APPROVED

THE HIGH COURT

[2024] IEHC 194

Record No. 2020 478 JR

BETWEEN/

RACHEL KONISBERRY

APPLICANT

-AND-

AN BORD PLEANÁLA

RESPONDENT

JUDGMENT of Mr. Justice Conleth Bradley delivered on the 22nd day of March 2024

INTRODUCTION

1. In this judicial review application Ms. Rachel Konisberry ("the Applicant") seeks to challenge a decision of An Bord Pleanála ("the Board") dated 19th May 2020 (ABP-306464-20) refusing her planning permission on lands located at Rinville West, Oranmore, County Galway ("the lands") for proposed development comprising *inter alia* the following four aspects: (1) permission for part demolition of an existing agricultural shed; (2) retention and completion of the remainder of the agricultural shed; (3) retention of an existing access road; (4) permission for the widening of the existing access road, together with additional landscaping and all associated site works.

2. Peter Bland SC and Evan O'Donnell BL appeared for the Applicant. Michéal O'Connell SC and Stephen Hughes BL appeared for the Board.

3. The Applicant breeds horses and states that since in or around 2016 she has been trying to secure planning permission for an agricultural shed on the lands.

4. Prior to that, on advice, the Applicant was informed that she could construct stables of approximately 200 square metres, and a dry storage shed of approximately 300 square metres, so long as the aggregate did not exceed 900 square metres and subject to same being located 100 metres away from any dwelling and from the nearest agricultural building. The Applicant says that she was careful to ensure that the construction was well within what she understood to be the exemption threshold. However, after engagement with the Planning Authority (Galway County Council), the Applicant

decided to apply to the Council for retention permission for what was built. Thereafter, as described herein, the Applicant engaged with the Council and the Board in seeking to regularise the planning status of this development.

5. In opening this application for judicial review, Mr. Bland SC, for the Applicant, presented this challenge as a 'reasons case.'

6. The issue between the parties is a net but important one. It centres on whether, when the Board disagrees with its Planning Inspector's recommendation in a report (to grant permission subject to eight conditions), the Board's reasoning for so disagreeing is legally sufficient or adequate in the circumstances. Mr. Bland SC says it was not. Mr. O'Connell SC argues that it was.

7. In making her case, the Applicant submits that the context and planning history of her engagement with the Planning Authority and the Board has three temporal staging posts: 2017, 2019 and 2020. Her core complaint is that during these years the Board has simply recycled (almost *verbatim*), in a 'copy and paste' exercise, the reason for refusal, first received in time, without regard to the changed nature of the application.

8. Therefore, before addressing (and assessing in this case) the legal obligations of the Board to provide reasons when it disagrees with its Inspector, it is apposite to examine the immediate planning history which forms the contextual background to the Applicant's complaints. That said, the prism through which the Applicant seeks to challenge the Board in this judicial review focuses on whether the manner in which it made its decision on 19th May 2020 to refuse permission complied with its legal

obligation to set out the reasons why it differed with the recommendation of its Inspector.

CONTEXTUAL BACKGROUND

The first application: 2017

9. The Applicant initially applied for the retention and completion of an agricultural shed consisting of a stables covering 193.7 square metres, and agricultural storage shed/hay barn together with ancillary site works covering 155.46 square metres. This application was refused by the Planning Authority under Planning Register Reference No. 16/1481 on 4th January 2017.

10. The Applicant appealed to the Board, and the Board refused permission (Board Order PL 07.247936-16/1481) on 3rd July 2017 for the following reasons and considerations:

> *"(1) Having regard to the locational context and planning history of the subject site, it is not considered that sufficient justification has been given relative to the need for the proposed retention development which comprises a large shed to be used for agricultural storage and stables, as a stand-alone building/facility on a relatively small holding, separate from any larger farm complex or operations in a rural area of High Landscape Sensitivity (Class 3), Landscape Conservation and Management Policy LCM 1 – Objectives LCM 1*

and LCM 2 of the current development plan for the area refer. It is considered, therefore, that the retention of the proposed development would set an undesirable precedent and would be contrary to the proper planning and sustainable development of the area.

(2) The building proposed for retention will be accessed via a circa 192 metres circuitous route from a proposed access onto a local road. The Board is not satisfied, on the basis of the information submitted with the planning application and appeal, that minimum sight distances for a local road can be achieved in both directions at the proposed access to ensure that no traffic hazard is created as a result of the development. It is therefore, considered that the retention development, if permitted, would endanger public safety by reason of traffic hazard or obstruction of road users or otherwise. As such the proposed development would not be in the interests of the proper planning and sustainable development of the area."

