville J in **Eoin Kelly**, citing McGovern J in **Navan Co-Ownership**, observed that as between the interpretation and the application of development plans and also in considering *“overlapping and sometimes competing, and arguably inconsistent, policies and objectives promoted in those documents”* that division of roles is not always clear or straightforward.

106 Tesco Stores Ltd. v. Dundee City Council [2012] UKSC 13, [21].

107 Tennyson v Dun Laoghaire Corporation [1991] 2 IR 527

108 §42

109 Tesco Stores Ltd. v. Dundee City Council [2012] UKSC 13, [21].

110 Eoin Kelly v. An Bord Pleanála & Aldi [2019] IEHC 84

111 Navan Co-Ownership v. An Bord Pleanála [2016] IEHC 181

131. None of the foregoing is to deny the increasing complexity of planning law, practice and documents in many respects and that the careful intelligence of the layperson will indeed be called upon in interpreting such documents. This case may be thought to illustrate that point.

132. I should also mention that my attention was drawn in argument to the certification by McDonald J of a question for the Court of Appeal in **Dublin Cycling Campaign CLG v. An Bord Pleanála (No.2)**¹¹² whether the XJS interpretative approach to interpreting a planning permission requires modification where the documents underlying the planning application contain significant contradictions as to the use intended for part of the intended structure. The context was one in which McDonald J had *“never previously come across a situation where the material before the Board was so contradictory or where it was so difficult to determine the parameters of what was permitted by the Board’s decision.”* He certified the question as *“While I sincerely hope that the existence of contradictions on this scale is rare, that does not mean that something similar will not arise again in the future.”* This brief account does not do justice to the nuanced judgment of McDonald J.

133. But as to the interpretation of the Development Plan in question here, I do not think we are in that same territory of contradiction prompting possible reconsideration of XJS principles. That is perhaps particularly so in the context of material contravention of a development plan where, by S.37(20)(b)(ii) PDA 2000, the effect of contradictions is not that they must be resolved but that their recognition activates the material contravention jurisdiction of the Board.

Interpretation of Development Plan in adopting Ministerial Guidelines.

134. The Development Plan, as will be seen, repeatedly expresses itself in terms of *“accordance with”* the Urban Residential Guidelines 2009. Ultimately it was not controversial that, in interpreting the Development Plan, both documents had to be interpreted together. I observed at trial that *“they have to be interpreted for this purpose as a single document”* and *“it’s qua Development Plan that you’re interpreting the Guidelines.”* This was in response to an observation by Counsel for the Board that, while unusual and counterintuitive but a fair thing to say in the current circumstance, the 2009 Guidelines need to be interpreted by reference to the Development Plan. Counsel primarily justified this by saying that Guidelines are drafted to be *“had regard to”*. On reflection, I think it important to avoid any suggestion that the Urban Residential Guidelines 2009 are to be in any general sense interpreted differently by reason of their adoption in the Development Plan. Indeed I imagine that would tend to frustrate the very purpose of their adoption – they were adopted because of what they were understood by the drafters of the Development Plan to mean. Of course it was open to the Development Plan to adopt them in an amended form and in case of conflict between the

112 [2021] IEHC 146

Guidelines and the text of the Plan, in interpreting the Plan the latter will prevail. In truth this may merely be to express counsel's proposition in non-counterintuitive form. However, ultimately it isn't clear to me that anything specific turned on the point.

135. That relevant elements of the Development Plan are expressed in terms of accordance with ministerial guidelines necessitates that the intelligent layperson, in interpreting those elements of the Development Plan, will also have to interpret the correspondingly relevant elements of those guidelines. That is not, and should not be confused with, the attribution of any more general planning expertise or knowledge to the intelligent layperson.

136. Arguably an interpretative approach to interpreting statutory ministerial guidelines somewhat different to that used in interpreting development plans was laid down in **Spencer Place Development Company v Dublin City Council**¹¹³. But Collins J accepted that guidelines are not to be interpreted as if statutes and in essence he unsurprisingly required no more than clear and careful drafting by Departments of Government and drafting consistently with the Planning Acts. And though observing that *"the reality appears to be that the language used in the Guidelines is not always precise or consistent"*, Collins J. did not suggest a particular solution or approach where clarity is lacking. But even in that case the parties had agreed that XJS principles applied: the disputed interpretation being an issue of "nuance and emphasis" in their application.

137. Any such differences in interpretative approach to development plans and ministerial guidelines could theoretically have posed particular difficulties in this case in the interpretation of a development plan expressed explicitly in terms of a ministerial guideline. The prospect of construing as one, two documents to be interpreted on different standards may perhaps illustrate my trepidation and reluctance to reconsider the venerable XJS standard. Happily, however, the parties here sensibly agreed that any such differences are unlikely in practice to make appreciable difference in this case.

Some further Observations

138. A caution to myself is necessary: there may be a mistaken, subconscious and even self-indulgent temptation for lawyers and judges to imagine that the layperson in interpreting a document will, by virtue of his/her care and intelligence, do so as would a lawyer - such that that careful intelligence becomes in effect a means of approximating lawyerly and lay interpretation. That tendency to approximation may be all the greater given lawyers and judges identify as their first port of call in interpreting any document its "literal" and "ordinary and natural" meaning. It can be difficult in a given case to discern where permissible, careful, intelligent, lay interpretation elides into impermissible legalistic parsing.

113 [2020] IECA 268

139. Also, policy documents such as guidelines and development plans are, unsurprisingly given their nature, properly written in broad open-textured terms with flexibility and holistic decision-making in mind: considerable room must properly be left for the judgment of the decision-maker. That avoidance of rigidity comes as a considerable price in lack of precision. In this case, quantification is avoided even of standards eminently susceptible to quantification. By no means do I suggest that this is incorrect. Yet, as recorded above, the development plan constitutes a contract with the community “*embodying a promise by the council that it will regulate private development in a manner consistent with the objectives stated in the plan ...*”¹¹⁴ - “*a representation in solemn form, binding on all affected or touched by it, that the planning authority will discharge its statutory functions strictly in accordance with the published plan*” and do so “*openly and transparently*”¹¹⁵. And so the interpretation of a development plan and the discerning of material contravention of it are matters of law for the Court so that the Court can discern whether the promise has been kept and the solemn representation honoured openly, transparently and strictly in accordance with the plan. To perform this task, the Court must attribute clear meaning to the plan as best it can while respecting the tension between its proper flexibility (of which the decision-maker must have the benefit) and its being a plan by which the planning authority can be held strictly to account. The less clear, the vaguer and/or the more flexible the plan, the less likely it is that the planning authority can be held strictly to account, which is, after all, one of the purposes of the plan. All the while the court must resist a lawyer’s temptation to parse and dissect meaning as the intelligent layperson might well not. Of course here the question is not of holding the Planning Authority to account and the interpretation of the plan and discernment of any material contravention is for the purpose of ascertaining whether the Board acted in a procedurally correct manner. But that does not alter the task of interpreting the plan or discerning material contravention: the plan does not mean one thing to the Planning Authority and another to the Board, though the Board has greater scope to depart from it via the statutory procedures laid down for the purpose.

Materiality of Contravention

140. It is convenient to dispose of the materiality question first. Simons J in ***Redmond v An Bord Pleanála***¹¹⁶ recently reapplied the test of materiality of a contravention of the Development Plan set by Barron J. in ***Roughan v. Clare County Council***¹¹⁷ and applied since, including as approved by Clarke J in ***Maye v Sligo Borough Council***¹¹⁸, by Baker J. in ***Byrnes v. Dublin City Council***¹¹⁹ and by Simons J in ***Heather Hill Management Company v An Bord Pleanála***¹²⁰. Per ***Roughan*** the question of materiality is considered:

114 AG (McGarry) v Sligo County Council [1991] 1 IR 99 at p 113

115 Byrne v Fingal County Council [2001] 4 IR 565

116 [2020] IEHC 151

117 unreported, High Court, Barron J., 18 December 1996

118 [2007] IEHC 146

119 [2017] IEHC 19, [23].

120 [2019] IEHC 450

“... in the light of the substance of the proposed development; whether or not any change of use would be significant; the location of the proposed development; the planning history of the site or area; and the objectives of the development plan. What is material depends upon the grounds upon which the proposed development is being, or might reasonably be expected to be, opposed by local interests. If there are no real or substantial grounds in the context of planning law for opposing the development, then it is unlikely to be a material contravention.”

Baker J. in **Byrnes** observed:

“Materiality can be tested in the light of objections made to a planning application. Sixty three third party objections were made to the subject application, albeit thirty nine were in identical form. That these raised matters of a planning nature would suggest that the grounds of objections were material from a planning point of view, but the extent of opposition, while it might identify the materiality of the contravention, does not of itself establish that the permission has been granted in material contravention. This is apparent from the decision of Hedigan J. in Ryan v. Clare County Council [2009] IEHC 115 where he said the following:

“... objections are only relevant when considering the materiality of a contravention as opposed to assessing whether one exists.” (para. 42)

Hedigan J. held in that case that there was no contravention, albeit there was a large volume of objections.”

As I understand this passage, the Court must first find whether or not a contravention exists and, if it does, the Court can then test its materiality in the light of objections.

141. Appendix 1 to the Inspector’s report in this case lists no less than 71 observers. Some were couples and others were groups such as residents’ associations - presumably representative of multiple members. The Inspector does not identify the concerns of each but it seems safe to assume that most, if not the great majority, were objectors. When describing the third party submissions the first subject-matter he addresses is that of “Principle/Density” in various formulations. Marston Planning Consultants for the members of three residents’ associations other than the Applicant alleged excessive density. So too did the Applicant in an observation on its behalf by Planner Hendrick W van der Kamp. I think I am entitled to infer on the balance of probabilities that at very least a large number of the observers and those they represented expressed objections, at least in part, in terms of excessive density. The SDCC report to the Board listed excessive density as a main issue raised by objectors to it and SDCC members did likewise. The SDCC executive considered the density proposed to be a reason to refuse permission

142. In my view, if there was a contravention of this Development Plan as to density, it was material. Indeed and correctly, neither the Board nor Shannon Homes resisted this conclusion though they did not formally concede it.

The Remaining Issue – Whether there is a Contravention?

143. Accordingly, the only remaining, and much disputed, issue as to the density is whether there was a contravention of the Development Plan. Determining that issue requires interpretation of the relevant parts of the Development Plan as to density, followed by inquiry whether 142 dph contravenes the Development Plan as so interpreted.

144. The Statement of Grounds pleads¹²¹ that the Impugned Decision is invalid as the Developer and the Board erred in law in concluding that the density of the proposed development did not constitute a material contravention of the Development Plan and sets out particulars¹²² of this plea. The Applicant says that, as to residential development of Institutional Lands, Development Plan Policy H8, Objective 3 explicitly incorporated the Urban Residential Guidelines 2009. Those guidelines in turn require¹²³ average net densities at least in the range of 35-50 dwellings per hectare and that the objective of retaining the open character of the lands be achieved by concentrating increased densities in selected parts of the site - *“say up to 70 dph”*. The Applicant accordingly says that:

- the Urban Residential Guidelines 2009, and so the Development Plan, allow a “maximum” density of (*“up to”*) 70 dph – and even that as an exception allowed only in *“selected parts”* of Institutional Lands in the interests of preserving their open character. The Applicant maintained this position at trial.
- A density of more than twice (141.7 units/ha) this maximum materially contravenes Policy H8, Objective 3 such that permission could only be (but was not) granted in accordance with section 37(2)(b) PDA 2000.

145. The Applicant argues¹²⁴ in the alternative that any flexibility above 70 dph is not open-ended and the Board is not at large to grant permission for any number above that. 70 dph (when read with 35-50 dph) is a numerical indicator of the applicable range of permissible density on Institutional Lands. 142 dph is beyond that range and a material contravention of the Development Plan. Strictly, this issue was not pleaded in terms but I consider that it is a predictable variation on the case pleaded and the Board and the Notice Party did not take a pleading point on the issue. I therefore will consider that case.

146. Turning to the Board’s Statement of Opposition as to the density issue:

- §41 merely traverses the allegation of material contravention by reason of density.

121 §E1.5

122 §§E2.38

123 at §5.10

124 written submissions §40

- §42 accurately recites the Inspector’s satisfaction that 142 dph was not excessive having regard to national and regional policy, the need to ensure efficient use of land, the need to maximise use of existing and future transport infrastructure and to support and enhance the viability of existing and future services. The Board was satisfied that the proposed development would constitute an acceptable quantum and density of development in the particular location. It is not asserted that these considerations derived from the Development Plan or any specific element of the Development Plan. §42 also asserts that the Inspector was satisfied, absent specific density limits in the Development Plan, that there was no material contravention. (But the Inspector’s satisfaction, or the Board’s, is not, ultimately, the point.)
- §43 merely traverses the alleged material contravention of, and inconsistency of the Impugned Decision with, Policy H8, Objective 3 of the Development Plan and the Urban Residential Guidelines 2009 – such that, so it is pleaded, invocation of Section 37(2)(b) PDA 2000 was unnecessary. The Board does not point to any specific policy, objective or element of the Development Plan in justification of its position – for example Policy H8 Objective 2 as to higher densities close to high capacity public transport corridors.
- In short, the Board joined issue with the interpretation of Policy H8, Objective 3 but has given no particulars, by reference to other content of the Development Plan, of its position that 142 dph was not in contravention of the Development Plan.

147. Turning to Shannon Homes’ Statement of Opposition as to the density issue,

- §25 is a mere traverse of the Applicant’s interpretation of Policy H8, Objective 3 and allegation of material contravention.
- §26 is essentially to similar effect – that Policy H8, Objective 3 imposes no maximum density limits – and pleads provision of open space in excess of the 20% minimum recommended in the Urban Residential Guidelines 2009.
- Again, while joining issue with the interpretation of Policy H8, Objective 3, Shannon Homes has given no particulars, by reference to the content of the Development Plan, of its position that 142 dph was not in contravention of the Plan.

148. However, the Applicant, sensibly, did not take a pleading point. Had it done so, the Board would have tellingly asserted an absence of unfairness in allowing the argument as to higher densities close to high capacity public transport corridors given the relevant content was readily apparent in the analysis in the Inspector’s report. It is important to state that it is at very least desirable that Opposition be clearly pleaded as to any positive case to be made – requirements of particularity of pleading apply as much to statements of opposition as to statements of grounds. But

in the circumstances just described, and considering in particular that no unfairness has accrued, I will not exclude the arguments made by the Board and Shannon Homes.

149. Counsel for the Applicant did complain that the Board's opposition papers don't expressly engage with the issue of incorporation of the Urban Residential Guidelines 2009 in the relevant Development Plan objectives: he supposed the logic of the Board's position was that they were not incorporated. Shannon Homes' Statement of Opposition is expressly agnostic on the issue. As it turned out, neither (correctly in my view) the Board or Shannon Homes disputed that for present purposes the Development Plan and the Urban Residential Guidelines 2009 must be read together.

Submissions and Analysis

No Prior Assumption of Density Limits & The Layperson's Surprise & Care

150. Counsel for the Board makes the introductory point that one should not come to a development plan expecting to find limits on residential density or making a prior assumption that they are required. Density maxima are not necessary content of a development plan. Control of quantum of development can be achieved via other means such as design safeguards, qualitative standards or plot ratios. He identifies the appropriate question as whether there is a rule, a standard, in the Development Plan, of which there is a contravention? He says it may be that the Development Plan isn't as informative as it might be, but that is not a basis for criticising the legality of the Board's decision – by which I take him to mean that the Court should not fill lacunae in the Plan and having done so find a material contravention by reference to the material "filled in". I generally agree in all these respects.

151. However the absence of a prior assumption that there would be density limits should not be over-emphasised. While the intelligent layperson, lacking planning expertise, would not know the detail, I think (s)he would at least be generally aware that, historically, density limits have been normal in Development Plans though not compulsory. As Barr J said, dealing with a case of density limits in **Tennyson**¹²⁵:

"An important purpose of the plan is to inform interested parties of what types of development may or may not be permitted in any given area or part thereof, and in the case of housing, the maximum number of units which may be permitted. This is normally achieved by dividing the entire area of the planning authority which is available for housing development into zones, each having a maximum number of houses and other types of dwelling per acre.. The development plan is the blueprint for development in the area of each planning authority. Normally it has a life span of three to eight years allowing for Ministerial extensions. It is difficult for a local authority to anticipate all aspects of future housing trends

125 *Tennyson v Dun Laoghaire Corporation* [1991] 2 IR 527

and it seems to me that development plans ought to be interpreted in a reasonably broad manner so that planning authorities are not unduly inhibited in their efforts to keep abreast of on-going trends and needs. However, it is equally important to bear in mind that all interested persons have a right to know what type or types of development are permissible in particular locations which are of concern to them. Such matters have an important bearing on the value and use of land.”

Interpreting the foregoing passage as a whole, and given the factual context of **Tennyson** – one of material contravention of housing density provisions of a development plan it seems to me that Barr J in referring to “*what type or types of development are permissible in particular locations*” was not simply referring just to broad “*types of development*” such as “housing” “industrial” or the like. And it is a truism that housing density potential has “*an important bearing on the value ... of land.*” It seems to me that, as related to housing, Barr J’s observation encompassed, at least in general terms, housing density. I do not consider that Barr J was purporting to adding to the list of statutorily prescribed contents of a development plan or stipulating that it must set numerical density limits - but he considered this to be amongst the issues of which “*all interested persons have a right to know*” at least in general terms.

152. Counsel for the Board suggested that asking whether the intelligent layperson reading the Development Plan as to density on Institutional Lands would be surprised to find a proposed density of 142 was to ask the wrong question. I agree it is not the ultimate question, which counsel correctly identified as whether there is content in the Development Plan of which there is a contravention. But, without elevating it to a formal test, that does not rule it out the intelligent layperson’s surprise as a useful means of interrogating the ultimate question. Of course, not making a prior assumption of a density limit, the intelligent layperson’s surprise, if any, would less be at the suggested absence of any density limit but at the juxtaposition of 142 dph with the Development Plan/2009 Guideline figures of 35-50 dph and 70 dph as to Institutional Lands. By this observation I am, at this point, describing, not answering, that question.

153. Counsel for the Board emphasises that the intelligent layperson will read the plan carefully. I agree but care by the lawyer is also needed - to not use care by the intelligent layperson as a backdoor to legalistic interpretation.

Absence of Specific Numerical Density Maxima – Efficiency & Qualitative Controls

154. Counsel for the Board and Shannon Homes emphasise what they say is the absence of specific numerical density maxima in the Development Plan. They say that what the Plan contains is

minimum, not maximum densities. They distinguish **Heather Hill**¹²⁶ and **Redmond**¹²⁷ as turning on development plans setting clear population targets and density limits/open space requirements respectively of which there were “self-evident” contraventions. I agree that they are distinguishable as to the presence of clear population targets and density limits/open space requirements. However that the contravention was in Heather Hill described as “self-evident” is descriptive. Self-evidence is a valid analytical tool¹²⁸ and may enable recognition of a particular material contravention. But that does not elevate “self-evidence” into an exclusive test of material contravention.

155. Counsel for the Board and Shannon Homes say that the absence of specific numerical density limits in the Development Plan does not imply a “free-for-all” as to density; rather, land must be used efficiently – which explains minimum numerical densities and tends to increase density. And to avoid the ills of overcrowding and the like the appropriate upper density for a particular site is addressed not by numerical limits but via considerations of proper planning and sustainable development, quality of development and development management criteria in the Development Plan. It seems to me that this views density in its upper reaches as a result rather than as a planning criterion or standard, though that is not per se a criticism.

The Particular Relevance of the 2009 Guidelines as to Institutional Lands – Open Character

156. Counsel for Shannon Homes cites the Proposed Development’s compliance with the minimum 20% open space quantitative standard set for Institutional Lands in the Urban Residential Guidelines 2009¹²⁹ and in the Development Plan¹³⁰ and submits that it is in the context of “open character” and “quality open space”, rather than density, that Policy H8, Objective 3 refers to the Urban Residential Guidelines 2009. If so, that does not assist. The Guidelines in turn¹³¹ clearly view “open character” as achievable via increased density and, putting the matter neutrally, address the issue of density in numerical terms.