The second application: 2019

11. The Applicant made a second application for retention and completion of an agricultural shed and associated development, including *inter alia*: (a) retention of agricultural building with overall floor area of 349.71 square metres; (b) widening of existing access road to 3.5 metres; (c) retention of soak pit; (d) front boundary to be set back if required. This application was refused by the Planning Authority.

12. When it was appealed to the Board (ABP: 30288-18 18/1142), the Inspector recommended refusal, but on grounds only of a traffic hazard arising from a failure to demonstrate adequate sightlines available at the entrance. When the Board made its decision in ABP: 30288-18 18/1142, the Inspector's reason for refusal was not included in the Board's decision. Rather, the Board refused the proposal on grounds of scale, mass and bulk and its location on elevated ground within an area of high landscape sensitivity which would detract from the visual and residential amenities of the area and interfere with the character of the landscape:

> "*Having regard to the planning history of the subject site, and its locational context, it is considered that the development for which retention is sought, which comprises a large shed to be used for agricultural storage and stables as a stand-alone building/facility on a relatively small landholding, by reason of its scale, mass and bulk, and its location on elevated ground within a rural area of High Landscape Sensitivity (Class 3) in the Galway County Development Plan 2015 – 2021, would detract from the visual and residential amenities of the area, would interfere with the character of the landscape, contrary to objectives LCM-1 and LCM 2 of this Development Plan, and would set an undesirable precedent for similar future development in the area. The development for which retention is sought would, therefore, be contrary to the proper planning and sustainable development of the area.*"

The third application: 2020

13. In the third application, the Applicant sought permission for a re-designed structure which included: (1) permission for part demolition of the existing agricultural shed of 67.66 square metres; (2) retention and completion of the remainder of the agricultural shed (283.73 square metres); (3) retention of an existing access road; and (4) permission for the widening of the existing access road, together with additional landscaping and all associated site works. The shed was intended for the stabling of horses and was to be constructed of reinforced concrete walls with a dark green corrugated cladding to the upper walls and roof and extended to a height of approximately 5.1 metres. It was laid out as stables with machinery store, hay store and it was proposed to provide a manure pit and subsurface effluent tank to the northern side of the building.

14. Additional landscaping measures included the provision of a semi-mature native tree belt on top of a constructed soil berm of 1 metre in height and 2 metres wide located to the north east and south east of the shed. The proposed planting was stated to consist of new native Hawthorn Hedgerow, supplemented by a mix of semi-mature trees consisting of Alder Hazel and Rowan/Mountain Ash and it was proposed to introduce additional planting around the agricultural building to consist of native climbers Honeysuckle and Ivy.

15. On 17th December 2019, the Planning Authority (Planning Register Reference No. 19/1653) decided to refuse permission for the following reasons:

    "*It is considered the proposed development seeking retention by reasons of scale mass and bulk, which is also located outside an*

established farmstead, and its location in an elevated Class 3 rural landscape, would interfere with the character of the landscape, would detract from the visual and residential amenities of the area, would establish an undesirable precedent for similar future developments in the area and thus would be contrary to the proper planning and sustainable development of the area. The proposed development seeking retention would, thus seriously injure the amenities of the area, contravene "Policy LCM1 – Preservation of Landscape Character", "Objective LCM 1-Landscape Sensitivity Classification" Objective LCM2 – Landscape Sensitivity Ratings" of the County Development Plan 2015-2021 and would be contrary to the proper planning and sustainable development of the area.

It is considered that the proposed development seeking retention by reason of the construction of a substantial internal driveway (>193metres) to access the proposed development seeking retention, to the rear of adjacent houses, on an elevated Class 3 rural landscape which is in an open and exposed site, would result in a haphazard disorderly development, and it would also be an obtrusive feature in the rural landscape. Accordingly, to grant the development seeking retention, as proposed, would seriously injure the residential amenities and depreciate value of properties in the vicinity, would set an undesirable precedent for similar type of development and would be contrary to the proper planning and sustainable development of the area."

16. The Applicant appealed this decision to the Board. As is set out presently, on 8th April 2020, the Planning Inspector Ms. Bríd Maxwell recommended that planning permission for the retention and completion of the development be granted subject to eight conditions. The appeal (Board Order ABP-306464-20) was considered at a Board meeting on 11th May 2020 and the Board decided to refuse permission.