The Important Wording

157. Counsel for Shannon Homes suggests that my consideration of the density issue will effectively boil down to what the intelligent layperson would make of the following words as to Institutional Lands in the 2009 Guidelines - “... *average net densities at least in the range of 35-50 dwellings per hectare should prevail and the objective of retaining the open character of the lands achieved by concentrating increased densities in selected parts (say up to 70 dph).*”¹³² I agree –

126 Heather Hill Management Company clg v. An Bord Pleanála [2019] IEHC 450

127 Redmond v. An Bord Pleanála [2020] I.E.H.C. 151

128 See analysis herein of the “I know it when I see it” technique.

129 §4.20 – see above

130 §11.3.1 – see above

131 §5.10

132 §5.10

though that is no simple matter. Counsel for the Board and Shannon Homes argue that, as to this passage in particular, but also more generally, the Inspector was correct to find an absence of “*any specific limits*” on density in the 2009 Guidelines and so, no material contravention.

158. Counsel for the Applicant considers the Development Plan’s repeated reference to accordance with the Urban Residential Guidelines 2009 to be the Plan’s guiding light as to densities. This did not prove controversial at trial.

159. Counsel for the Applicant acknowledges that the Development Plan actively promotes higher residential densities in appropriate locations, including near high capacity public transport corridors, to make efficient use of zoned land and maximise the value of infrastructure and services, including public transport. He notes the general observation that “*Where there is good planning, good management and the necessary social infrastructure, higher density housing has proven capable of supporting sustainable and inclusive communities. In general, increased densities should be encouraged on residentially zoned lands and particularly in the following locations*”¹³³ subject to “*Design Safeguards*”¹³⁴. He agrees that the Plan and 2009 Guidelines generally encourage higher densities but says they are very specific via Plan objectives and the 2009 Guidelines as to how that is to be done and to be done specifically in “*appropriate locations*”. He cites the list of such locations which follows¹³⁵ – some of which I have set out above. Counsel for the Applicant notes in particular, and by way of contrast with Institutional Lands and Public Transport corridors, the only location type of which it is explicitly said there should be “*no upper limit*” – i.e. City and Town centres¹³⁶. Increased densities, generally a minimum of 50 dph, should be promoted in Public Transport Corridors¹³⁷ – i.e. within 500m walk of a bus stop. He notes the Chapter 5 checklist which asks whether densities are “*sufficiently high in locations which are, or will be, served by public transport? And have all proposals for higher densities been accompanied by high qualitative standards of design and layout?*”

160. Counsel for the Applicant acknowledges the 2009 Guidelines’ objective of residential development specifically of “*Institutional Lands*” – but subject to avoiding overdevelopment by the retention of their open character and the provision of quality public open space of at least 20% of site area¹³⁸. He concentrates on the phrase “*(say up to 70 dph)*”. The phrase is not “*say 70 dph*” – he emphasises “*up to*” as denoting an upper limit. Counsel for the Applicant says the Inspector and the Board, in finding no contravention of the Development Plan on the basis that the Guidelines do not contain “*any specific limits*” on density, depend entirely on the word “*say*” in the phrase “*(say up to 70 dph)*”. He considers “*say*” an unusual word in the context. He allows it may connote some flexibility - perhaps 72 or 73 dph - but says that any flexibility it implies is capped by the words “*up to*” – that any other reading would be absurd. He says that a disinterested interpreter would not consider “*(say up to 70 dph)*” capable, on a reasonable construction, of allowing 142 dph – an

133 §5.4 Urban Residential Guidelines 2009

134 described at §5.1 et seq - Urban Residential Guidelines 2009

135 §5.4 et seq - Urban Residential Guidelines 2009

136 §5.5 Urban Residential Guidelines 2009

137 §5.8 Urban Residential Guidelines 2009

138 §4.20 Urban Residential Guidelines 2009

average density 200% greater than - “more than double” - the exceptional limit. Notably, 142 dph is here proposed not as a higher density concentrated in particular parts of the site but as an average density the correct comparator of which is not “*up to 70 dph*” but “*35 to 50 dph*”. Counsel for the Applicant says his argument does not mean 142 dph is impermissible – but that it is permissible only via the material contravention process - which was not invoked by the Board.

161. I will slightly adapt a rhetorical question posed by the Applicant: if an agent receives instructions to purchase a car at auction “*say up to €5,000*” has he authority to spend €14,200? The analogy with the issue at hand is not at all precise. The Agent buying a car and the Board are performing very different functions in very different contexts. But neither is the analogy entirely unilluminating as to the use and understanding of language by laypeople – even careful intelligent laypeople.

Why not omit the 70 dph? the Maths of the Matter & 35-50 dph is “higher” density

162. Again paraphrasing slightly, Counsel for the Applicant also asks why, if as to Institutional Lands there is no numerical limit on average density, was it necessary at all to identify a numerical exceptional higher density to preserve open character – whether or not of “(say up to 70 dph)” or any other number? This seems to me a telling question.

163. The Board’s and Shannon Homes’ response in effect is that the phrase “*say up to 70 dph*” on selected parts of institutional lands is intended only in contrast to, and as a function of, the “*at least 35 – 50*” average. In their submission “*say up to 70 dph*” is just indicative that there are areas in which higher densities are permissible. They submit that if the average density is higher than 35-50, as “at least” contemplates, then the exceptional figure will correspondingly (whatever correspondingly may mean) exceed 70. Arguably this latter argument is supported by the observation that even a modest increase in the average above 50 would bring it close to 70, thus diluting the capacity of 70 to achieve the preservation of open character by concentrating density in parts of the site. Counsel for Shannon Homes sought to illustrate this proposition by mathematical calculations designed to show that, assuming 35-50 dph as an “at least” figure capable of being appreciably exceeded, “say up to 70 dph” must relate specifically to the 35 to 50 net density minimum as opposed to being a standalone maximum density: that 70 is a function of 35 to 50. If I understand him correctly, and to put it yet another way, he seeks to show that applying the “at least” wording to allow, say an average of 65dph would correspondingly increase the “say up to” number. His calculations are as follows:

- Assume 70 dph is the maximum permitted to achieve 20% open space
- Assuming 100 units to go on 2 Hectares implies an average 50 dph
- Put 70 units on 1 hectare @ 70 dph

- Put remaining 30 units on 2nd hectare @ 70 dph – occupies 0.43 hectares¹³⁹
- Remaining for open space – (1 - 0.43) = 0.57ha
- = 28.5%¹⁴⁰ of total site is open space

Now modestly (as counsel says) increase the average density by 10 dph

- Assuming 120 units to go on 2 Hectares implies an average 60 dph
- Put 70 units on 1 hectare @ 70 dph
- Put remaining 50 units on 2nd hectare @ 70 dph – occupies 0.71 hectares¹⁴¹
- Remaining for open space – (1 - 0.71) = 0.29ha
- = 14.5% of total site is open space

Counsel for Shannon Homes submits that these calculations demonstrate that to operate 70 dph as the maximum permitted to achieve 20% open space would in effect be to impose on the “at least 35-50 dph” average a cap of below 60 dph.

Another way of looking at this is to assume a 1 hectare site and 20% open space, and calculate how many units would fit on the remaining 80% of the site at 70 dph and translate that into an average density over the entire site. That yields a density of 56dph¹⁴². In other words, to operate 70 dph as the maximum permitted to achieve 20% open space would in effect be to impose on the “at least 35-50 dph” average a cap of 56dph.

164. Counsel for Shannon Homes argues that these calculations demonstrate that what he considers a relatively small increase on what he calls the “minimum threshold” (i.e. 50 dph) results in a breach of the Guidelines' recommendation that at least 20% of the lands must be available for open space. However that is to ignore that the stated standard is not “at least 50 dph”. It is “*at least 35-50 dph*”. In my view that phrase lacks the clarity required of guidelines by Collins J in Spencer Place – as does the accompanying “*say up to 70 dph*”. But we all must make of it what we can. A cap of 56dph may seem a small increment over 50dph but it is an increment over the upper end of the range in a guideline in which, without suggesting it is a maximum and save for that single instance of 70 dph, the highest density “number” I could find is 50 dph. And counsel for Shannon Homes agreed that planners might differ as to how many dph was a “small” increment.

165. It must also be remembered that “35-50 dph” is not, in terms of the Urban Residential Guidelines 2009, low or even medium density. Though only on an “at least” basis, “35-50 dph” is an example of the “higher” densities to which the 2009 Guidelines generally aspire¹⁴³ and identify in particular for specified types of location, of which Institutional Lands is one.¹⁴⁴ And on a similar basis

139 30/70

140 0.57/2

141 30/70

142 70 x 80% = 56 units on 1 hectare

143 E.g. §5.4 above – repeated here for convenience

Appropriate locations for increased densities – Where there is good planning, good management, and the necessary social infrastructure, higher density housing has proven capable of supporting sustainable and inclusive communities. In general, increased densities should be encouraged on residentially zoned lands and particularly in the following locations:

144 §5.10

one can say that the 2009 Guidelines consider 50 dph to be high density as to Public Transport Corridors. To put it another way, by the Urban Residential Guidelines 2009, and for all their espousal of higher density, 40 dph could not be criticised as a failure to efficiently exploit Institutional Lands or a failure to put high density development on them. Views of what constitutes acceptable higher density may have increased considerably since 2009. The Apartment Guidelines 2018 consider >45 dph to be “medium-high density”. But while those changed views might well justify a material contravention, they cannot affect the interpretation of the Development Plan based explicitly on the 2009 Guidelines or the question whether there is a material contravention requiring justification.

166. As a response to the question posed – why was it necessary at all to identify a numerical exceptional higher density to preserve open character? - the Board’s answers strikes me as unconvincing. It would have been far simpler for the drafters and easier for the reader – not least the intelligent layperson - if the drafters wished to avoid conveying any maximum number on the issue - to simply omit the phrase “(say up to 70 dph)” altogether. The passage could have read:

“In the development of such lands, average net densities at least in the range of 35-50 dwellings per hectare should prevail and the objective of retaining the open character of the lands achieved by concentrating increased densities in selected parts”

One might add, reading the relevant passage in context and the Urban Residential Guidelines 2009 as a whole, that the drafters could also and easily have done exactly what they did only a few paragraphs earlier, as to city and town centres and state that there should be “no upper limit”.

167. Counsel for the Board correctly suggests that, despite the fact that in this case it is incorporated in the Development Plan, we must interpret the phrase “up to 70 dph” as appearing in S.28 Guidelines. On that basis he suggests that, as planning authorities are obliged only to “have regard” to such Guidelines, the phrase could not have been intended to set a maximum because the 2009 Guidelines couldn’t have had that effect. But that reasoning could just as well apply to the minima which were set. Counsel says that it is clear that the 2009 Guideline is about minimum densities. But if they can suggest minima, guidelines can suggest maxima and if a Development Plan, though not obliged to, adopts them as such, there is no reason why both minima and maxima should not, as a matter of interpretation of the Development Plan, be recognised. And the Board’s argument still does not explain the inclusion, as opposed to the omission, of “up to 70 dph”.

168. Indeed, ultimately Counsel for the Board, in seeking to explain the inclusion as opposed to the omission, of the words “say up to 70 dph” was driven to the submission that the meaning of the sentence in which they sit is not changed by their inclusion, which is, he says merely a colloquial means of illustratively expressing how the “at least” average of 35-50 dph could be achieved and he describes it as “perhaps not helpful” or clear. I frankly do not see the intelligent layperson agreeing that the sentence is unchanged by the inclusion, as opposed to the omission, of the words “say up to 70 dph”. All in all, the Board’s arguments on this issue are skilfully and beguilingly presented but ultimately unconvincing – not least by the intelligent layperson interpretative standard.

“at least”

169. The Board, by way of contrast with the “*at least*” formula used by the 2009 Guidelines as to Institutional Lands, points to Development Plan Housing Policy H8 Objective 6, as to certain Outer Suburban Lands outside the M50, which adopts “*a density range of 35-50 units per hectare*”. The Board sees this as SDCC explicitly adopting a density limit for Outer Suburban Lands in contrast to the position as to Institutional Lands. This range for Outer Suburban Lands is explicitly derived from the Urban Residential Guidelines 2009¹⁴⁵ as “*Studies have indicated that The greatest efficiency in land usage in such lands will be achieved by densities in the general range of 35-50 dwellings per hectare (which) ... should be encouraged*”. The point is well made by the Board but I don’t think it determinative on its own and the 2009 Guidelines excerpt just cited could be taken as suggesting that even in promoting efficiency density can have its limits. And the argument is at odds with the Board’s other argument that the nature of Guidelines is such that they cannot set maxima. Counsel for the Board also points to Housing Policy H8 Objective 7, but I confess I didn’t find it of assistance either way.

The role of Density, The Development Plan as a Whole and Interpretation of this Plan

170. The Board and Shannon Homes also cite the Urban Residential Guidelines 2009¹⁴⁶ to the effect that “*dwellings per hectare is not effective in predicting or controlling the built form of development on a site – planning standards or plot ratio are more effective*”. But the preceding sentence states that “*dwellings per hectare is the most appropriate measure for providing a broad indication of the intensity/form of development envisaged on a site ..*” and on the preceding page it is said that “*At the site-specific level, if density controls are to produce the expected results, a density standard must be carefully related to the area accommodating the development.*” This latter sentence seems to recognise a need to control, as well as to promote, higher density. The same may be said for development Plan Policy H8 to not merely promote higher residential densities at appropriate locations but also “*to ensure that the density of new residential development is appropriate to its location and surrounding context.*” The Board observes that the Development Plan H8 Objectives each “*must be seen in light of the overall policy described in Housing Policy 8, which emphasise the need to have higher densities at appropriate locations.*” That is true but does not much advance the Board’s case: as I have said Policy H8 as to ensuring that density is appropriate to location and context seems to recognise a need to control, as well as to promote, higher density. And it can hardly be disputed that the Inspector and the Board, as well as in terms of planning standards, in fact considered the issues in terms of density and in terms of the numerical densities indicated in the Urban Residential Guidelines 2009¹⁴⁷. And notably the Development Plan explicitly¹⁴⁸

145 §5.11

146 Appendix A pp67 & 68

147 at §5.4 et seq as already cited

148 §2.2.2 Set out above. Repeated here for convenience.

Residential Densities - Government policy as outlined in the Sustainable Residential Development in Urban Areas Guidelines recognises that land is a scarce resource that needs to be used efficiently. These guidelines set out a range of appropriate residential densities for different contexts based on site factors and the level of access to services and facilities, including transport. Densities should take account of the location of a site, the proposed mix of dwelling types and the availability of public transport services. As a general principle, higher densities should be located within walking distance of town and district centres and high capacity public transport facilities.

adopts density, per the Urban Residential Guidelines 2009, as a criterion in deciding residential planning applications.

171. Counsel for the Board argued that the intelligent layperson, if surprised by 142 dph on reading the Development Plan as to density on Institutional Lands and in determining whether 142 dph contravenes the Plan, will look at other aspects of the Plan. I accept that the Plan must be read as a whole. But that prompts the question, where elsewhere in the Plan is support found for such a density? As to “numbers”, no average density figure remotely close to 142 dph appears. As I have said, the highest I could find is 50 dph.

172. Counsel for the Board suggests that the most obvious of those other aspects of the Plan which might be expected to support such a higher density is height, because height and density are bound up together. Doubtless, density increases with height. But the difficulty for the Board in making this argument is that the increased density generated by increased height in this case is generated by a height which is itself a material contravention of the Plan, as the Board itself decided. On that view, the posited most obvious potential source within the Plan of validation of 142 dph is simply not in the Plan.

173. The Board and Shannon Homes correctly point to policy, guideline and Development Plan emphases on considering density by reference to public transport availability and the “efficient” use of land - by which I understand maximising the accommodation provided on a given site by means of increased density and consistently with proper planning and sustainable development. They correctly cite the Urban Residential Guidelines 2009¹⁴⁹ as encouraging higher densities and Development Plan Housing Policy H8, as emphasising higher densities at appropriate locations and that both apply to Institutional Lands. The Board says that Housing Policy H8 is generally about how to achieve higher densities and efficient use of land, not how to limit densities or make sure they don't get out of hand or control overdevelopment. And that is why the H8 objectives express density minima. In similar vein the Board notes that the Chapter 5 checklist asks whether densities are *“sufficiently high in locations which are, or will be, served by public transport? And have all proposals for higher densities been accompanied by high qualitative standards of design and layout?”* The Board emphasises that densities should take account of the site location, the mix of dwelling types and availability of public transport. They then say that absent specific numerical limits for density it was appropriate for the Board to determine that the density of the proposed development was not excessive and was consistent with the overall Development Plan. With one important caveat, this is all correct and important generally, as far as it goes. Indeed, nobody disputes that the site is suited for higher densities – the question is how much higher?

§11.3.1 (ii) “Residential density - In general the number of dwellings to be provided on a site should be determined with reference to the Departmental Guidelines document Sustainable Residential Development in Urban Areas – Guidelines for Planning Authorities (2009). As a general principle and to promote sustainable forms of development, higher residential densities will be promoted within walking distance of town and district centres and high capacity public transport facilities. In accordance with Departmental Guidance, the residential density (net) of new development should generally be greater than 35 dwellings per hectare

149 §5.4

174. The caveat is that it does not seem to me entirely correct to say that the relevant parts of the Plan are not about controlling excessive development. Even on the Board's view the Plan seeks to control overdevelopment – though they say not by density. Housing Policy H8 certainly espouses higher densities but only in appropriate locations and seeks *“to ensure that the density of new residential development is appropriate to its location and surrounding context”*. And Appendix A of the 2009 Guidelines states that *“At the site-specific level, if density controls are to produce the expected results, a density standard must be carefully related to the area accommodating the development.”*

175. That submission also assumes the absence of density limits in the relevant section(s) of the Development Plan. The fact that the Plan generally advocates higher densities than heretofore generally applied or in particular locations or having regard to certain factors such as proximity to public transport, or in pursuit of efficiency does not, even in principle, preclude density limits. It merely implies that if density limits are set they will tend to be higher than any previous such limits. There is no reason to infer that “higher” means “unlimited”, whether or not in numerical terms or by qualitative planning criteria. Those submissions do not of themselves address the question whether the Development Plan does specify density limits. To resolve that issue one must turn to Development Plan Policy H8, Objective 3 specific to Institutional Lands.

176. Density of residential development is a controversial issue. It is not for me to express a view on the substance of those controversies. But if, as a matter of choice by the Planning Authority, quantified density statements are indicatively set out in the Development Plan, the necessary flexibility allowed by the Plan cannot be so great as to deprive them of meaning – of their indicative function in conveying to the public, developers and stakeholders generally, principles capable of practical and reasonably predictable application in individual planning applications. That is a basic purpose of a development plan – the “environmental contract”. The planning significance of an increase in density may not - I imagine will not - be linearly related to the quantum of that increase. That makes quantifying an increment of density as small or large difficult and a matter of expert planning judgment, at least at the margins. But I think it is reasonable to expect, and that the drafters of development plans and the democratic representatives adopting them will have anticipated, in drafting and adopting development plans, that the intelligent layperson will compare, and if appropriate be struck by the comparison of, the density “numbers” in a development plan. It is with these views in mind, I think, that the intelligent layperson would approach his/her interpretative task.

177. On turning to the Urban Residential Guidelines 2009 the intelligent layperson finds that they identify various categories of locations appropriate for increased densities. S(he) reads, as to Institutional Lands, that *“average net densities at least in the range of 35-50 dwellings per hectare should prevail”*. As the Board and Shannon Homes emphasise, the words *“at least”* are important: 35-50 dwellings per hectare is a baseline not a limit. Next, s(he) reads that the *“objective of retaining the open character of the lands (may be) achieved by concentrating increased densities in selected*

parts (*say up to 70 dph*).¹⁵⁰ S(he) will readily see that this not intended to alter or increase the average net density on the site. It is about concentrating development in particular areas of the site – and that for the particular purpose of retaining the open character of the site. S(he) will note the figure of 70 dph and that it represents a doubling of 35dph and an absolute increase of 35dph on that figure and that it represents the addition of 40% to 50 dph and an absolute increase of 20 dph. I think s(he) will see this 70 dph as at least indicative of an order of increased density exceptionally permissible on part of the site to achieve retention of the open character of the site: all the while maintaining the average density of “at least” 35-50 dph.

178. The intelligent layperson will be puzzled, as am I, by the word “say”, in “(*say up to 70 dph*)”. It could be interpreted as expressing a limit of 70 dph or as the opposite. It is not a helpful word – as an expression of clarity or even as an expression of flexibility. However the context in which “say” is used is important. “up to” is at least indicative of a limit. And it is a phrase notably to be contrasted with “at least”. In the end I think s(he) will (correctly) interpret it as a form of bureaucratic hedge-betting intended to introduce some flexibility beyond 70 dph. But even assuming flexibility, the numbers are not meaningless and do set a context and, in general terms, influence the expectations of the intelligent layperson – who will expect at least some reasonableness of relationship between those numbers and determinations whether or not a particular planning application is in material contravention of the Development Plan by reference to density.

179. The Board submits that “‘*up to 70 dph*’ *is simply an indication that there are areas of institutional lands in which higher densities are permissible.*” I agree – save for the word “simply”, if that word is intended to deprive the number 70 of worthwhile meaning. I agree that there are “*no prescribed maxima or minima*” in any narrow or strict numerical sense. But the number 70 was chosen by the drafters of the 2009 Guidelines, presumably deliberately and carefully (as Collins J in Spencer Place envisaged). They did not choose 100, or 200, 300, 500 or even 5,000. At some point, no doubt, the number becomes absurd but neither I nor the intelligent layperson are equipped or entitled to discern where. We are entitled to assume that the number 70 was inserted by the drafters of the Urban Residential Guidelines 2009, not by way of a rigidly prescriptive number, but at least to convey some worthwhile and more or less reliable meaning to their intended audience. Indeed, that a number is used at all tends to that effect – especially a number which could have been simply omitted if the Board’s interpretation is correct. Where indicative numbers appear they must be taken to indicate something – and something capable of being relied upon. I do not think the intelligent layperson will try to infer from the 2009 Guidelines and phrase “up to 70 dph” a precise numerical upper limit to density. But s(he) will consider that the density numbers given are intended to shape expectations in useful and practically applicable indicative terms and that flexibility as to densities is not the same as carte blanche open-endedness such as would deprive the Guidelines of useful meaning on this issue. The 2009 Guidelines provide a tool by reference to which, as to density, material contravention can be considered even in the absence of strict density limits: definitions may be unavailable and individual cases may be in a grey area but, at least in clear cases, it may be apparent whether a material contravention has or has not been proposed. In my view the

150 §5.10

Intelligent layperson will consider the words “up to” as tending to convey a limit and “say ...70” as numerically identifying, though not precisely delineating, the ballpark of acceptability. It seems to me that 142 dph is out of that ballpark – as Simons J put it in **Heather Hill**, self-evidently.

180. However, it is vital to compare like with like. As Counsel for the Board agreed to any proposed average density, in this case 142 dph, “say 70 dph” is not the better comparator. “say 70 dph” is not proposed in the guidelines as an increased average density but as a density appropriate to part only of the site while maintaining an average density of “at least ... 35-50”. While not ignoring the words “at least”, it is, putting it at its mildest, striking that the 142 dph average density proposed here is over 4 times 35dph and a 106 dph increase. That is to say, putting 4 dwellings in the same space as 1 would occupy at the density of 35dph envisaged by the Plan. That is a practical image which the Intelligent layperson would readily understand. It is 2.8 times 50 dph and a 91 dph increase. While these are the better comparators, given the words “up to” as denoting a limit of some sort I think it is permissible to observe that 142 dph is double even the figure of 70 dph and a 71dph increase. Even applying the 2009 Guidelines as to Public Transport Corridors, and adopting a similar view of the indicative significance of numbers, it does not appear to me that their advocacy of “minimum net densities” of 50 dph avails the Board as to a density not far off 3 times that number. Again, it seems to me that 142 dph is out of the ballpark identified by the “numbers” used as to density in the Development Plan – as Simons J put it in **Heather Hill**, self-evidently.

181. It seems to me significant that the 2009 Guidelines contain only one explicit prohibition on an upper limit as to densities and that where one might expect it - as to city and town centres¹⁵¹. Of course that does not per se prohibit unlimited density elsewhere but as part of an holistic reading of the Urban Residential Guideline 2009 and so of the Development Plan, it at least casts other elements of the Guidelines, including those as to Institutional Lands, in that contrasting light. It demonstrates that had the authors of the Guidelines, or of the Plan wished to prohibit an upper limit as to density or to provide that density would be limited only by qualitative planning standards, they could very easily have made that clear.

182. I need not, and do not attempt to, define where a numerical density limit lies in the Urban Residential Guidelines 2009 as bearing on this site. But I do not consider that the intelligent layperson would read them as envisaging an average 142 dph for the entire site.

183. As observed above, the distinction between the application of a Development Plan to a particular development proposal, as a matter of planning judgment entitled to deference on O’Keeffe principles and the interpretation of a Development Plan, illustrated and illuminated by consideration of a particular development proposal, may not be not always clear or straightforward. But I do not consider this case on this issue to be an issue of application of a development plan as to which the planning judgment of the Board is entitled to deference.

151 §5.6

184. I am conscious that in the foregoing I may have fallen into the trap of legalistic parsing of which I warned myself. So it may be a useful cross-check to “stand back” to take an overview, as it were. The law accepts that, on occasion, legal phenomena may be easier to recognise than define: for example, practical completion in a building contract – **Mears Ltd v Costplan Services**¹⁵². In interpreting a contract in light of surrounding circumstances it is accepted that those surrounding circumstances can be “*illustrated but hardly defined*” – **Hyper Trust v FBD**¹⁵³. Sometimes known as the “elephant test”, this approach was recently recognised by Donnelly J in **Mullins v Irish Prison Service**¹⁵⁴. On those occasions the law may be willing to say simply: “*I know it when I see it*” - **Jacobellis v Ohio**¹⁵⁵. Admittedly, the foregoing cases are different contexts to the present but Simons J seems to have adopted a similar approach in describing the material contravention in **Heather Hill**¹⁵⁶ as “*self-evident*”. Without giving licence for either careless interpretation or second-guessing the judgment of a planning authority within its proper sphere, I suggest that, as applicable to the interpretation of development plans drafted by non-lawyers and containing considerable elements of policy, the careful intelligent layman is entitled, and perhaps more likely than a lawyer, to adopt such an interpretative approach. It may be possible for a Court to say, on the facts of a particular case we know contravention, and material contravention, when we see it. And in my view, that is possible here. To paraphrase a remark by counsel for the Applicant, having looked at minimum net densities of 50 dph for public transport corridors and of 35 to 50 dph for Institutional Lands, going “say up to 70”, the leap from that to 142 is “pretty huge”.

185. I emphasise that the foregoing is not a review of national density policy as at 2021, much less its development since 2009. Nor does it deprecate a policy favouring numerically “open-ended” criteria allowing density to be determined as to each site indirectly by reference, exclusively or not, to quality, performance or other criteria and not by numerical limits. Nor is the foregoing a prohibition on the Board’s permitting an average density of 142 dph on this or any other site. Nor is it to suggest that the inspector or the Board are wrong in their view that 142 dph is, in the end, acceptable on this site – I have no expert competence or legal jurisdiction in that regard. What I am considering here are much narrower questions of law - of interpretation of this specific Development Plan as to density through its explicitly chosen lens of the 2009 Guidelines and whether the present development proposal represents, as to density, a material contravention of that Plan such that the Board must recognise that material contravention and address it by the correct procedural means via S.9(6) of the 2016 Act and S.37(2)(b) PDA 2000.

152 Mears Ltd v Costplan Services (South East) Ltd and others - [2019] 4 WLR 55; Keating on Construction Contracts, 10th ed (2016), para 20–169;

153 Hyper Trust Ltd v. FBD Insurance PLC [2021] IEHC 78 (High Court (General), McDonald J, 5 February 2021) §31

154 [2021] IECA 318 §23 – citing O’Donnell J in Clarke v O’Gorman [2014] 3 IR 340

155 Jacobellis v. Ohio, 378 U.S. 184 (1964); US Supreme Court Justice Potter Stewart’s threshold test on how to spot obscene material: ‘I know it when I see it’. Friends of the Irish Environment Ltd v Commissioner for Environmental Information, Case C-470/19 Opinion of Advocate General Bobek 3 December 2020, Citing - Jacobellis v. Ohio, Cherwell District Council and others v Oxfordshire CCG [2017] EWHC 3349 (Admin); in Young v Sun Alliance and London Insurance Ltd [1976] 3 All ER 561 Lawton LJ said: “This appeal raises a semantic problem which has troubled many philosophers for centuries, and it can, I think, be expressed in the aphorism that an elephant is ‘difficult to define but easy to recognise’. I find difficulty in defining the word ‘flood’ as used in this policy; I have no difficulty in looking at the evidence in this case and coming to the conclusion, as I do, that the water in the lavatory was not a flood within the meaning of para 8 of this policy.”

156 Heather Hill Management Company clg v. An Bord Pleanála [2019] IEHC 450

186. Accordingly the repeated assurances, which I accept, that the inspector and the Board considered as a planning judgment that the density was not excessive and was in accordance with proper planning and sustainable development, are beside the present point. So, and for example, the inspector's view¹⁵⁷ that density in the ranges cited in the 2009 Guidelines (and hence in the Development Plan) "*would not be in line with other relevant national and regional guidelines, including that set out in Design Standards for New Apartments Guidelines for Planning Authorities (2018)*" does not contribute to answering the questions posed by the Applicants in this judicial review as to material contravention of a development plan made in 2016.

187. Indeed, whatever view one takes, or the Inspector took, of the meaning of the 2009 Guidelines as to densities on Institutional Lands, and given the effective incorporation of those Guidelines as to densities in the Development Plan, the observation just cited is strongly resonant of a justification of a material contravention of the Development Plan on grounds permitted by:

- S.37(2)(b)(ii) as to Development Plan Objectives conflicting as between Institutional Lands and Public Transport Corridors or lacking clarity in their application to the site and
- S.37(2)(b)(iii) as to planning policies and guidelines, other than the Development Plan, justifying material contravention.

188. The Applicant makes a second argument – that, by reference to the provisions of the 2009 Guidelines as to Institutional Lands¹⁵⁸ as adopted in the Development Plan, there is no evidence that 142 dph was designed to achieve or actually achieves the retention of the open character of the lands. I am not clear that this is a useful analysis. The Board and the Inspector clearly concluded, and were entitled to, that the retention of the open character had been sufficiently achieved – not least where the Development Plan requirement of 20% of the site as open space has been exceeded¹⁵⁹. Shannon Homes asserted¹⁶⁰ that the Development would provide over 28% of the site as public open space and that was not disputed. But given that 142 dph is an average density in, as I have held, material contravention, and not a direct comparator to the "say up to 70 dph" to be used to achieve retention of the open character of the lands it seems to me impossible to analyse the issue as argued. The "say up to 70 dph" arises only if a basis for it has been laid in an average density conforming to the Development Plan, which did not occur in this case. In any event I need not, and do not, decide this issue given my finding of material contravention as to average density.

189. But the proposition reversed may point to a useful analysis. It appears to me that the proper interpretation of the Development Plan in this regard is that if both the permissible average density (whatever that may be) and retention of the open character are achieved, higher density is

157 Inspector's report §12.2.15

158 §5.4

159 See Inspector's report §12.5.7 & 12.5.8

160 Material Contravention Statement

permissible in part of the site. And whatever the permissible average density may be, as a matter of logic and maths, it cannot be higher than any higher density permissible in parts of the site.

Conclusion as to Density

190. On the bases set out above I find, that as to density, the development permitted by the Impugned Permission, in permitting an average density across the site of 142 dwelling per hectare, is in material contravention of - in excess of that average density contemplated in - Development Plan Objective H8 Objective 3 and §5.10 of the Urban Residential Guidelines 2009 as to Institutional Lands such that the failure by the Board to recognise that density of 142 dwelling per hectare as a material contravention and address it as such either by refusing permission or granting permission via S.9(6) of the 2016 Act and S.37(2)(b) PDA requires that the Impugned Permission be quashed.

BUILDING HEIGHT – SPPR3, Misalignment Issue & Public Transport Capacity Issue – Ground 7

Introduction

191. The Board permitted increased building height explicitly as a material contravention of the Development Plan, relying on S.37(2)(b) PDA 2000. Though it did not, and should have, cited S.9(6) of PD(H)A 2016 as its route to the application of S.37(2)(b), as reliance on S.9(6) is necessarily implicit in reliance on S.37(2)(b), the Applicants, in my view correctly, did not plead any case on this account.

192. The Board did not explicitly apply S.9(3) of PD(H)A 2016: i.e. it did not explicitly apply any SPPR. The Board's submissions asserted that it had not relied on S.9(3). But, as recorded above, the Impugned Decision records in its "Reasons and Considerations" that in coming to its decision the Board had regard to the Height Guidelines 2018 "*and particularly Specific Planning Policy Requirement 3*". And that SPPR3 was applied is common case.

193. The Applicant, in essence, asserts that the Board failed, in justifying increased height, to

- address the capacity of public transport serving the development. I have addressed this issue above and found the Impugned Permission deficient in this regard.
- apply the principle, set out at §3.1 of the Height Guidelines 2018, requiring that the Development Plan and the NPR be misaligned before SPPR3 can be applied – the "Misalignment Issue". As will be seen, I reject the challenge in this regard.

194. As to the “Misalignment Issue”, the Statement of Grounds asserts that the Developer identified support for a material contravention as to height in the terms of the NPF (identified by the Inspector at §12.3.23) and the Board relied on the NPF for its material contravention justification pursuant to section 37(2)(b). The Statement of Grounds asserts that the Board, as a “*condition precedent*” to the application of SPPR3, must (‘shall’) have regard to the principles identified in §3.1 of the Height Guidelines. One such requires the Board to, but it did not, assess whether the Development Plan aligns with and supports the objectives and policies of the NPF. The Statement of Grounds asserts that the Board thereby failed to take into account a relevant consideration.

Interpretation of the Numerical Height Limitations Prohibition

195. In the end, it seems to me, that the presence or absence in the Development Plan of a numerical limitation on building height was not at issue in these proceedings as the decision to treat the height of the proposed development as a material contravention and to justify it by reference to national policy was not, in general terms, controversial. The controversies were limited to those identified above.

196. However, the Board asserts, and the Applicant disputes, that the Development Plan contains a blanket limitation on building height of the kind impugned in Chapter 1 of the Height Guidelines 2018 and in SPPR1¹⁶¹ of the Height Guidelines. And the Board expressed the view that all numerical limitations on building height were prohibited by the Height Guidelines 2018 in favour of an approach based on “*performance criteria*”, citing NPO13 to the effect that consideration of “*.. building height .. will be based on performance criteria*”. As the issue was in dispute I consider I should deal with it. I do not consider that the Board’s argument is correct.

197. Chapter 1 of the Height Guidelines 2018 and SPPR1, in terms, do not contemplate a blanket prohibition of numerical limitations on building height. They contemplate a prohibition of blanket numerical limitations on building height. The syntax matters. The word “*blanket*” governs the numerical limitation on building height, not the prohibition. The precise meaning of “*blanket*” and “*generic ... across their functional areas*”¹⁶² is not clear. But the words at very least connote something widespread and tending to the general as opposed to focussed on a small area. Whatever they may mean, the adjectival use of the word “*blanket*” to describe what is prohibited, as opposed to the prohibition, is consistent with the imposition of “*non-blanket*” numerical limitations on building height. That may leave appreciable scope for the imposition of numerical limitations on building height of a less-than-widespread/less-than-general kind and/or applicable in a part or parts of the functional area of a planning authority as opposed to over the entire or the greater part.

161 Set out above

162 Height Guidelines 2018, Chapter 1 §1.4

198. SPPR1 must be interpreted as a whole. It does not require increased building height and density everywhere in a functional area. Nor does it apply directly to consideration of planning applications. Rather it requires that development plans identify areas in which increased building height and density will be actively pursued. That makes sense only if it is accepted that there will be other areas in which increased building height and density will not be actively pursued. And SPPR1 does not require that in those other areas increased building height and density will be permitted (as opposed to being actively pursued). One might also cite the narrative introduction to SPPR1 - §§2.7¹⁶³, 2.8¹⁶⁴, and 2.11 & 12¹⁶⁵ to similar effect. The prohibition on “blanket limitations” must be understood in this light. Again, it is a prohibition of “blanket limitations” – not a blanket prohibition of limitations.

199. Chapter 1 also advocates a “*more performance criteria driven approach*” and not an exclusively performance criteria driven approach – which is consistent with the imposition of height limits which are not “*blanket*” or “*generic ... across their functional areas*”. As recorded above, the NPF narrative introducing NPO13 reads “... general restrictions on building height may not be applicable in all circumstances in urban areas and should be replaced by performance-based criteria appropriate to general location”¹⁶⁶. It does not read “... restrictions on building height will not be applicable in any circumstances in urban areas”¹⁶⁷. I do think it does advocate replacement of general restrictions on building height by performance-based criteria. But that does not prohibit specific restrictions on building height. And the following text appears in the introduction to NPO3 which requires the adoption in urban areas of building height standards based on performance criteria: “*To enable brownfield development, planning policies and standards need to be flexible, focusing on designed and performance-based outcomes, rather than specifying absolute requirements in all cases.*” The words “*in all cases*” imply that absolute requirements in some cases are permissible. These passages appear to imply that building height restrictions may not be “*general*” in urban areas but are permissible in at least some circumstances. This suggests that there is no blanket ban on numerical height limitations: that there is rather, which is a different thing, a ban on blanket numerical height limitations.

200. The allegedly “blanket” limitation inconsistent with Chapter 1 of the Height Guidelines 2018 and SPPR1, to which the Board refers in written submissions and at trial is Development Plan Housing Policy 9 Objective 4: “*To direct tall buildings that exceed five storeys in height to strategic and landmark locations in Town Centres, Mixed Use zones and Strategic Development Zones and*

163 Appropriate identification and siting of areas suitable for increased densities and height will need to consider the environmental sensitivities of the receiving environment as appropriate, throughout the planning hierarchy. The Environmental Sensitivity Mapping online tool, developed by the EPA, can be a useful guide in this regard.

164 Historic environments can be sensitive to large scale and tall buildings. In that context, Planning Authorities must determine if increased height buildings are an appropriate typology or not in particular settings

165 it is therefore critically important that development plans identify and provide policy support for specific geographic locations or precincts where increased building height is not only desirable but a fundamental policy requirement. Locations with the potential for comprehensive urban development or redevelopment (e.g. brownfield former industrial districts, dockland locations, low density urban shopping centres etc) should be identified areas to be included in this assessment are central and/or accessible locations and also intermediate urban locations where medium density residential development in excess of 45 residential units per hectare would be appropriate.

166 Emphases in this paragraph added

167 Emphases in this paragraph added

subject to an approved Local Area Plan or Planning Scheme". But the Inspector identified no such "blanket" limitation or inconsistency with Chapter 1 of the Height Guidelines 2018 and SPPR1. Rather he asserted a conflict, internal to the Development Plan, with Housing Policy 8 to generally encourage higher densities and efficient use of lands, at appropriate locations. Nor did the Impugned Decision identify such a blanket limitation inconsistent with Chapter 1 of the Height Guidelines 2018 and SPPR1. I do not see that it is open to the Board to so argue now.

201. The SDCC report observes that *"The County Development Plan seeks to direct development above 5 storeys into appropriate urban centres as provided for in SDZs and Local Area Plans"* and *"... has provided for taller development in appropriate locations across the county"* – which it clearly sees as consistent with the Height Guidelines 2018. This, says the Board, *"only permits buildings over 5 storeys in certain locations"*. Assuming, without finding, that the Board has correctly thus characterised the Objective, it does not follow that the Plan is on this account in conflict with SPPR1 - which explicitly requires that a Plan specify increased building height in certain areas. It does not seem to me a *"blanket numerical limitations on building height"*. Rather it explicitly contemplates permitting *"buildings over 5 storeys"* and sets no upper limit. That it directs such higher buildings to particular areas, albeit preceding SPPR1 in point of time, seems to me to be what SPPR1 required by way of explicit identification of areas for promotion of high buildings.

Relationship between S.9(3) and S.9(6) PD(H)A 2016 and their application in the Impugned Decision – did the Board apply SPPR3?

202. The first question is whether the Board in the Impugned Decision in fact applied SPPR3 of the Building Height Guidelines 2018. If not, the question whether it satisfied a precondition to its application would not seem to arise. This issue prompted some discussion, though not dispute, at trial as to the relationship between S.9(3) and S.9(6) PD(H)A 2016. On that account and also to set the context for consideration of the matters which were in dispute, it seems to me appropriate to consider that relationship.

203. On the face of its order the Board applied S.37(2)(b) PDA 2000, and so by necessary implication, S.9(6) PD(H)A 2016 – though it does not explicitly cite S.9(6). That is the material contravention procedure: not the direct application of an SPPR, for which S.9(3) PD(H)A 2016 provides. Unfortunately, the Impugned Decision doesn't explicitly state which of S.9(6) or S.9(3) it applied.

204. The Applicant and the Board both argued the case on the basis that the Board applied SPPR3 of the Building Height Guidelines 2018 explicitly via S.37(2)(b) PDA 2000 and so, implicitly via S.9(6) and not via S.9(3). But that SPPR3 was applied is common case. And the Impugned Decision explicitly identifies SPPR3 as relevant – such, as will be seen, that the Board was obliged to apply SPPR3 via

S.9(3), whether or not it misaligned with the Development Plan and whether or not it also applied SPPR3 via S.9(6) as to material contravention.

205. The Board, with some reason, suggests that Owens J, in **Pembroke Road Association v. An Bord Pleanála**¹⁶⁸ validated the Board's use of an SPPR via S.9(6) instead of S.9(3). Yet Owens J did observe that:

“Strictly speaking, exercise of the Section S.9(6) power should not arise where a provision of a development plan touching on any issue is overridden 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.”

206. S.9(3)(b) specifies that, where they are misaligned, an SPPR applies instead of a development plan. But the more general provision, S.9(3)(a), specifies that where an SPPR is “relevant” the Board “shall” apply it. Strictly, that could have been the end of the matter whether or not the SPPR and the Development Plan were misaligned. But, no doubt wisely given the statutory status of the development plan and its centrality to the planning process, S.9(3)(b) was added to make the relationship between SPPRs and development plans clear. Nonetheless, it seems to me that S.9(3)(a) has the effect that the application of an SPPR in a given case is not dependent upon misalignment between the SPPR and the Development Plan. Rather, where an SPPR is relevant to, it must be applied to, the decision of a planning application – and applied whether or not the SPPR and the Development Plan align or misalign. Also, S.28(1C) PDA 2000 baldly requires that the Board shall, in the performance of [its] functions, comply with SPPRs. In that light S.9(3)(b) may perhaps be best viewed as an avoidance of doubt provision.

207. I make the following observations:

- a. By S.9(3) where an SPPR is relevant, the Board “shall apply” it. As Owens J says - “*This is not a matter for exercise of discretion.*”. So, where an SPPR is relevant S.9(3) must be applied, and it would assist if the Board, in its decisions, made its application express. Otherwise, as here, confusion with the S.9(6) material contravention process is apt to arise – especially when S.9(6) is not cited either.
- b. It seems that where an SPPR is relevant S.9(3) applies whether or not in material contravention of the Development Plan¹⁶⁹.

168 [2021] IEHC 403 §102

169 See below

- c. If the SPPR is congruent with the Development Plan in all relevant respects, clearly no question of material contravention arises and the question of application of S.9(6) will not arise – at least in this respect.
- d. But by s.9(3), if the requirements of an SPPR “*differ from the provisions of the development plan*” then, to the extent of such difference the SPPR requirements “*apply instead of the provisions of the development plan*”. Though the practical effect may be the same in a given case, this effect is not achieved by deeming the development plan amended (as, for example, in the case of a Strategic Development Zone Planning Scheme) but is achieved by applying the SPPR “*instead of*” the development plan. The same “*instead of*” formula is used in S.34(2)(ba)¹⁷⁰ PDA 2000 to the same effect.
- e. This suggests that, in the application to a planning application of an SPPR which differs from a development plan, the question must be considered whether such application of an SPPR also constitutes a material contravention of the development plan such that S.9(6) and S.37(2)(b) PDA 200 should also be invoked. Though the outcome of that invocation may be predictable given the imperative of S.9(3) to apply the SPPR.
- f. So, in a case of difference between an SPPR and a development plan and while invoking S.9(3)(b) may also require invocation of s.9(6), given the imperative of S.9(3), it would not seem open to the Board to choose to apply S.9(6) instead of s.9(3).

208. The Inspector considered¹⁷¹ SPPR3 as explicitly informing his assessment of the application and he assessed the matter against the criteria in §3.2 of the Height Guidelines 2018 which are explicitly by the terms of SPPR3 the criteria for the application of SPPR3. He found¹⁷² that “*the proposed development satisfies the criteria described in section 3.2 and therefore SPPR 3 of the Building Height Guidelines.*” As noted above, the Board did not explicitly apply S.9(3) PD(H)A 2016: i.e. it did not explicitly apply any SPPR. But, as also noted above, the Impugned Decision records in its “Reasons and Considerations” that in coming to its decision the Board “*had regard to*” the Height Guidelines 2018 “*and particularly Specific Planning Policy Requirement 3*”. To “*have regard to*”, whether particularly or not, is a much lesser matter than to “*apply*”. The statutory obligation to ‘have regard to’ means precisely that, no more and no less; it does not, for example, entail an obligation to follow - **Temple Carrig Secondary School v An Bord Pleanála**¹⁷³.

209. Accordingly, it is to be regretted that that the Board order was unclear in its deployment of SPPR3. That said, it does seem to me that the Board could not lawfully have had regard to SPPR3

170 (ba) Where specific planning policy requirements of guidelines referred to in subsection (2)(aa) 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.

171 §12.3.6 et seq

172 §12.3.16.

173 Board of Management of Temple Carrig Secondary School -v- An Bord Pleanála [2017] IEHC 452 (Barrett J, citing Kearns J. in Evans v. An Bord Pleanála Unreported, High Court, 7th November, 2003), 23

unless it was relevant and by S.9(3) if an SPPR is relevant the Board must apply it via S.9(3). However, as the issue was not in dispute my observations in this regard must be obiter.

Misalignment Issue - Precondition to the Application of SPPR3?

210. As the Board submits, in **Pembroke Road**, Owens J in fact held that it was not necessary, in order to reach a decision under S.9(6) PD(H)A 2016 to allow a material contravention by reference to SPPR3, for the Board to come to the view, envisaged in §3.1 of the 2009 Guidelines, that the policies and objectives in respect of building heights in a development plan did not align with the policies and objectives of the NPF on building height. That seems to me to be the ratio of that judgment on the height issue – with which I agree.

211. §3.2 of the Height Guidelines 2018 explicitly sets “*criteria*” to be demonstrated by the applicant in a planning application. And SPPR3 explicitly makes satisfaction of “*criteria*” a precondition of its application to planning applications. It is not disputed that the Inspector and the Board found, and were entitled to find, these criteria satisfied. The issue is whether satisfaction of principles indicated in §3.1 of the Height Guidelines 2018 had also to be satisfied.

212. §3.1 of the Height Guidelines 2018 states “*broad principles*” which “*Planning Authorities*” “*must apply*” “*in considering development proposals for buildings taller than prevailing building heights in pursuit of these guidelines*”. One of those broad principles is framed as a question: Can misalignment between the Development Plan and the NPR be “*demonstrated*”?

213. The Board submits that no obligation can be “*implied*” into the Height Guidelines that §3.1 obliges the Board, in considering whether to apply SPPR3, to first determine whether “*it can be demonstrated*” that the Development Plan is not in alignment with the NPF. The Applicant does not purport to infer such a requirement or say the Height Guidelines imply it: it says the requirement is express, given the Board “*must apply*” the broad principles.

214. The Board is correct in characterising this alignment question as one of application of a “*broad principle*” and, no doubt, in contrasting it with the more specific development management criteria contained in §3.2, with which a planning permission applicant must demonstrate compliance. But that does not address the remaining fact that, broad though the principle may be, by the explicit terms of §3.1 the Board “*must apply*” it “*in considering development proposals*”. Whether the principles are broad or narrow does not bear on any necessity of their application.

215. Unsurprisingly, the Applicants emphasise “*must apply*” – readily to be contrasted with a “*have regard to*” obligation - and say that if they “*must*” be applied their application must be apparent in the Board’s decision and is not. The Applicants also emphasise the words “*in pursuit of these guidelines*” – though I am not sure that much advances their case.

216. There is no doubt that the words “*must apply*” are striking. And contrasting “*the Planning Authority/An Bord Pleanála*” in §3.2, with “*Planning Authorities*” in §3.1, I think falls short of a convincing solution: there is no obvious reason why the Board (on appeal) should decide a planning application without having to have regard to principles to which the Planning Authority were obliged to apply in deciding the same planning application at first instance. Indeed SPPR3 mentions only “*the Planning Authority*” whereas S.9(3) clearly requires the Board to apply SPPRs.

217. SPPR3 adds a further twist in that, while by S.9(3) its application is compulsory if the criteria for its application are satisfied, its terms are discretionary such that the Board “*may approve such development, even where specific objectives of the relevant development plan ... may indicate otherwise*”.

218. In truth, I am by no means clear that any interpretation is entirely convincing. But it seems to me striking, by reference to the text of SPPR3, that whereas §3.1 sets out “*broad principles*” §3.2 sets out “*criteria*”. These are similar, but nonetheless distinct concepts. SPPR3 expressly makes satisfaction of “*criteria*”, but does not expressly make satisfaction of “*principles*”, a precondition of its application. SPPR3, in terms, only requires satisfaction of “*criteria*”. This seems to me significant. §3.2, having set out the criteria, provides that where the Board (in this case) “*considers that such criteria are appropriately incorporated into development proposals*” it “*shall apply*” the following SPPR3. No similar provision as to SPPR3 appears in §3.1 as to the broad principles. SPPR3 requires that in concurring on that issue with the developer, the Planning Authority must address “*the wider strategic and national policy parameters set out in the NPF and these guidelines*”. That is a subject-matter more akin to the “*broad principles*” of §3.1. But, by SPPR3 the Planning Authority need only take account (“*taking account*”) of “*the wider strategic and national policy parameters set out in the NPF and these guidelines*” despite §3.1 saying the Planning Authority “*must apply*” the “*broad principles*”. To be obliged to take account of something may mean an obligation the strength of which lies somewhere between to “*have regard to*” and to “*apply*” (see **McEvoy v Meath County Council**¹⁷⁴, citing **R. v CD**¹⁷⁵ and, contra, **Cork County Council v Minister for Housing**¹⁷⁶) – though whether that would be to avoid interpreting a guideline as if a statute and whether the intelligent layperson would draw that distinction, I doubt. It is difficult to reliably discern what the intelligent layperson would make of this and to avoid the trap of highly legalistic interpretation.

174 [2003] 1 IR 208

175 [1976] 1 NZLR 436

176 *Cork County Council v the Minister for Housing Local Government and Heritage et al.* [2021] IEHC 683

219. Counsel for the Applicant made another argument on this issue: taking it that the Impugned Decision had regard to the Height Guidelines 2018 generally, as opposed to SPPR3 of those guidelines specifically, for the purposes of s.37(2)(b) PDA 2000 in permitting a material contravention as to Height, he says that it was not open to the Board to pick and choose elements of the guidelines – that it must apply, and be recorded in the Impugned Decision as applying, the broad principles of §3.1 of those Guidelines, including as to the malalignment issue. This is at first glance an attractive argument given the words “must apply” in the Guidelines.

220. But it must be remembered that whereas S.9(3) PD(H)A 2016 imposes a “*shall apply*” obligation as to SPPRs, S.9(6) PD(H)A 2016 and S.37(2)(b)(iii) impose a “*have regard to*” obligation as to permitting material contravention by reference to guidelines. The language of the Guidelines, however imperative, cannot translate a statutory obligation limited to “*having regard*” into a legal imperative to apply guidelines. And a “*have regard to*” obligation seems to me to imply at least some capacity to pick and choose relevant elements of a guideline as the decision-maker, in its planning judgment, may consider useful in a particular case. So this argument must fail.

Malalignment Issue - Conclusion

221. Two considerations weigh with me. First, and as stated, SPPR3 in terms only requires satisfaction of “criteria” and §3.2 sets out “criteria” whereas §3.1 sets out “broad principles”. Second, while §3.1 envisages demonstration of misalignment of the Development Plan with the NPF, S.9(3)(a) makes clear that, in any event, an SPPR must be applied where relevant regardless of alignment or misalignment of the SPPR with the Development Plan.

222. I have sympathy with the Applicant’s reliance on the words “*must apply*” and, not without misgivings, find that the Board did not err by not articulating in its decision its appliance of the broad principles set out in §3.1 and position as to misalignment of the Development Plan with the NPF.

223. The conclusion that the Board in this case applied SPPR3 in granting permission and, by necessary implication, should have applied S.9(3) does not impugn the Board’s application of the material contravention procedures of S.9(6) and S.37(2)(b) PDA 2000. The application of both S.9(3) and S.9(6) is coherent via S.37(2)(b)(iii) PDA 2000 in that an SPPR is both part of a S.28 Ministerial Guideline and represents a relevant policy of the Minister and in that both SPPR3 and S.37(2)(b) do not require a particular or different planning decision but in essence leave the matter to the exercise of the Board’s discretion.

224. Given my conclusion that the Board did not err in this respect, it appears to me unnecessary to decide the question whether, as to building height, the Development Plan and the NPF are

misaligned or the Development Plan and SPPR3 are misaligned. Regardless, once relevant, SPPR3 must be applied and in this case was applied.

Observations on the Impugned Decision as to Building Height

225. As the interpretation of a development plan is ultimately for the Court, I would not wish this judgment to be considered to uphold the Board's view, expressed as a reason for its decision on building height, of a conflict for purposes of section 37(2)(b)(ii) between Housing Policy H8 of the Development Plan, to support higher densities and Housing Policy 9 Objective 4 as to height. Arguably that view represents a failure to consider the plan as a whole and interpret it holistically as required by the decisions in **Navan Co-Ownership**¹⁷⁷ and **Eoin Kelly**¹⁷⁸. A development plan should be interpreted with a view to reconciling its content where possible rather than finding conflicts.

226. The decision of the Board omits arguably important wording of Housing Policy H8, which states that it is the policy of the Council to promote higher residential densities at appropriate locations. Indeed it continues: *“and to ensure that the density of new residential development is appropriate to its location and surrounding context.”* Policy H8 Objective 2 also envisages higher densities at *“appropriate locations that are close to Town, District and Local Centres and high capacity public transport corridors”*. Arguably, Policy 9 Objective 4, which seeks to direct tall buildings that exceed five storeys in height to strategic and landmark locations in Town Centres, Mixed Use zones and Strategic Development Zones and subject to an approved Local Area Plan or Planning Scheme could, and if so should, be interpreted consistently with, rather than in conflict with, Housing Policy H8 and so as identifying at least some of those “appropriate locations” and by referring to Strategic Development Zones, Local Area Plans or Planning Schemes merely seeks to ensure careful handling of the height issue. Of course, whether these objectives accord with other planning policies and guidelines is a different matter. This observation is obiter, but I respectfully suggest that the Board may wish to consider the issue where it arises.

227. In view of the Impugned Decision one may also, I think, legitimately ask whether for purposes of S.37(2)(b)(iv) the single swallow of one nearby SHD planning approval can constitute the summer of a “pattern” of development or “permissions” (note the plural) granted in the area. The Inspector's report reads as follows

“12.3.26. In relation to the pattern of development/permissions granted in the area since the adoption of the Development Plan, of particular relevance, is the recent approval for an SHD application on the Scholarstown Road ('Beechpark' and 'Maryfield', Scholarstown Road, Dublin 16) for a development of 590 no. residential units, up to 6 storeys in height (ABP Reference 305878-19). This is located approximately 1km to the west of this site. As such

177 Navan Co-Ownership v. An Bord Pleanála [2016] IEHC 181
178 Eoin Kelly v. An Bord Pleanála & Aldi [2019] IEHC 84

precedent for higher buildings (and higher densities) than currently exist has been established in this area.

12.3.27. *Should the Board be minded to invoke the material contravention procedure, as relates to Development Plan policies pertaining to height, I consider that the provisions of Section 37(2)(b)..... (iv) have been met, and in this regard I consider that the Board can grant permission for the proposal."*

It seems at least arguable that the Inspector here confused the concept of a precedent (singular) with a "pattern of development/permissions granted" ("plural"). Again, as the issue was not argued this observation is obiter, but I respectfully suggest that the Board may wish to consider the issue where it arises.

TRAFFIC – Ground 8

228. I have dealt with the Public Transport aspect of Ground 8 above. I now deal with the Traffic issue.

Traffic – Pleadings & Submissions

Applicant

229. The Applicant pleads that the impugned decision is invalid as the Board acted irrationally or unreasonably and/or breached the Applicant's rights to fair procedures and a reasoned decision making in its assessment of traffic impacts from the proposed development on the greater Rathfarnham area. A pleaded assertion of breach of the EIA Directive was abandoned.

230. The Applicant pleads that the Board failed adequately to assess the impact of the traffic that would be generated by the proposed development. Shannon Homes' "Traffic and Transport Assessment" by DBFL Engineers ("DBFL TTA") concluded in particular that the Ballyboden Roundabout was already under pressure but that the proposed development would only marginally impact this issue. Observers other than the Applicant commissioned and submitted to the Board an analysis by traffic engineers Martin Peters & Associates (the "MPA Technical Note") which was critical of the DBFL TTA in respects set out in the Grounds.

231. The Applicant pleads that where material identifying specific and significant problems with the DBFL TTA was before the Board, the Board in this case was obliged to give reasons as to why it did not uphold these objections. The Applicant gives examples. Why did the Board prefer the Developer's:

- trip generation figure over that provided by observers?
- conclusion of insignificant effects versus the analysis provided by the observers that, in effect, traffic chaos would result?
- model of the junctions without considering the impacts of the other crossings that would directly affect those junctions as identified by the observers?
- conclusions that the proposed site was served by public transport over the observers' objections that, even if correct, this is meaningless unless that public transport will have sufficient capacity once the 1000+ residential dwellings committed in the area are constructed?
- And why did the Board not address the lack of inclusion of traffic from the proposed Primary Care Centre identified by the Applicant in the Developer's assessment? The latter point is pressed particularly as a public transport capacity analysis was specifically requested by the Board during pre-application consultation, and access to frequent public transport was specifically identified by the Council in its submission but which was not provided by the Developer. However, notwithstanding this default, the Board was still content to grant permission without any information as to the carrying capacity of the public transport accessible from the site.

The Applicant pleads that public participation is set at naught if the Board can dismiss sophisticated and empirically justified submissions by relying, in effect, on the absence of any objection from the Planning Authority.

The Board & Shannon Homes

232. To avoid needless repetition I will record the submissions of the Board and Shannon Homes together. Any resultant minor inaccuracy in attributing a particular point to both rather than one is irrelevant as to any extent they differed their submissions were complementary. As relevant and beyond traverses, the Board and Shannon Homes say that the Inspector engaged in detail with the traffic issue and "*considered and assessed*" the MPA Technical Note at §§10.1.54 - 10.1.66 of his report in which he concluded that the impacts on the surrounding road network would be limited. They say that the Board was within its jurisdiction to assess, and reach a conclusion on, the evidence. They say that it complied with its obligation to give reasons and did not breach the principles set out in **Mallak v Minister for Justice, Equality and Law Reform**¹⁷⁹ or **Balz v An Bord Pleanála**¹⁸⁰. They characterise the Applicant's argument that the Board was required to engage with the report of Martin Peters & Associates to a greater extent to that which appears in the Inspector's Report as an argument that there is an obligation on the Board to engage both with every submission made by the public and with the minute detail of those submissions and that the Applicants are looking for "micro-reasoning" and perfection in terms of discursive reasoning - arguments having no support in law. In passing I observe that this submission requires first of all an examination of the extent to which the Inspector's Report in fact engaged with the report of Martin

179 [2012] 3 I.R. 297

180 The Opposition Statement cites [2018] IEHC 309 but doubtless it was intended to be [2019] IESC 90

Peters & Associates. They say that the consideration and determination of traffic issues lies within the expert jurisdiction of the Board and is reviewable only for irrationality and that the decision of the Board complies with the requirement to provide “*broad reasons regarding the main issues, not micro-specific addressing of every detail in a narrative, discursive correspondence.*”

233. The Board and Shannon Homes emphasise the Inspector’s reliance on the fact that SDCC had considered the Shannon Homes traffic analysis adequate and they emphasise the content of §10.1.61 of the Inspector’s Report.

Traffic - The Nature of the Challenge

234. The argument that that the Board acted irrationally or unreasonably in the O’Keeffe sense was untenable – there clearly was material before the Board capable of grounding its decision. In reality this was a “reasons” point. And in that respect it is relevant but not necessarily sufficient for the Board and Shannon Homes to observe that there was material before the Board capable of grounding its decision.

Traffic - Importance of the Issue

235. The Board’s obligation, pithily summarised by Humphreys J., is to give “*the main reasons for the main issues*” - **Cork County Council v Minister for Housing**¹⁸¹ and **Atlantic Diamond v An Bord Pleanála**¹⁸². For example, in **Atlantic Diamond** Humphreys J. said that, in context, “*the alleged unprecedented nature of the scheme was a main issue and there is no clear reason provided as to why that was not a countervailing consideration to the grant of permission.*” The words “clear reason” are notable. He dealt as follows with a submissions that reasons were lacking for rejection of the objectors’ submission as to the impact of the proposed apartment development in a commercial park on existing industrial operations:

15. “*The submission was made in particular that the noise and fumes of an industrial estate are not compatible with residential developmentThe inspector’s report in essence, states that given the reports carried out on behalf of the developer including the transportation assessment travel plan and stage 1 road safety audit, the proposed development would not represent an unacceptable traffic safety risk.*”

16. “*Insofar as concerns questions of planning judgement, the decision-maker is entitled to prefer one set of expert opinion over another, all things being equal. However, that approach has its limits, particularly where the facts are contested. It is hard to see in the*

181 Cork County Council v Minister for Housing Local Government and Heritage et al. [2021] IEHC 683
182 [2021] IEHC 322

decision a basis for saying that clear reasons are provided in respect of all of the applicant's main points, particularly the movements of heavy vehicles and the use of outdoor equipment.

17. *Any affidavits providing additional evidence subsequent to the board decision do not resolve the legal issue for the board or the notice party and are best regarded as either contextual or as simply inadmissible."*

18. *..... even assuming that one stretched to its limits the approach of implying reasons from acceptance of the developer's expert material, I do not think that it can be said that the applicant has been provided with the main reasons for all of the main issues (particularly the rejection of the applicant's submissions regarding movements of heavy vehicles and the use of outdoor equipment) having regard to the perhaps atypical circumstances here, so accordingly I would quash the decision on that basis also."*

236. Borrowing the concept of materiality, considered above, from the law as to material contravention of Development Plans, it seems to me that one, though not at all the only, yardstick of what is a "main" issue is whether it is an issue *"upon which the proposed development is being, or might reasonably be expected to be, opposed by local interests"* - **Roughan v Clare County Council**¹⁸³ - and *"Materiality can be tested in the light of objections made to a planning application."* - **Byrnes v Dublin City Council**¹⁸⁴.

237. By that yardstick, I see that the inspector noted¹⁸⁵ that many Third Party Submissions had raised the issue of existing and potential traffic congestion. And no less than three residents' associations who objected to the proposed development went to the trouble of commissioning an expert technical note on the issue – for which note, it seems, a fourth residents' association, the Applicant, paid. According to the Inspector's report on the pre-application consultation, traffic and transportation was a "main topic" discussed. In any event, and as had been recommended by the Inspector who reported in the pre-application process, the Board in its statutory pre-application opinion had specifically required that the planning application be accompanied by an updated Transport Impact Assessment (TIA) providing further consideration and/or justification in relation to potential traffic impacts, inter alia the impact on the local road network. In giving its reasoned conclusion on significant effects for EIA purposes, the Board identified "Traffic and Transportation Impacts" as worth specific mention.

238. In my view traffic congestion was a "main issue" on which "main reasons" were required and to which the quality and conclusions of the BPFL TTA the Board had itself required was central in any event but all the more so given the content of the objections. In fairness, neither the Board nor Shannon Homes argued otherwise.

183 unreported, High Court, Barron J., 18 December 1996

184 [2017] IEHC 19, [23].

185 §10.1.55 et seq of his report

Traffic - Inspector's Report & Comment thereon

239. The Inspector addressed Traffic issues at §10.1.55 et seq of the EIA section of his report. In his Planning Assessment from §12 he addressed issues *“other than those not already dealt with in the EIAR”* and did not specifically address traffic. So §10.1.55 et seq as to EIA, unsurprisingly and sensibly, “doubles” as the planning assessment of the traffic issue. This is notable as the Applicants abandoned their EIA point as to traffic. It survives as a planning matter.

240. It is important to state that the Inspector does consider the traffic issue and in certain respects in some detail. The Inspector's conclusion¹⁸⁶, inter alia on the basis of the EIAR, the BPFL TTA and the SDCC report, was: *“I am satisfied that the impacts on the surrounding road network will be limited, in terms of additional traffic volumes.”* And having considered also car parking and cycle infrastructure, he concluded¹⁸⁷ that *“the impacts on the surrounding road network will be limited, having regard to the conclusions of the TIA¹⁸⁸, the reduced level of car parking provision (see below), the availability of existing and planned bus services, the existing and proposed cycle and pedestrian network and the provisions of the Mobility Management Plan.”* The Applicant's concern is specific to the inspector's consideration of MPA's criticisms of DBFL's methods of data collection and analysis and the resultant reliability of DBFL's conclusions.

241. I observed above that the Board's submission on this issue requires first of all a determination of the extent to which the Inspector's Report in fact engaged with the MPA Technical Note. As stated, the Inspector had recorded¹⁸⁹ that many Third Party Submissions had raised the issue of existing and potential traffic congestion and that he had *“had regard”* to the MPA Technical Note. His only other references to the MPA Technical Note were at page 22 and at §10.1.61:

- In reciting submissions, *“Attached Traffic Report – concludes that the proposed development is not in a sufficiently accessible location for the scale of development proposed/would lead to significantly increased traffic congestion and road safety hazards.”*¹⁹⁰
- In recording that *“it questions the methodology and conclusions of the TIA and raises issues related to inter alia the lack of adequate cycle infrastructure and lack of public transport serving the site, with the potential for the development to generate additional traffic than reported in the EIA.”*¹⁹¹

242. His analysis of the issues raised by the MPA Technical Note consists of the following at §10.1.61:

186 at §10.1.62

187 at §10.1.66

188 in referring to the TIA, the Inspector appears to have been referring to what I have called the BPFL TTA

189 §10.1.55

190 P22

191 §10.1.61

- *“I have considered the issue of cycle infrastructure and public transport provision elsewhere in this section, and I consider that the site is relatively well served by same.”*
- *“I also note that the Transport Division of the Planning Authority has not raised any objections to the methodology or the conclusions of the TIA and in this regard the Transport Division note that the lower parking provision (as compared to Development Plan Standards), increased bicycle provision and the Mobility Management Plan all help to reduce the car traffic impact of this development.”*

243. It will be noted that the only sense in which, beyond their recitation, the MPA criticisms of the TTA methodology are addressed by the Inspector is to note that the *“Transport Division of the Planning Authority has not raised any objections to the methodology or the conclusions of the TIA”*. The Board and Shannon Homes emphasise the Inspector’s reliance on the fact that the Planning Authority had considered the Shannon Homes Traffic analysis adequate. While this is a factually correct and legitimate observation by the Inspector, it does not amount to analysis or reasoning by the inspector or, by extension, the Board.

It is also difficult to resist the temptation to observe that the emphasis by the Board and Shannon Homes on the importance of Inspector’s reliance on the SDCC view of the traffic issue contrasts notably with the failure of the Board and Inspector to engage at all with the SDCC view of the public transport issue – but I have given no weight to that observation in my consideration of the public transport issue.

244. That the Inspector’s reference to the SDCC view on traffic does not amount to analysis or reasoning by the inspector or the Board as to the content of the MPA Technical Note is particularly apparent when one observes that the Inspector’s reference is to the SDCC Roads Department Planning Report annexed to the SDCC report to the Board. It describes elements of the DBFL TTA and expresses satisfaction *“..... that the applicant has taken the roads recommendations on board (This seems to be a reference to pre-application consultations) and has endeavoured to mitigate the traffic generation from this proposed development satisfactorily.”* However, it does not mention either the MPA Technical Note or the substance of its methodological criticisms of the DBFL TTA.

Incidentally, an assertion by the Applicants that SDCC did not have the MPA Technical Note seems, as a matter of probability to be incorrect as the MPA Technical Note went to the Board under cover of a letter from Marston Planning dated 26 June 2020 and the SDCC report is dated 20 July 2020 and purports to record a summary of the points raised in the submissions received by the Board including that by Marston Planning.

245. Incidentally also and as referred to above, Ms O’Donoghue, deponent for the Applicant, asserts that the Applicant paid for the MPA Technical Note which went to the Board on behalf of three local residents associations other than the Applicant. Not merely did the Applicant pay for the MPA Technical Note, the Applicant’s submission to the Board did raise the traffic issue. It is to

everybody's benefit that local groups co-ordinate and assist each other in making submissions to the Board. It minimises repetition and it would pointlessly increase the burden and expense of submissions on the Board if every potential applicant for judicial review had to keep its options open by making submissions covering every point or submitting every document overlapping with and repeating the submissions of other objectors. I do not purport to lay down a general rule but on these facts I do not consider that the Applicant should in these proceedings be shut out from arguing this point.

246. One must of course be careful to avoid imposing obligations on the Board to give narrative or discursive judgments which the law does not require. But if the Board relies, as an articulation of its reasons, on an inspector's report which is inevitably narrative or discursive to some greater or lesser degree, the question may at least to some extent be – what can reasonably have been expected of the inspector? Nor is the Inspector or the Board obliged to resolve all differences between applicants and observers or their respective experts. The quality of reasons required will vary according to context. In a minority of cases the reasons will be so obvious as to require little elucidation. In some cases merely preferring one expert to another will suffice. In others not. I will consider the authorities presently but it may assist to first give an account of part of the MPA Technical Note.

Traffic - The MPA Technical Note

247. The MPA Technical Note addressed a variety of matters and made many and varied criticisms of the DBFL TTA. However for present purposes I focus on the methodological criticisms of the DBFL TTA set out by MPA at §5 Traffic Impact. They include the following:

- The TTA traffic surveys raw data has not been provided such that it is not possible to verify that it has been transposed correctly.
- The queue length survey results are not included in the TTA either as raw data or as a simple description of what was observed. It is unclear whether the base junction assessment models have been appropriately calibrated against the recorded queue lengths. It has to be assumed that the junction models have not been calibrated which brings into question the accuracy of the junction assessments as a whole.
- The use of background traffic growth factors based on a predicted opening year of 2021 and future design years of 2026 and 2036 is questioned given the development may not open in 2021 (a prediction now clearly borne out). The assessment years should be amended to 2022, 2027 and 2037 which will increase the background growth in traffic flows and further reduce the capacity of the local road network to accommodate the traffic flows associated with the development proposals.
- For trip generation assumptions inappropriate comparator datasets from the TRICS database (including two from Dublin) have been used such that reliance thereon is debateable. And the AM Peak hour vehicle trip rates associated with the comparator TRICS site in Dundrum are considerably higher than those used within the TTA.

- Shannon Homes has used other local sites as a proxy when considering the parking provision, so it should also use local proxy sites when considering likely traffic generation.
- It is clear that the proposed development is likely to generate considerably more traffic than allowed for within the TTA particularly in the AM peak period. The resulting assessments of junction capacity post development are therefore fundamentally flawed with the actual impacts likely to be significantly greater than reported.
- There are errors in the residential vehicle trip rates. Where for instance Tables show that the proposed 496 units would generate 90 two-way vehicle movements in the AM peak hour and 105 two-way vehicles in the PM peak hour, these values should be 141 and 125 respectively. Shannon Homes has not only used trip rates significantly lower than appropriate but also under reported the traffic volumes derived from their use.
- So the trip generation assumptions represent a fundamental flaw of the TTA. The trip rates are too low and the trip rate calculations are erroneous. Relying on the values quoted within the TTA through the subsequent assessment of traffic impact will lead to significant errors and show the adjacent road network to be operating better and with more capacity than will be the actual case.
- The trip distribution methodology is criticised – though in much milder terms. As is the consideration of three development sites already committed

248. At §5.3, under the heading “Operational Capacity” MPA states:

“The above has raised significant concerns regarding the accuracy of the trip rates and the trip distribution used within the TTA. It has also identified an error in the calculation of likely traffic generation which further underestimates the number of vehicle movements associated with the proposed development. These factors mean that the ‘with development’ traffic flows in the design years are wrong and that the junction capacity assessment results reported within the TIA are therefore also wrong.

Notwithstanding, the network impact values identified in Table 6.1 of the TTA identify flow increases of between 4.2% and 12% at the Ballyboden Road/ Scholarstown Road / Edmondstown Road signal controlled junction and flow increases of between 1.1 % and 3.3% at the Taylor's Lane / Ballyboden Road / Ballyboden Way roundabout. A 12% value is considered to be a high level of impact and given the overly low trip rates and calculation errors within the derivation of trip numbers, the actual impact value will clearly be higher still. It is essential that this overall network impact assessment be revisited to identify the actual levels of flow increase that will occur. Only then will the true impact of the proposals be identified.”

249. Similar criticisms are levied at the DBFL TTA assessment of the performance, including queue generation at the proposed junction giving the main access to the Development (to be achieved by adding a 4th limb to an existing T-junction) and it is said that:

“It is clear from the traffic assessments for this junction that the applicant is putting more emphasis on seeking to show that the junction will operate within capacity and with

appropriate queuing post development than on pedestrian convenience and safety. This is considered inappropriate particularly given the high density nature of the proposals and the potential for a high number of pedestrian movements through the junction. The applicant consistently suggests that the pedestrian network in the vicinity of the site is of a high standard yet proposes a signal controlled site access junction arrangement that does not provide appropriately for pedestrians.

As before, the operation of the junction will only worsen when appropriate vehicle trip rates are used and existing calculation errors are amended.”

250. As to the Taylor's Lane/Ballyboden Road/Ballyboden Way Roundabout, MPA say the data and analysis imply that in the 2036 design year, these values increase to 1.18 and 1.22 respectively with queues up to 113 vehicles long and delays of up to 6 minutes per vehicle. MPA say that

- Adding further development flows to what is already predicted to be a significantly constrained roundabout is clearly unwise.
- The With Development results for the roundabout also identify that the Ballyboden Road South approach is predicted to operate with a queue length of 116.5 vehicles. This is the equivalent of a queue approximately 650m long which will extend back to and through the Ballyboden Road / Scholarstown Road / Edmondstown Road traffic signals which also forms the main vehicle access to the site. It is therefore not appropriate for the TTA to simply say that the impact of the proposals will be minimal when compared to the future operation of the road network should the development not come forward.
- The future operation of the traffic signals at the site access junction is totally dependent on the future operation of the roundabout. The two junctions should therefore be assessed as a linked system to fully understand the overall operation of the wider road network with the development in place.
- As it currently stands, the applicants own assessments show that the site access junction will be blocked and that appropriate access arrangements cannot be provided.
- The use of more appropriate (higher) vehicle trip rates within the capacity assessments will only make the RFC, queuing and delay values worse.
- There are signal controlled pedestrian crossings on both Taylor's Lane and Ballyboden Road (north) close to the roundabout. These will interrupt traffic flows and have further adverse implications on the operation of the roundabout. The proposed development is likely to increase the number of pedestrians wishing to cross at these signals and will therefore increase the number of times when the signals are used.
- The ARCADY assessments¹⁹² take no account of the presence of these controlled crossings or their increased usage post development. This means that the results presented are not accurate and despite the already poor junction operation identified by the results, the situation will in reality be worse still.
- The TTA does not say on whether ARCADY model of the roundabout has been calibrated against the queue length survey results. It is essential that this be undertaken to ensure that the capacity of the various approaches is accurately represented.

192 The TTA assesses the operational capacity of the roundabout via ARCADY computer software

- It is considered that the junction capacity assessments within the TTA are inaccurate and need to be completely revisited before any decisions can be made.
- The TTA results already show the wider road network will be significantly over capacity in the future design years with these results likely to become worse still when more appropriate parameters are used within the junction modelling.

251. At §6.0 under “Summary and Conclusions” MPA say, inter alia, that:

- The TTA junction capacity assessments results cannot be relied on.
- There are serious concerns regarding the trip rates used ... which could lead to a significant increase in the traffic impact of the development proposals once corrected. This needs to be reconsidered particularly given that the junctions assessed are already shown to be close to capacity.
- The staging and phasing used within the TRANSYT modelling of the Ballyboden Road site access junction needs to be reconsidered to give more emphasis to pedestrian movements. The stop line capacity values for the 2019 baseline assessments also need to be cross referenced to the surveyed queue length values to ensure an appropriate level of accuracy when assessing the future years. These adjustments are likely to show the proposed site access junction being over capacity and leading to inappropriate levels of queuing and delay.
- The geometric parameters used within the ARCADY modelling of the Taylor's Lane roundabout need to be revisited both to include the presence of the existing signal controlled pedestrian crossings and to ensure that the modelled queue lengths are representative of those recorded through surveys. These adjustments are likely to show the roundabout being significantly over capacity with extensive queuing and delay.
- The TTA identifies that the operation of the Taylor's Lane roundabout will likely impact on the operation of the Ballyboden Road site access junction in the future design years. The operation of the two junctions therefore needs to be considered as a linked system to fully understand the future operation of the local road network.

252. I should emphasise that it is no part of my function to prefer any element of the MPA Technical Note to the DBFL TTA – or vice versa. As far as I am concerned, either or both of the Technical Note and the TTA may be entirely right or entirely wrong or anywhere in between. And it is only fair to record that a Director of DBFL on affidavit disagreed emphatically and in some detail with the MPA Technical Note. But, while it is understandable that the affidavit was tendered, its content is of little present relevance as it was not before the Board when it made the Impugned Decision.

253. There is perhaps a danger that my extensive quotation of the detail of the MPA Technical Note could be misinterpreted as implying an expectation of a narrative and discursive judgment or as disagreement with the view expressed in **Hellfire**¹⁹³ that “*the obligation for reasons does not require micro-specific detail*”. Neither is the case. My purpose rather is merely to demonstrate that its criticisms of the DBFL TTA were expert, detailed, swingeing and fundamental.

193 Hellfire Massy Residents Association v. An Bord Pleanála [2021] IEHC 424

254. What matters is not that MPA Technical Note was right or wrong but that its criticisms were, as I have characterised them, expert, detailed, swingeing and fundamental. The MPA Technical Note was written by presumably reputable expert traffic engineers. And in the Board's considering a Planning Application, the Developers' experts have no presumed superiority over those retained by observers. As between the respective sides' experts, the starting point is parity of esteem.

255. It was not necessary that the MPA Technical Note be upheld, or that it be addressed in a detailed narrative judgment. But it was necessary that it be treated with a seriousness commensurate with its expert provenance and the importance of the issues it raised. It is entirely possible that the MPA Technical Note would have been properly rejected outright and the DBFL TTA preferred in every respect – indeed, by implication that is what happened – but the objectors were not told why.

256. Given the parity of esteem to which I have referred, and by way of rhetorical illustration, is it conceivable that the inspector in this planning application and in a report leading to refusal of permission on traffic grounds, would give no analysis of the DBFL TTA save to say he had had regard to it and that, on such a basis, Shannon Homes could have been expected to be satisfied with the reasons given – satisfied that the Board had “*directed its mind adequately to the issue before it*” – a fundamental required by Hardiman J in **Oates v Browne**¹⁹⁴. Obviously not. And as Hardiman J makes plain, it does not suffice that the Board show that it directed its mind to the matter: it must show that it did so “adequately”.

Reasons - The Authorities & their Application

257. The law on the obligation to give reasons for decisions has evolved over time and likely is still evolving. In 2012 Fennelly J in **Mallak v Minister for Justice**¹⁹⁵ traced that evolution and in 2018 Clarke CJ in the important decision of **Connelly**¹⁹⁶ cited “*significant developments in recent years*” on the topic. Gone are the days when there was doubt even as to the existence of the obligation or in which it could be described as “*very light*” or “*almost minimal*” – see **Crekav Trading GP Ltd v An Bord Pleanála**¹⁹⁷. Fennelly J in **Mallak** concluded that the issue was one of fairness and the obligation was general to administrative decisions:

“[68] In the present state of evolution of our law, it is not easy to conceive of a decision maker being dispensed from giving an explanation either of the decision or of the decision

194 [2016] IESC 7

195 [2012] IESC 59

196 [2018] IESC 31

197 [2020] IEHC 400 §164

making process at some stage. The most obvious means of achieving fairness is for reasons to accompany the decision. However, it is not a matter of complying with a formal rule: the underlying objective is the attainment of fairness in the process. If the process is fair, open and transparent and the affected person has been enabled to respond to the concerns of the decision maker, there may be situations where the reasons for the decision are obvious and that effective judicial review is not precluded.”

Clarke CJ in **Connelly**¹⁹⁸ cited O’Donnell J.’s “*useful and elucidating analysis*”¹⁹⁹ of Mallak, as identifying §68 above as the “core” of Fennelly J.’s decision in Mallak.

258. By giving reasons, fairness is achieved in three overlapping respects by reference to the efficacy of which fairness is assessed:

- First, Fennelly J in **Mallak**²⁰⁰ observes “*that persons affected by administrative decisions have a right to know the reasons on which they are based, in short to understand them*”²⁰¹. So, not merely must the reasons provide knowledge, they must enable understanding by an “*intelligent person who has participated in the relevant proceedings and is apprised of the broad issues involved*”²⁰². Murray CJ in **Meadows v. Minister for Justice**²⁰³ phrased this as an entitlement to know the “*essential rationale on foot of which the decision is taken*”. Clarke CJ in **Connelly** phrased it as an entitlement to “*know in general terms why the decision was made.*” Humphreys J in **Balscadden Road SAA Residents Association Ltd v. An Bord Pleanála**²⁰⁴ phrased it as an entitlement to “*broad reasons regarding the main issues not micro-specific addressing of every detail in a narrative discursive correspondence*”. A reasoned decision is required – not a discursive, narrative analysis. And what is required in practice in a given instance to meet this standard depends on the context – including the “*type of decision being made and the legal requirements which must be met in order for a sustainable decision of that type to be reached*” see Clarke CJ in **Connelly**²⁰⁵. So, as Barniville J said in **Crekav Trading**²⁰⁶ “*reasons which might be adequate in a particular case or in particular circumstances might not be adequate in another case or in other circumstances.*”
- Second, the reasons must, with sufficient clarity, convey to the disappointed party sufficient information to enable it to assess whether the decision is lawful or it would have a reasonable chance²⁰⁷ in a challenge in judicial review or if there be a right of appeal, to enable it to assess the chances of success and to adequately present its case on the appeal

198 §6.7

199 O’Donnell, “Mallak and the Rule of Reasons” in *Of Courts and Constitutions: Liber Amoricum in Honour of Nial Fennelly*, (2014) at 228) 200 69

201 Emphasis by Clarke CJ in **Connelly**

202 See summary of principles at **Balscadden Road SAA Residents Association Ltd v. An Bord Pleanála** [2020] IEHC 586 §39

203 [2010] 2 I.R. 701

204 [2020] IEHC 586

205 §5.3

206 §174

207 Kelly J in **Mulholland v An Bord Pleanála # 2**[2006] 1 IR 453

or its case in judicial review – such that the court has the material on which to conduct such a review. See Clarke CJ in **Connelly**²⁰⁸.

- Third, though arguably part of the second, but described by Hardiman J in **Oates v. Browne**²⁰⁹, as fundamental, *“it is an aspect of the requirement that justice must not only be done but be seen to be done that the reasons stated must ‘satisfy the persons having recourse to the tribunal, that it has directed its mind adequately to the issue before it’.”* See Clarke CJ in **Connelly**²¹⁰. The word *“adequately”* here is significant.

259. The test for adequacy of reasons is objective but the potential audience is relevant - **Náisiúnta Leictreach Contraitheoir Eireann Cuideachta Faoi Theorainn Ráthaíochta v The Labour Court, et al.**²¹¹ (“NECI”). In a significant sense, reasons are for losers: winners are usually less concerned with why they won than are losers with why they lost. In **Balz**²¹² O’Donnell J addressed the first of the three purposes of reasons set out above in terms of the important consideration of trust in public administration which serves to reconcile the loser to his defeat and to accepting and abiding by the decision. **O’Donnell J** said:

“It is a basic element of any decision-making affecting the public that relevant submissions should be addressed and an explanation given why they are not accepted, if indeed that is the case. This is fundamental not just to the law, but also to the trust which members of the public are required to have in decision making institutions if the individuals concerned, and the public more generally, are to be expected to accept decisions with which, in some cases, they may profoundly disagree, and with whose consequences they may have to live.”

260. To any extent that it has been suggested that this is a more limited observation than might on its face appear, I must respectfully differ. In **Balscadden**²¹³ Humphreys J observed that he didn’t read O’Donnell J in Balz as adding *“an additional layer of obligation as to reasons.”* And he described the passage cited above as *“a comment rather than a holding, but it is also a comment made in the context of rejection of a point in limine by the decision-maker. More fundamentally though, the concept of submissions being ‘addressed’ is not to be confused with engaging with submissions in a discursive-type judgment.”* I agree there is no need for a *“discursive-type judgment”* and that O’Donnell J added no new *“layer of obligation”*. But I do not consider that Humphreys J intended that his observations in Balscadden deprive the obligation to *“address”* submissions of real substance. Humphreys J is of course correct in citing Connelly as remaining the leading case as to practical applicable principles on the adequacy of reasons.

208 §6.13, citing EMI Records (Ireland) Limited & ors v. The Data Protection Commissioner [2013] IESC 34 and §6.14 citing Oates v. Browne [2016] IESC 7,

209 [2016] IESC 7

210 §6.14 citing Oates v. Browne [2016] IESC 7,

211 [2021] IESC 36. §157

212 Balz v An Bord Pleanála [2019] IESC 90

213 Balscadden Road SAA Residents Association Ltd v. An Bord Pleanála [2020] IEHC 586 §39

261. Importantly, Clarke J in **Connelly** said:

“..... it will rarely be sufficient simply to indicate the factors taken into account and assert that, as a result of those factors, the decision goes one way or the other. That does not enlighten any interested party as to why the decision went the way it did. It may be appropriate, and perhaps even necessary, that the decision make clear that the appropriate factors were taken into account, but it will rarely be the case that a statement to that effect will be sufficient to demonstrate the reasoning behind the conclusion to the degree necessary to meet the obligation to give reasons.”

262. To put it another way, there is a middle-ground between a narrative, discursive essay and a mere anodyne or box ticking or name-checking acknowledgement that regard has been had to a submission. As Clarke J said in **Connelly**: *“While it has often been said that a decision maker is not required to give a discursive determination along the lines of what might be expected in a superior court judgment, it is equally true that the reasoning cannot be so anodyne that it is impossible to determine why the decision went one way or the other.”* And as Clarke J said and Barnville J repeated in **Crekav**, where in that middle-ground the obligation lies, in a particular case, along a spectrum between narrative, discursive essay and the mere anodyne or box-ticking or name-checking, will depend on the circumstances of that case. Reasons must be adequate to the circumstances.

263. Also informing my view of the intended generality of the views of O’Donnell J in **Balz**, I note its distinct echoes of the views of McKechnie J. in **Byrne v Fingal County Council**²¹⁴ as to development plans: notably the idea that the plan is *“answerable to public confidence”*, and *“those affected, many aversely, must abide the result. They must suffer the pain, undergo the loss and concede to the public good.”*²¹⁵ O’Donnell J, entirely predictably in my view, using slightly different wording, tells us that the Board and its decision-making are *“answerable to public confidence”*. To be answerable to public confidence requires that reasons be given – and that they be given in form and content sufficient to the aim of maintaining public confidence – and in particular the confidence of those who must abide the result, suffer the pain, undergo the loss and concede to the public good.

264. Though the analogy between a decision in a planning application and a judgment by a court is far from complete, it is nonetheless notable that in **Defender v HSBC France**²¹⁶ O’Donnell J observed that an important part of the administration of justice is that *“a party, in particular the losing party, should believe that his or her case was fairly ventilated and considered.”* Of course, the Board is not engaged in the administration of justice and the principle stated by O’Donnell J imposes different degrees of reason-giving obligations in different contexts. But in general terms the principle applies to both forms of decision-making via the public interest in public faith in decision-making by

214 [2001] 4 IR 565

215 Emphases added

216 *Defender Limited v HSBC France (formerly HSBC Institutional Trust Services (Ireland) Limited)* [2020] IESC 37, [2021] 1 ILRM 1 §24

public institutions. And it seems to me that the remarks of O’Donnell J in this regard in **Defender** and in **Balz** are of a piece. As I have said above less elegantly and less completely, reasons are for losers.

265. I respectfully do not agree with any view which might be taken from **Balscadden** that the significance of the cited passage in Balz is diminishable as addressing only the circumstances particular to that case - in which an objector’s submission was rejected in limine as irrelevant and so was not even considered by the Board. O’Donnell J makes clear in terms that “*relevant submissions should be addressed and an explanation given why they are not accepted*”²¹⁷. While the obligation to address submissions could arguably be understood as directed to the issue of their rejection in limine as irrelevant, the obligation to explain their non-acceptance more typically arises only once they have not been dismissed in limine and have been addressed and only then rejected. To my mind, this phrase speaks of an obligation more general than that as to rejections of submissions in limine. And whether or not a comment rather than a holding and even if obiter (which may be doubted), it is an obiter of the highest authority speaking for a unanimous Supreme Court. It is also expressed in terms both general and striking: the use of words such as “basic” and “fundamental” and the invocation of public trust in public decision-making institutions (amongst the highest aims of administrative law) seem to me inconsistent with an intention to express a narrow view of limited application. While it is an expression of the importance of reasons rather than of a different or heightened standard for their adequacy, when one remembers that adequacy has always been context-specific to the type, importance and addressee of the decision at issue, Balz is at very least an important reminder of the need to closely scrutinise whether reasons given in reality and in practice serve the purposes of fairness identified in the three respects described above and to do so bearing in mind the vital need for public trust in decision-making institutions and their decisions.

266. In **The Board of Management of St Audeons National School v An Bord Pleanála & Merchants Quay Ireland CLG**²¹⁸ Simons J cited Balz to the effect that “*The right to make submissions carries with it, as a corollary, a right to be informed of the reasons for which those submissions are not accepted.*”. MacMenamin J, **NECI**²¹⁹ states “*Balz makes clear that a decision-maker must engage with significant submissions.*” and cites a passage from Balz which, inter alia, refers to “*the understanding and comprehension which should be the object of any decision.*” MacMenamin J notably requires that reasons must suffice to disclose to and satisfy their addressees that the decision-maker has “*truly*”²²⁰ engaged with the issues which were raised”²²¹. MacMenamin J says of the test of adequacy of reasons:

“Obviously, the test must be an objective one. The views of an aggrieved party having recourse to a tribunal may be a consideration. But, when determining whether the reasons given were sufficient, the test must be more dispassionate and detached. In this case, the potential audience is relevant. The Labour Court was engaged in a statutory role, involving

217 Emphasis added

218 [2021] IEHC 453

219 [2021] IESC 36. – see generally §152 et seq

220 Emphasis added

221 §157; A recent example of the Board’s duty to engage with evidence is found in *Owens v. An Bord Pleanála* [2021] IEHC 532 (High Court (Judicial Review), Barrett J, 27 July 2021)

compliance with statutory duties to protect rights, where public interest required transparency. The reasons had to be sufficient, therefore, not just to satisfy the participants in the process, but also the Minister, the Oireachtas, other affected persons or bodies, and the public at large²²², that the Labour Court had truly engaged with the issues which were raised, so as to accord with its duties under the statute.”

While one might cavil whether a decision of the Board on a planning application affects “rights” in the strict sense, it certainly affects interests – often very important interests. It affects the capacity (to use a neutral word) of a landowner to develop his/her/its property. It often, and often profoundly, affects the interests of other landowners and occupiers locally and the public interest in such matters is reflected in the entitlement (unusual when granted by the 1963 Act) of all and any members of the public to make submissions in the planning application process and, indeed, in the case of a planning decision by a planning authority to appeal the result to the Board and in turn to seek judicial review of the result. And McMenamin J in **NECI** grounded his decision in **Balz** – a planning case. I do not think there is any basis for expecting less of the Board as to its expression of reasons than did McMenamin J of the Labour Court.

267. **O’Donnell J** in **Balz** also emphasised the importance of the Board’s fulfilling its statutory role and public function in the context of the imbalance of resources between protagonists:

“The imbalance of resources and potential outcomes between developers on the one hand, and objectors on the other, means that an independent expert body carrying out a detailed scrutiny of an application in the public interest, and at no significant cost to the individual, is an important public function.”

MacMenamin J in **NECI**²²³ returns to this passage as relevant to the giving of reasons and engagement with submissions. This passage may not add to, but does illuminate, the importance of the Board’s obligations as an independent decision-maker on those occasions when the imbalance is overcome at least to the extent of objectors’ retaining an expert advisor, to ensure that its decisions demonstrate that both sides’ views have been considered – and considered adequately. The reference to the Board’s “independence” necessarily implies the “parity of esteem” as between experts to which I referred above.

This reference to the Board as “expert”, and indeed the deference its decisions receive at domestic law on precisely that account, implies that it is not overburdensome to expect the Board, in preferring one expert’s views over another, to do so on the basis of an analysis of those respective views. Humphreys J recently made the point in **Reid v An Bord Pleanála & Intel Ireland**²²⁴ in the context of EIA. He noted that art. 5(3)(a) of the EIA Directive imposes “... *an autonomous obligation on the board to bring the necessary level of expertise to bear on the assessment of the developer’s material ...*”. The EIA context makes clear that this requires “analysis”. Nor can the requirement as to the Board’s deployment of expertise sensibly differ as between traffic considered as an EIA issue and

222 Emphasis in original.

223 [2021] IESC 36.

224 [2021] IEHC 362

as a planning issue – especially when the Inspector deemed his treatment of the former to be also his treatment of the latter. All this does not require reasons by way of a narrative or discursive account of the analysis or micro-reasoning. Nor does it require a judgment-like resolution of differences between experts. But it must at least be clear from the reasons that the engagement with submissions has “truly” occurred (**NECI**²²⁵), that the analysis has been done and at least in general terms, why the views of one expert were preferred to those of another. The substantive weight of that obligation will vary according to circumstances. But by reference to the standard of “true” engagement and, as Counsel for the Applicant put it, it is not adequate just to “name-check” the MPA Technical Note – at least in the context of the present case.

268. Clarke J in *Connelly* considered where reasons might be found other than in the impugned decision itself. That is not an issue in this case as it is clear that we may look to the inspector’s report. But in considering this issue Clarke J made some observations also broadly relevant to the quality of reasons: “*care needs to be taken to ensure*” that the reader must be able to both “*readily*” and “*accurately*” “*determine what the reasons were.*”. And it was required that “*the reasons be capable of being determined with some degree of precision.*” “*Legal certainty requires ... that it must be possible to accurately determine what the reasons were.*” The decision must “*actually provide the reasons which led to the decision concerned.*” I do understand that in these passages Clarke J was referring to the search for the reasons rather than their substance or quality. But I think nonetheless that they shed at least some light on the latter.

269. I note that in ***Eco Advocacy v An Bord Pleanála***²²⁶ Humphreys J has referred to the Court of Justice a question as to the extent of the obligation, in giving reasons for screening out appropriate assessment under the Habitats Directive, to engage with the expression of relevant environmental concerns by experts. He suggests an obligation to give detailed and explicit reasons responding expressly and individually each of the concerns raised. I hasten to emphasise that this question arises in the context of the particular and demanding requirements of the Habitats Directive. One should not too readily analogise the law as to reasons from that context to the domestic law traffic issue here. It must also be noted that the answer to the question is awaited from the Court of Justice. However insofar as Humphreys J in this context espouses transparency and promoting good administration by requiring the competent authority to expressly consider and address such points his views seem generally coherent with those expressed in **Balz** and in **NECI**.

270. In ***Atlantic Diamond v An Bord Pleanála***²²⁷ Humphreys J observed that “*Insofar as concerns questions of planning judgement, the decision-maker is entitled to prefer one set of expert opinion over another, all things being equal. However, that approach has its limits, particularly where the facts are contested.*” One might or might not regard this as a case of facts contested between the traffic experts but in any event in my view the controversy between the experts as to methodology is fundamental on a main issue such as to exceed the limits cited by Humphreys J.

225 §157

226 [2021] IEHC 610

227 [2021] IEHC 322

271. To the layman and the Court, traffic engineering and assessment is an arcane discipline. Clarke CJ in *Connelly* also observed that “... *in at least certain types of applications for planning consent, the issues involved may themselves be complex. The reasons put forward either in favour or against a proposed project may involve detailed scientific argument or complex calculation. If such issues arise then it will inevitably be the case that the reasons themselves may be complex and scientific. Where a party wishes to engage with the planning process in a case which raises complex issues of that type .. then it is inevitable that the party concerned will also have to engage with such matters if any part of their opposition or challenge derives from such complex or scientific questions. It could form no part of a legitimate complaint, based on an argument as to reasons or the lack thereof, to suggest that the reasoning was unduly complicated or scientific if the issues which arose in the context of the grant or refusal of permission required engagement with such issues.*”²²⁸ This passage seems to me to relate primarily, not to the task of finding the reasons, but to the task of understanding of them once found. It also explicitly recognises that there will be cases in which a planning decision requires “engagement” with “detailed scientific argument or complex calculation” such that “it will inevitably be the case that the reasons themselves may be complex and scientific.” Clarke J was looking at the issue from the point of view of the person trying to understand the reasons. But the word “inevitably” clearly implies that in such cases an obligation may arise that “the reasons themselves may be complex and scientific”.

272. **Connelly, Balz** and **NECI** seem to me in essence a development of the “common sense” that reasons must be not only clear but also cogent – **Mulholland v An Bord Pleanála**²²⁹, **Grealish v An Bord Pleanála**²³⁰, **Harten v An Bord Pleanála**²³¹. “Cogent” is a word used by lawyers in various contexts – often as descriptive of a strength of evidence - but usually without elaboration, as if its meaning is self-evident (no doubt it is to many). While dictionary meanings must be treated with care, “cogent” is notably defined by Cambridge as both “clearly expressed” and “persuasive” and by Merriam/Webster as “appealing forcibly to the mind or reason: convincing” and “pertinent, relevant”. Collins defines it as a reason that is “strong and convincing” or “compelling”. The Oxford Dictionary’s definition of cogent is perhaps the most striking: “Constraining, impelling; powerful, forcible; Having power to compel assent or belief; argumentatively forcible, convincing”. Generally, these seem to me the senses in which lawyers speak of “cogent” evidence. Perhaps the most useful synonym is “persuasive” in the sense of capable of persuading. Certainly, there is no question of requiring that the “loser” in a particular planning application actually be convinced by the cogency of reasons given. It also is important not to require too burdensome a standard of decisionmakers as to reasons for decisions. But the word “cogent” is, to my mind, at very least a useful counterweight, not just to box ticking and name-checking, but also to the anodyne.

228 Emphases added

229 *Mulholland and Kinsella v An Bord Pleanála and others*. [2005] IEHC 306

230 [2007] 2 IR 536

231 [2018] IEHC 40

273. It does seem to me that, having regard to the clear importance of the traffic issue and fundamental differences between the traffic engineers, this is that type of case in which, in the Board's reasons, such "*engagement*" with their differences and "*cogent*" reasons accordingly, as were contemplated in Connelly, Balz and NECI, were required. That did not occur.

274. The argument by the Board and Shannon Homes that it is evident from the Inspector's Report that he performed his assessment by reference to all of the evidence was before him including the MPA Technical Note in substance and as to the methodological criticisms made by that note is an argument better directed to an allegation of failure to have regard to relevant matters than to the allegation made here of failure to give adequate reasons and as applied to this case amounts to an argument that name-checking the MPA Technical Note on that issue suffices. To reject that argument is not to require that the Board engage by name with each submission individually. But just as name-checking is not required, neither does it necessarily suffice: what matters is that the decision-maker's reasons show that it has "*cogently*", "*adequately*" and "*truly*" engaged with the substantive issues.

275. The Board's and Shannon Homes' argument on this issue is summarised in the Board's written submissions²³² - it is that the Applicant in effect argues that "*there is an obligation on the Board to engage both with every submission made by the public and with the minute detail of those submissions.*" That is in truth the Board's straw man argument. The Applicant has given examples of questions it would have like to have seen answered and I agree that to impose each and every question on that list on the Board would be excessive. In oral submissions the Applicant did not press the list of example questions; it asked, more simply, as between the DBFL TTA and the MPA Technical Note - why did the decision go the way it did?

276. It seems to me that for the Board to say, correctly, that there is no obligation on the Board to engage both with every submission made by the public and with the minute detail of those submissions does not answer the question whether there was an obligation to engage with this submission and, to a greater or lesser degree, its detail and whether the Board met that obligation. To put it another way, it would clearly be incorrect to say that there is no obligation on the Board to engage with any submission made by the public or with any detail of those submissions.

277. The Board cites the **Sliabh Luchra** case²³³ referring to the obligation to give reasons. I set out below the excerpt from that decision which the Board set out. In my view the Board failed to engage with the words I have underlined:

"I do not, however, believe that this always requires that every submission made to the respondent should be individually addressed in a decision of the respondent or in a report of

232 §52

233 Sliabh Luchra Against Ballydesmond Windfarm Committee v. An Bord Pleanála [2019] IEHC 888 §38

an inspector which precedes such a decision. What seems to me to be crucial is that the points made in submissions should be addressed. In circumstances where there will frequently be an overlap between submissions made by one observer and another, it seems to me that it would not be necessary to address every submission by name so long as the substantive points made in the submissions are each appropriately addressed. As noted in para. 19 above, it is a crucial part of the exercise which the respondent is obliged to carry out, in the context of appropriate assessment, that there should be complete, precise and definitive findings and conclusions regarding any identified potential effects on the qualifying interests of any European site.”

In this passage McDonald J was addressing primarily the problem of multiple overlapping submissions – not the issue here as to the difference between two experts. Far from diluting the obligation to give reasons, the word “*always*” acknowledges that it will sometimes be necessary to address individual submissions and, more importantly, McDonald J considers it “*crucial ... that the points made in submissions should be addressed*” and that the necessity to address every submission by name can be avoided “*so long as the substantive points made in the submissions are each appropriately addressed*”. Indeed the word “*each*” here is striking.

278. The means of distinguishing those submissions requiring engagement and reasons from those which do not lies, it seems to me, in the Board’s obligation to give the main reasons on the main issues. In this case traffic was a main issue and, given that issue crystallised in the competing expert views on traffic analysis methodology and resultant reliability of conclusions, main reasons were required for the choice between them. They were not given.

Traffic - Reasons, Conclusion

279. It appears to me that the differences between the protagonists as to important traffic issues crystallised in the competing DLPF TTA and the MPA Technical note and so the Board, in preferring the former, was required to address and truly engage with the latter, and give reasons for its decision accordingly, in a real or cogent rather than a box-ticking, nominal or anodyne way - which it did not do. Such engagement is essential to public faith in and acceptance of decisions with which many profoundly disagree but are expected to accept. On that account the Impugned Decision must be quashed for failure to give reasons.

280. I confine my decision on this issue to the methodological criticisms by MPA of DPLF recited above. I cannot say whether they were justified in substance – but they were expert, detailed, swingeing and fundamental and had to be addressed. The Inspector referred to the fact that the methodological criticisms had been made but simply did not engage with them or address them in suggesting reasons to the Board. A perusal of the content of his report on this issue as recited above, makes that conclusion irresistible. It is not a question of requiring a discursive judgment or micro-

reasoning: the general rationale for the Board's faith in the DPLF methodology despite the methodological criticisms by MPA is not apparent in its reasons.

SEVERANCE OF REASON - s.37(2)(b) – Material Contravention

281. The impugned decision justified material contravention of the Development Plan as to height, inter alia pursuant to S.37(2)(b)(iii) PDA 2000²³⁴ on foot of the Height Guidelines 2018 which state, inter alia, that building heights must be generally increased in appropriate urban locations, subject to the criteria as set out in §3.2 of the Guidelines. As recorded above, one criterion of §3.2 is that the site be well served by public transport with high capacity, frequent service and I have found the impugned decision deficient as to the capacity issue.

282. The Board urges that if the Board erred in its application of s.37(2)(b)(iii) I should refrain from quashing the impugned decision on the basis that the Board's reasons given pursuant to s.37(2)(b)(i)(ii) & (iv) PDA 2000 survive and suffice. The analogy of severance of invalid planning conditions and **Aherne v An Bord Pleanála**²³⁵ are called in aid. I respectfully reject that submission.

283. Aherne is authority that a "peripheral and insignificant" planning condition is severable if invalid and it is demonstrated that the Board would have granted the relevant permission subject only to the other conditions. While material contravention permissions by the Board are by no means unusual in practice, nonetheless as disapplications of democratically-adopted development plans, they are no small thing, are legally exceptional and should arise only for substantial reason – a consideration reflected in the obligations imposed on the Board by s.37(2) PDA 2000. As a matter of law I should not lightly conclude that any reason given pursuant to s.37(2)(b) PDA 2000 is "peripheral and insignificant" or in any degree analogous to "peripheral and insignificant. The Board has not stated that any individually its reasons pursuant to s.37(2)(b) sufficed to justify its decision or whether the cumulative weight of some or all sufficed for that purpose and I do not consider that I can make an inference to that effect. Accordingly the Board's argument in this regard fails.

BATS & OTTERS

284. At trial the Applicant made oral submissions as to bats but, for want of time, negligible submissions specific to otters. But the point as to otters was not withdrawn and essential legal issues are common to both. And I must bear in mind that cases such as these are now given only three days hearing whereas formerly they would have taken considerably longer: this on the premise that the

234 (iii) permission for the proposed development should be granted having regard to [regional spatial and economic strategy²³⁴] 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, (Footnote not part of Board Decision)
235 [2015] IEHC 606

court will itself read the papers and have full regard to the written submissions even in respects in which they are not elaborated orally.

The Inspectors' Report and the Impugned Decision – Bats & Otters

285. The Inspector²³⁶ addressed the obligation in EIA²³⁷ to address biodiversity with particular attention to species and habitats protected under the Habitats²³⁸ and Birds²³⁹ Directives and recorded that he had had regard to the Third Party submissions in those regards - including as to effects on bats and otters – which submissions he briefly records²⁴⁰. Inter alia he notes the submissions as follows:

“Impact on wildlife/Otter Activity has been recently reported on site/Impact to fish species/Impact on salmon/ Single faunal survey undertaken in 2019 is not sufficient – ignores seasonality - should have undertaken an additional survey/Dublin City Biodiversity Action Plan 2015-2020 indicates that the rivers and streams that flow through south Dublin county were among the top waterways for otter activity – particularly the Dodder and the Owendoher/ Loss of ecological linkages.”

286. He records the Planning Authority submission as follows:

*“Ecological Impact / Heritage/ Bats
SDCC Heritage Officer disputes this low value definition for a number of trees/unclear as to whether or not the trees have been surveyed for bat roosts and biodiversity value/loss of over 90% of the trees on the site/ be a major loss for biodiversity/no necessity for the removal of trees on the western boundary of the site.*

Layout should be revisited in order to retain more of the trees/significant loss of biodiversity would require significant additional mitigation and compensation to that proposed by the applicant. ...”²⁴¹

He notes also the Planning Authority recommendation to refuse permission, inter alia on biodiversity grounds, as follows:

“The development would result in an unacceptable loss of biodiversity on the site in the form of feeding grounds and travel routes for bats, and birds, on the site. The proposed mitigation measures would not make up for the loss of most of the trees on the site.”²⁴²

236 §10.1.13 et seq

237 EIA Directive Art 3

238 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora

239 Directive 2009/147/EC

240 Inspector's report p24

241 Inspector's report p33

242 Inspector's report p35

287. As to the EIAR and bats and otters the Inspector records:

“10.1.19. In terms of otter, no signs of otter were recorded in 2013 and the 2019 survey did not record any signs of otter. However, the EIAR states that otters may on occasion use the site. There is no evidence cited in the EIAR however to support this claim.

10.1.20. Bats were recorded on the site in the 2013, 2016 and 2019 surveys. No evidence of bat roosting was recorded, but it is noted that there is potential for bats to roost in a number of locations within the buildings. Of note it is stated that the design and structure of the attic of the building would be very favourable to brown long eared bats. However, the EIAR reports that there is no evidence of bats roosting in the existing buildings.

10.1.22. Potential impacts are identified as direct habitat loss, disturbance, fragmentation and water pollution, including the loss of tree cover, impacts on bats and loss of foraging area for birds.

10.1.23. No impacts on otters are highlighted, and while I note that EIAR states that otter may use the site, and a number the Third Party submissions state that otters have been recorded on this site, there is no empirical evidence on file to support this claim. Reference is also made by Third Parties to the Dublin City Biodiversity Action Plan 2015-2020, and the Otter Survey carried out as an action of this plan. This Otter Survey (dated August 2019) is publicly available on the Dublin City Council Website, and while it is published by Dublin City Council, it contains data in relation to Otter activity in the area within South Dublin County Council administrative boundary, including along the Owendoher River. The report notes relatively high level of otter activity along the Owendoher River but does not report otter activity on this subject site.

10.1.24. Landscaping proposals include the removal of the mono-cultural stand of cypress trees will improve the conservation value of the riparian corridor, as the area will be replanted with a diversity of native tree, shrub and herbaceous species. This will bring about a net improvement of tree and vegetation quality over time and into the future. Tree protection fencing is proposed for the remainder of the trees on the site. Nesting and roosting opportunities will be provided for both bats and birds within the new development as appropriate. These will include the erection of 10 no. artificial nest boxes and 10 no. bat boxes, which will be accommodated o[n] trees within the site. It is proposed to retain and alter the watercourse along the southern boundary of the site to enhance it for wildlife through suitable planting.

10.1.26. I have had regard also the contents of the Tree Survey Report. It is stated therein, that while there is extensive tree removal on the site, I concur that the nature of the tree cover would preclude a residential layout that made efficient use of the site.

10.1.27. *I generally concur with the conclusion of the EIAR in that the overall impact will be moderate negative. While otter activity has been cited on the site by Third Parties, no activity or signs of otter was recorded on the development site by any of the surveys carried out, and there is no other empirical evidence on file that otters use this site. In this regard I note the watercourse will be retained, although altered but will provide a net improvement of tree and vegetation quality over time. I noted that on the southern side of the watercourse, construction works are being carried out in relation to the HSE Primary Care Centre and this will result in significant disturbance to this area in any case.*

10.1.28. *While there is significant tree removal, to my mind this is necessary to ensure efficient use of the site. Category A trees are proposed to be retained and replacement native planting is proposed for the ecological corridor to the south of the site. I consider that this replacement planting, and other proposals as detailed in the EIAR such as nesting boxes, are sufficient in my view to ensure impacts are minimised.*

10.1.29. *Mitigation measures in relation to bats are considered to be sufficient, and are common for such residential sites. The proposed development would introduce areas of new planting, and the landscaping and planting proposals submitted with the proposed application are acceptable.*

288. The Impugned Decision, in its Reasoned Conclusion for EIA purposes, anticipates measures identified in the EIAR, including construction management measures, protection of trees to be retained, landscaping including the provision of an ecological corridor to the south of the site, and the provision of bat and bird boxes. Condition 2 of the Impugned Decision requires that mitigation and monitoring commitments in the EIAR be effected in full and that details be agreed with SDCC before development commences. Notably as to construction management measures, the EIAR²⁴³ commits to mitigation under licensed bat expert supervision, including of tree-felling and to inform NPWS of any bats found.

The Pleadings & Submissions

Ground 3 - Bats

289. The Applicant pleads error in failing to have any, or any adequate regard for the strict protection of bats for the purposes of Article 12 and Annex IV of the Habitats Directive²⁴⁴.

²⁴³ §5.7

²⁴⁴ A pleaded point based on the Wildlife Act 1976 was not pursued.

290. The Grounds plead that the investigations of the site for bats by Shannon Homes' bat expert were inadequate for various reasons. Four species of foraging bats were detected on the site. Trees were identified as potential bat roosts. Proposed mitigation measures included re-surveying for bats after permission had been granted, controlled demolition of the roofs of the existing buildings, tree-felling in September/October under the guidance of a bat expert, erection of bat nesting boxes and, if bats are found, securing a derogation licence for their disturbance pursuant to Article 16 of the Habitats Directive. The Grounds plead the Inspector's noting the absence of identified bat roosts but the "*potential for bats to roost in a number of locations within the buildings*". He noted the nesting boxes proposal. He considered the extensive removal of tree cover "*necessary to ensure efficient use of the site*" and that the retention of Category A trees and replacement planting sufficed to ensure that impacts were minimised. He held that "*Mitigation measures in relation to bats are considered to be sufficient, and are common for such residential sites*". The Board Direction recorded similar conclusions and specifically identified the provision of bat boxes as adequate mitigation measures.

291. The Applicant makes six points as to bats, based on their strict protection by Article 12 and Annex IV of the Habitats Directive:

- a. First, that the Board did not have any information before it which would allow it to reach a conclusion compatible with strict protection from deliberate disturbance and loss of roosting sites. This is particularly so as to the alleged tree roost survey – of which the Board was given no details and no information as to which or how many of the trees for removal are potential bat roosts.
- b. Second, the Developer's bat assessment and data gathering did not comply with the basic requirements of *Bat Mitigation Guidelines for Ireland*²⁴⁵. Factual details are pleaded. The data was insufficient and not in accordance with best practice guidelines sufficient ground a conclusion that the proposed development would not lead to disturbance to species entitled to strict protection.
- c. Third, given strict protection of bats, Articles 4 and 12 of the Habitats Directive preclude reliance on mitigation - compensatory planting and bat nest boxes - the utility of which, to preclude significant effects on bats, is unverified. The Applicant relies, by analogy, on *Commission v Germany (Moorburg Power Plant)*²⁴⁶.
- d. Fourth, (this was a ground based on the Wildlife Act 1976 which was not pursued).
- e. Fifth, the Inspector's conclusion that the efficient exploitation of the site necessitated the removal of the trees is *ultra vires* the Board. The Board must consider whether the proposed development is consistent with "*proper planning and sustainable development*". It must refuse permission for proposed developments incompatible with the Habitats Directive. The Board has

245 NPWS 2006
246 Case C-142/16

no jurisdiction to promote intensive development, particularly in the teeth of specific and binding protections for bats in the Habitats Directive.

- f. Sixth, reliance on ex-post grant derogation licences is incompatible with strict protection and the *Finnish Wolves*²⁴⁷ and *Commission v Ireland*²⁴⁸ cases. However this is pleaded against the State not the Board and so need not be further considered here.

Ground 4 – Otters

292. The Grounds plead error in failing to have any or adequate regard to the strict protection by Annex IV/Article 12 of the Habitats Directive of otters from *inter alia* disturbance and destruction of breeding and resting places. They plead inadequate Otter surveys by reference to relevant guidance²⁴⁹ and that there was no information before the Board, upon which it could lawfully have concluded that there would be no disturbance of otters or that no significant effects on otters were likely (even if it had made such a determination).

293. The EIAR²⁵⁰ and AA Screening report²⁵¹ record that 2013 and 2019 surveys of the stream on the southern side of the site found no signs of otter but “*It is possible that otters may on occasion use the site*” “*as they are known from the Owendoher River*”. The EIAR noted²⁵² that it was proposed to re-plant and enhance this watercourse. The Inspector²⁵³ noted the EIAR content and that submissions had identified otter usage of the site but he considered that “*there is no empirical evidence to support this claim*”. He noted that a 2019 Dublin City Council otter survey identified high levels of otter activity on the Owendoher River²⁵⁴ but not on the subject site. He did not identify that the survey²⁵⁵ identified the Owendoher as one of the most significant rivers for Otters in Dublin.

294. The Applicant pleads that the 2019 DCC survey in fact identified otter activity in the development site as delineated by “red line” in the planning application maps. Ballyboden Bridge²⁵⁶ and Scholarstown Road Bridge²⁵⁷ further south cross the Owendoher river and are in the 2019 DCC survey area. And so the water and riverbank associated with these bridges are also within the “red line”. The Inspector did not identify that the report described the river, in the development site, as in an area of moderate disturbance (OWN3) and so more sensitive to development. The Board made no other conclusion in respect of potential impact on otter.

247 C-647/17

248 Case C-183/05

249 The Ecological Surveying Techniques for Protected Flora and Fauna during the Planning of National Road Schemes (NRA, 2008)

250 §5.3.5

251 P11

252 §5.7.1

253 Report §§10.1.19 & 10.1.23

254 A tributary of the Dodder

255 p.48

256 or Ballyboden Way Bridge

257 known locally as Billy’s Bridge or Boden Bridge

Opposition – Bats & Otters

295. As relevant and beyond traverses the Board’s Opposition pleads as to both Bats and Otters, inter alia, that:

- The Applicant lacks standing, not having raised Bats and Otters issues or adduced relevant evidence before the Board or explained its not having done so.
- The Inspector addressed bats issues²⁵⁸ and was satisfied that impacts on biodiversity, including would be sufficiently mitigated, including by bat boxes and the Board’s Order conditions implementation of all mitigation proposed in the EIAR.
- The Inspector addressed otter issues²⁵⁹ and did not misinterpret the evidence - including the 2019 DCC Otter Survey.
- There is no evidence that the proposed development will impact bats or otters in breach of Article 12 of the Habitats Directive.
- Shannon Homes remains subject to the obligations imposed by the Habitats Regulations 2011²⁶⁰ - in particular Articles 51 and 54. Article 51(2), in compliance with Article 12 of the Habitats Directive, prohibits as offences actions listed at Article 51(2)(a) – (e) save in accordance with a licence granted by the Minister under Article 54. By S.10(6) PD(H)A 2016 planning permission does not excuse a developer from requiring other relevant licences and/or consents.
- The Board was satisfied that it had sufficient information to complete an EIA - which is the obligation placed on it by the PD(H)A 2016 and the PDA 2000
- The Board is not precluded by Articles 4 or 12 of the Habitats Directive from relying on mitigation measures in completing an EIA.
- The Applicants conflate the obligations arising under, respectively, Article 6(3) and Article 12 of the Habitats Directive. *Commission v Germany (Moorburg Power Plant)*²⁶¹ relates to obligations under Article 6(3) and not to Article 12.

296. As relevant and beyond traverses and issues raised by the Board, Shannon Homes’ Opposition pleads as to both Bats and Otters, inter alia, that:

- The Bat and Otter surveys were adequate – details are set out.
- Small numbers of bats were recorded on site – of common species which adapt to urban settings. No roosts were found. The potential for bat roosts was identified.
- Non-compliance with the Bat Mitigation Guidelines for Ireland²⁶² or The Ecological Surveying Techniques for Protected Flora and Fauna during the Planning of National Road Schemes²⁶³ is denied but any non-compliance does not invalidate the impugned decision.

258 at §10.1.20 et seq of his report

259 in particular at sections at §10.1.19, 10.1.23 and 10.1.27 et seq of his report

260 European Communities (Birds and Natural Habitats) Regulations 2011

261 Case C-142/16

262 NPWS, 2006

263 NRA, 2008

- No signs of otters were found in the area of the small watercourse on the southern site boundary. The EIAR noted the possibility that otters may on occasion use the site;
- Though not a qualifying interest of any relevant European Sites, Bats were addressed in the AA Screening Report “for completeness”. On a precautionary approach to avoid impacts on bats, the EIAR proposed mitigation by lighting design, provision of roosting and nesting opportunities including bat boxes, re-surveying of buildings prior to demolition, removal of the roof and the felling of trees identified as potential bat roosts to be supervised by a bat specialist. A similar plea is made as to otters.
- The mitigation measures as to Bats ensure compliance with Article 12;
- The Applicant adduced no evidence that the utility of mitigation set out in the EIAR is unverified.
- The Inspector’s consideration of the Bat issue is recited, including his conclusion²⁶⁴ that the “mitigation measures in relation to bats are considered to be sufficient, and are common for such residential sites”. The Board adopted his report.
- The information before the Board as to bats and otters sufficed to allow it to carry out an EIA and reach a reasoned conclusion on significant effects. The question of such sufficiency is primarily a matter for the Board – which considered the information sufficient.
- The information before the Board as to bats, including as to trees with roost potential and trees to be removed, and as to mitigation, sufficed to allow it to reach a conclusion compatible with Annex IV of the Habitats Directive
- The Applicant adduced no evidence that roosts and breeding places will be intentionally destroyed.
- The impugned planning permission does not authorise deliberate disturbance of bats or otters or deterioration or destruction of their breeding sites or resting places in breach of Article 12 of the Habitats Directive; nor does it obviate any requirement for a derogation licence under Article 54 of the Habitats Regulations, which implements Article 12.
- The public roads (including, it seems, Ballyboden Bridge and Scholarstown Road Bridge) are within the red-line boundary to allow public services and road improvements to facilitate the development.

Submissions – Bats & Otters.

297. The Applicant made written and oral submissions on the Bats issue and, on the Otters issue, written submissions but not oral for want of time.

298. The Applicant asserts that the EIAR²⁶⁵ notes that a tree survey for bats was done using listed standard criteria but nowhere states the detail of the survey or its results - such that the Inspector records²⁶⁶ that SDCC is unclear whether the trees have been surveyed for bat roosts in the context of

264 §10.1.29

265 §5.4

266 §8.1

loss of over 90% of the trees on the site. Permission is granted without any information as to which or how many of those trees are potential bat roosts or what type of bat roosts they may contain.

This, it alleges, breaches two distinct obligations of the Board:

- to strictly protect bats from deliberate disturbance and loss of roosting sites for the purposes of Annex IV and Article 12 of the Directive
- and to properly assess the development for EIA purposes.

299. The Applicant elaborates on the assertion of Bat Survey inadequacy by reference to the *Bat Mitigation Guidelines for Ireland* such that the Board can't know whether or not it has granted planning permission for the destruction of bat roosts because neither it nor the Developer knows if there are bat roosts on the site.

300. Article 12 strict protection prohibitions apply at the level of individual specimens and individual roosts. Mitigation is, logically, irrelevant to a prohibition.

301. By analogy the Applicant relies on *Commission v Germany (Moorburg Power)*²⁶⁷ in which the efficacy of a fish ladder on the relevant river, proposed to reduce direct significant effects on Natura 2000 sites upstream, had not been demonstrated - such that it together with other measures "*could not guarantee beyond all reasonable doubt, ... that plant would not adversely affect the integrity of the site, within the meaning of Article 6(3) of the Habitats Directive.*" And it is implausible to suggest that evidence of the efficacy of mitigation is required in respect of Article 6(3) but not in respect of the "*much more stringent protection*" of Article 12. The question of reliance on mitigation measures in the context of Article 12 is not *acte claire* and a reference to the Court of Justice is sought.

302. As to otters, the Applicants written submissions essentially repeat the grounds and complain that the Developer did not provide the results of its surveys to the Board (month, location, duration, weather conditions, equipment used, number of visits etc.) and so the Board could not legally determine that the proposed development would not result in disturbance for otters for the purposes of Annex IV of the Habitats Directive. The permission is inconsistent with the Habitats Directive's²⁶⁸ protection of otters from *inter alia* disturbance and destruction of breeding and resting places throughout the range of the species (Article 12). In the absence of any adequate environmental information or surveying having been completed and/or provided to the Board in order to allow the Board to assess the potential impacts on these species it is the Applicants' case that there was no basis upon which the Board (even if it had made such a determination) could have concluded that no significant effects were likely from the proposed development on these species. It

267 Case C-142/16

268 Article 12

is irrelevant if there was no information on file in relation to otter usage of the site, because it is clear that the Developer simply did not look for them to the standard required.

303. Though the written submissions do not address the “red line” issue, Counsel for the Applicant adverted to it orally on day 1 as “an issue to some extent”. On day 2 he said “*we will come back to if we have time*” but as matters transpired did not have time. But the point was not abandoned.

304. The Board and Shannon Homes make overlapping submissions. They observe that the Applicant does not challenge the EIA as to bats and otters but instead argues that the Board failed to carry out an assessment which complies with Article 12 of the Habitats Directive which requires strict protection of species. The Board points out that even if the impugned permission survives challenge, Shannon Homes must, on pain of criminal liability, comply with Articles 51 and 54 of Habitats Regulations 2011 which transpose Articles 12 and 16 of the Habitats Directive and the Board has no role in the grant or refusal of derogation licences under Article 16 of the Directive and Article 54 of the Regulations. They cite, inter alia, **Redmond v. An Bord Pleanála**²⁶⁹, **Highlands Residents Association v. An Bord Pleanála**²⁷⁰ and **Clifford & O’Connor v. An Bord Pleanála**²⁷¹. They also submit that the Applicants’ case in this regard is inadequately pleaded, citing **Ballyboden Tidy Towns Group v. An Bord Pleanála**²⁷². I do not find it necessary to more extensively record the Board’s submissions here.

Discussion & Conclusion – Bats & Otters

305. I should first say something of pleadings in judicial reviews of this kind. **Order 84 Rule 20(3)** of the Rules of the Superior Courts provides that:

“It shall not be sufficient for an applicant to give as any of his grounds ... an assertion in general terms of the ground concerned, but the applicant should state precisely each such ground, giving particulars where appropriate, and identify in respect of each ground the facts or matters relied upon as supporting that ground”.

306. Of fairness, a party should know in advance, in broad outline, the case he will have to meet at trial without either party being taken at a disadvantage by the introduction at trial of matters not fairly to be ascertained from the pleadings. The importance of pleading in judicial review has been re-emphasised and applied in recent caselaw. The Supreme Court in **Casey v. Minister for Housing,**

269 [2020] IEHC 15

270 [2020] IEHC 622

271 [2021] IEHC 459

272 Ballyboden Tidy Towns Group v. An Bord Pleanála [2021] IEHC 648 (High Court (Judicial Review), Humphreys J, 20 October 2021)

Planning and Local Government²⁷³ - a judicial review action - observed that pleadings ensure fairness in the process. They set the parameters of, and define and fix, the issues in dispute which may be determined by the court. They define and limit the jurisdiction of a court because a court obtains its jurisdiction from the issues the litigants, by their pleadings, bring before it for decision. A decision “*made ... without pleading ... cannot be sustained ...*” In an adversarial system this is entirely fair. Each party is free to choose to argue, or not, whatever (arguable) position it pleases. The role of the court is to determine the correctness of the position of one or other party. It is entirely fair to require each party to plead its position so the other party may have a fair chance to consider and meet it.

307. Also, Baker J in **Casey** noted the chilling effect of judicial review proceedings on administrative activity. Comparing judicial review to other types of proceedings she observed that “*... the statement of grounds does perform the same function as pleadings generally, and in the case of judicial review, having regard to the requirement to obtain leave to bring judicial review on the grounds pleaded, the requirement for clarity and specificity in pleadings and the extent to which the statement of grounds defines and confines the issues to be determined at trial could be regarded as more strict.*” The foregoing was presaged by the Supreme Court in **Keegan v. Garda Síochána Ombudsman Commission**²⁷⁴ in which O’Donnell J concluded that the purpose of pleadings is “*particularly important in judicial review, which is a powerful weapon of review of administrative action*”.

308. In **Ballyboden Tidy Towns Group v An Bord Pleanála**²⁷⁵ Humphreys J, noted that Barniville J. in **Rushe v An Bord Pleanála**²⁷⁶, regarded O.84 R.20(3) RSC as the express articulation of the requirement of specificity in judicial review pleadings laid down by Murray C.J. in **A.P. v Director of Public Prosecutions**²⁷⁷: “*In the interests of the good administration of justice it is essential that a party applying for relief by way of judicial review sets out clearly and precisely each and every ground*²⁷⁸ upon which such relief is sought. The same applies to the various reliefs sought.” Barniville J. commented, “*It is not open to an applicant to advance new arguments during the course of the hearing which go beyond the scope of the ground or grounds upon which leave was granted or to raise new grounds. These requirements, which are now reflected in O. 84, r. 20(3), are intended to ensure not only procedural fairness for the opposing parties in the judicial review proceedings, but also to avoid ambiguity or confusion as to the issues before the High Court, both for that Court itself and in the context of any appeal from the judgment of the High Court.*” He considered this particularly important in “*the complex field of EU planning and environmental law*” such as the Habitats and the EIA Directives. In **Clifford & Sweetman v An Bord Pleanála**²⁷⁹, Humphreys said that “*the pleadings are absolutely vital.*” And “*if there is a potentially viable point, but it isn’t adequately pleaded, then it just isn’t going to be a basis for relief.*” Humphreys J put it, the pleadings must serve

273 [2021] IESC 42 §22 et seq (Baker J)

274 [2015] IESC 68

275 [2021] IEHC 648

276 [2020] IEHC 122

277 [2011] 1 I.R. 79, at para. 5

278 Emphasis added

279 [2021] IEHC459

“ensure that there is no doubt, ambiguity or confusion as to what the applicant’s case is before the High Court”. To put it another way, if on the Grounds pleaded there is genuine *“doubt, ambiguity or confusion”* an Applicant in Judicial Review cannot have the benefit of it.

309. The Board correctly observes that the pleaded Grounds as to bats and otters are made on foot of the strict protection regime required by Article 12 and Annex IV of the Habitats Directive and do not challenge the EIA. Those Grounds repeatedly call in aid the *“requirements of the Habitats Directive”* and the obligations of strict protection of species *“for the purposes of Annex IV and Article 12 of the Directive.”* The premise of these Grounds, is that the Board was obliged *“to reach a conclusion compatible with the requirements of strict protection in Annex IV of the Habitats Directive”* and *“to refuse permission for proposed developments that are incompatible with the requirements of the Habitats Directive”*.

310. Importantly, though the Grounds cite the EIAR as to the substantive information as to bats and otters, they do not invoke obligations under the EIA Directive or any question of the adequacy of EIA or assessments made in EIA. Specifically, they do not invoke Article 3(1)b of the EIA Directive which requires EIA to consider *“biodiversity, with particular attention to species and habitats protected under”* the Habitats and Birds Directives. Nor do the Grounds invoke domestic law giving effect to Article 3(1)b. Though in submissions the Applicants assert inadequacy of EIA by reference to bats and otters and the obligations of the EIA Directive, these submissions have no basis in the case as pleaded in the Grounds and so I cannot consider them. Thus, decisions such as **Connelly**²⁸⁰, and the opinion of Advocate General Kokott in **Namur**²⁸¹ do not require further consideration here as they relate to EIA – and also as Namur is a challenge to a derogation licence, which is not the case here. However, I will briefly refer to Namur below. The Applicant’s point that the EIA failed to consider the possible effect of works on the Ballyboden and Scholarstown Road bridges over the Owendoher river or the public roads in the vicinity on otters in the Owendoher river likewise falls away.

311. That leaves only the issue whether the Board acted in breach of its supposed obligations under the Habitats Directive.

312. Though obliged in EIA, by Article 3 of the EIA Directive, to assess significant effects on *“Biodiversity with particular attention to species and habitats protected under [the Habitats Directive]”* the Board was not, in so doing, performing a function under the Habitats Directive. The Board has no power to grant a derogation licence under Article 16 of the Habitats Directive, failing which grant by the competent Minister, actions in breach of Article 12 of the Habitats Directive are, and always, remain prohibited as criminal offences whether or not planning permission is granted by the Board. The impugned planning permission does not alter that position or authorise actions in

280 §11.5

281 Case C-463/20 Namur-Est Environnement ASBL v Région Wallonne & Cimenteries CBR SA

breach of Article 12. S.10(6) of the 2016 Act provides that “A person shall not be entitled solely by reason of a permission under section 9 to carry out any development.” The meaning of this provision is well-understood having regard to the equivalent provision as to non-SHD permissions found in S.34(13) PDA 2000. As Simons J said in **Redmond v. An Bord Pleanála**²⁸², “... planning permission merely confirms that the statutory requirements under the planning legislation have been complied with. Accordingly, the fact that you have got your permission does not obviate the need for the developer to apply for a “derogation licence” in circumstances where required ...” As Counsel for the Board put it planning permission doesn't permit you to do anything which would otherwise be unlawful. So, to any extent that development on foot of the impugned planning permission would breach Article 12, the permission is, in practical terms, provisional and ineffective unless and until a derogation licence under Article 16 is granted. If the development cannot proceed for want of a derogation licence, no effect, significant or otherwise, will occur. So the permission poses no threat to strict protection of species – whether bats or otters - under Article 12. In my view the Applicant's reliance on Article 12 of the Habitats Directive and the system strict protection of bats and otters it requires of the State is misconceived and I reject this ground of challenge. I am fortified in my view in this regard by decisions such as **Redmond, Highlands Residents Association v An Bord Pleanála**²⁸³ and **Clifford & O'Connor v An Bord Pleanála**²⁸⁴ - indeed in Highlands, in contrast to the present case, bat roosts were found. Any interference with bats or otters would have to be addressed by a derogation licence from NPWS and works could not proceed in the absence of such a licence.

313. In reply Counsel for the Applicants introduced **Commission v. Ireland C-183/05** as suggesting that a derogation licence should precede EIA or at least precede planning permission. Counsel recalled hard-pressing a similar submission in **Highlands** but that McDonald J²⁸⁵ didn't feel the need to address that issue as it was not appropriate for him to address a case of alleged failure to properly transpose the requirements of EU law in relation to protection of bats and as counsel put it to me, because in **Highlands** “the applicant had been successful on other grounds.” I appear to be in a similar position to McDonald J.

314. The EIAR in the present case did not find or predict that a derogation licence as to bats would actually be necessary. It recorded²⁸⁶ that “Although no roosts were confirmed within the buildings in the site they have high potential to support roosting bats. The buildings, which are scheduled for demolition, will be resurveyed for bats prior to any proposed demolition works as some time may have elapsed between the present survey and these works once planning permission is granted. Should bats be discovered during these works a bat derogation licence will then be sought.” While this does not address otters in the Owendoher river, nothing turns on that as the excerpt merely reflects the law that the prohibition, as an offence, of actions in breach of Article 12 applies absent a derogation – and that applies to otters as to bats.

282 [2020] IEHC 15 at §153 – 155; see also S.10(6) of the 2016 Act

283 [2020] IEHC 622 at §119. It states, inter alia, “Crucially, the decision of the board does not permit any of the proposed interference with bats. Any such interference will have to be addressed appropriately under the 2011 Regulations, if it is to be lawful.”

284 [2021] IEHC 459 at §85 – as to the grant of planning permission in the absence of a derogation licence: “the grant of planning permission does not render the development lawful

285 Counsel cited §106 of the judgment in Highlands

286 P5.16

315. Unlike Namur, if a derogation is needed for the development at issue in this case it will have been preceded by EIA. I cannot assume that such derogation, if granted, will be invalid for any reason, but I must recognise that if a derogation is refused, or if it is granted and invalidated, the planning permission will be ineffective to any extent that the development cannot proceed without committing offences under Article 12.

316. AG Kokott in Namur further considered that if EIA showed the project incompatible with EU Habitats law the competent authorities must refuse development consent within the meaning of the EIA Directive. For example an EIA might predict significant adverse effect on a European Site in breach of Article 6(3) of the Habitats Directive. While judgment is awaited in that case, I assume this view to be correct. However I cannot see EIA as requiring refusal because it is foreseen that derogation licence may be required. Such licenses are not incompatible with EU Habitats law – they are part of it.

317. For the reasons set out above, no question arises in this case of the project being effected if incompatible with environmental requirements of the Habitats Directive. Either it will not offend Article 12 or a derogation licence will be required. If a derogation licence is required but refused the project cannot proceed and no offence against Article 12 will occur. If a derogation licence is granted, it necessarily follows that the project is compatible with the Habitats Directive. Derogations are part of the scheme of the Habitats Directive. Accordingly, I do not see that AG Kokott’s opinion in Namur suggests a different outcome to this case than would otherwise be the case.

318. In **Hellfire**²⁸⁷ Humphreys J has recently referred questions to the CJEU as to the relationship between the Habitats and EIA directives. The Applicants challenged the validity of the 2011 Habitats Regulations as they relate to derogation licences and as to the alleged non-integration of the planning and derogation processes. No such challenge is made in the present case. A question referred in that case is whether public participation is required in a derogation process which post-dates development consent and, by implication EIA. However it seems to me that that question does not bear on the questions arising in this case.

319. The Board also submits that the Applicants’ case as to bats and otters case is premised on Article 12 of the Habitats Directive placing obligations on the Board, independent of the manner in which Articles 12 and 16) have been transposed into national law. Article 12 mandates the State to create a “system” of strict protection. Clearly the obligation to create such a system cannot be an obligation of the Board unless imposed by transposing domestic legislation. Those transpositions place no obligations on the Board.

287 Hellfire Massy Residents Association v. An Bord Pleanála [2021] IEHC 424

320. In any event, they say, the Applicants have failed to plead any basis for the assertion that Article 12 imposes obligations on the Board or any basis for the assertion of the scope or content of any such obligations. They cite the **Ballyboden Tidy Towns case**²⁸⁸ - which I have considered above as to pleadings more generally - in which Humphreys J rejected a similar case as to the Habitats Directive, noting that *“A legal ground has to postulate a basis for an entitlement to relief by reference to some identified legal provision or doctrine and an explanation as to how that gives rise to an entitlement to the remedy sought.”* Humphreys J said that Articles 4 and 12 of the Habitats Directive *“are addressed to Member States, not to individual competent authorities. No obligation on the board to “reach a conclusion”, as is put in the applicant’s pleadings, is imposed directly by arts. 4 or 12. That gives rise to a requirement for the pleadings to specify how such an obligation is imposed indirectly. Or indeed more fundamentally to specify what the obligation is – reach what conclusion consistent with arts. 4 and 12?”* In my view these comments are apposite here and I echo the consideration by Humphreys J of the necessity of specificity and particularity in pleadings in judicial review and his endorsement of the view of Barniville J. in **Rushe v An Bord Pleanála**²⁸⁹ *“that the complexity of the area of European planning law made it particularly important that the applicant’s case was precisely pleaded”*. In effect the Grounds presume, rather than plead, that Article 12 imposes obligations directly on the Board. As a matter of pleading that is insufficient.

321. For the reasons set out above I reject the Applicants’ Grounds 3 and 4 as to bats and otters and as to the pleaded case that the impugned permission operates in breach of Article 12 of the Habitats Directive or failed to consider Article 12 adequately or at all. No Ground as to adequacy of EIA as to bats and otters was pleaded and so I decline to consider any such issues.

CONCLUSION

322. For the reasons set out above, I will quash the Board’s impugned decision for, briefly put:

- Failure to recognise material contravention of the Development Plan as to density and address it as such.
- Failure to take into account a relevant consideration as to the capacity of the public transport network and give adequate reasons for its decision on density in that context.
- Inadequacy of reasons on the traffic issue – specifically as to the disagreement between the traffic experts regarding methodology and the reliability of the results resulting from the application of that methodology.

I reject all other grounds of challenge.

²⁸⁸ Ballyboden Tidy Towns v. An Bord Pleanála, Ireland and the Attorney General and South Dublin County Council [2021] IEHC 648.
²⁸⁹ [2020] IEHC 122

323. This judgment is delivered electronically. I direct that the parties correspond with a view to agreeing the terms of the orders to be made on foot of this judgment as to all matters arising thereon - such communications to be completed within fourteen days of electronic delivery of this judgment. Forthwith thereafter the result of such correspondence is to be notified by email from the solicitor for the applicants to the registrar. Thereafter I will give further directions, electronically, as to how the matter is to be dealt with.

DAVID HOLLAND
10 January 2022