THE STATUTORY PROVISIONS

Section 34(10) of the 2000 Act

17. Section 34(10)(a) and (b) of the Planning and Development Act 2000 ("the 2000 Act") provides the statutory basis for the Board to provide reasons when it disagrees with its Inspector's recommendation, as follows:

> "*(a) Subject to paragraph (c) and without prejudice to section 172(1I), a decision given under this section or section 37 and the notification of the decision shall state* ***the main reasons and considerations on which the decision is based****, and where conditions are imposed in relation to the grant of any permission the decision shall state* ***the main reasons for the imposition of any such conditions****, provided that where a condition imposed is a condition described in subsection (4), a reference to the paragraph of subsection (4) in which the condition is described shall be sufficient to meet the requirements of this subsection.*
>
> *(b)* ***Where a decision*** *by a planning authority under this section or* ***by the Board under section 37 to grant or to refuse permission is***

***different**, in relation to the granting or refusal of permission, **from the recommendation** in—*

(i) the reports on a planning application to the chief executive (or such other person delegated to make the decision) in the case of a planning authority, or

*(ii) **a report of a person assigned to report on an appeal on behalf of the Board**,*[1]

***a statement under paragraph (a) shall indicate the main reasons for not accepting the recommendation in the report or reports** to grant or refuse permission.*

350(c) Where, in the case of an application for planning permission accompanied by an environmental impact assessment report, a decision by a planning authority under this section or by the Board under section 37, as the case may be—

(i) to impose a condition (being an environmental condition which arises from the consideration of the environmental impact assessment report) in relation to the grant of permission is materially different, in relation to the terms of such condition, from the recommendation in—

(I) the reports on a planning application to the chief executive (or such other person delegated to make the decision) in the case of a planning authority, or

(II) a report of a person assigned to report on an appeal on behalf of the Board,

[1] The Inspector.

as the case may be, a statement under paragraph (a) ***shall indicate the main reason****s for not accepting, or for varying, as the case may be, the recommendation in the reports or report in relation to such condition referred to in clause (I) or (II), as the case may be,*

(ii) to grant, subject to or without conditions, permission, such permission shall include or refer to a statement that the planning authority or the Board, as the case may be, is satisfied that the reasoned conclusion on the significant effects on the environment of the development was up to date at the time of the taking of the decision, and

(iii) shall include a summary of the results of the consultations that have taken place and information gathered in the course of the environmental impact assessment and, where appropriate, the comments received from an affected Member State of the European Union or other party to the Transboundary Convention, and specify how those results have been incorporated into the decision or otherwise addressed." (Emphasis added).

Meaningful engagement

18. Generally, the duty to give reasons can be viewed as being '*book-ended'* by two points on the decision-making spectrum. At one end of the spectrum, there is a discursive analysis (which is not required); at the other end of the spectrum, there is a formulaic tick-box exercise (which is insufficient).

19. In *Connelly v An Bord Pleanála* [2018] IESC 31, [2021] 2 I.R. 752, [2018] 2 I.L.R.M. 453, Clarke C.J. (at paragraphs 10.1, 10.2 and 10.3) referred to a middle ground between the sort of broad discursive consideration (which might be found in a court judgment) on the one hand, and on the other, an entirely perfunctory statement that, having regard to series of factors to be taken into account, the decision goes one way or the other.

20. It might be observed that capturing precisely what the appropriate level of reasoning looks like in a decision would seem easier to assert as a principle than to describe as a function.

21. A review of the extensive jurisprudence on this issue in recent years, for example, emphasises that the singular responsibility on a decision-maker – the Board in this instance – is one of '*meaningful engagement*' where, for example, its decision will clearly show that relevant submissions were addressed and that an explanation was given as to why they were not accepted.[2]

[2] See, for example, *Killegland Estates Limited v Meath County Council* [2023] IESC 39; *Náisiúnta Leictreach Contraitheoir Éireann v Labour Court* [2021] IESC 36; [2021] 2 I.L.R.M. 1; *Balz & Heubach v An Bord Pleanála and Cork County Council and Cleanrath Windfarms Ltd* [2019] IESC 90; [2020] 1 I.L.R.M. 36; *Sliabh Luachra Against Ballydesmond Windfarm Committee v An Bord Pleanála* [2019] IEHC 888; *Connelly v An Bord Pleanála* [2018] IESC 31, [2021] 2 I.R. 752, [2018] 2 I.L.R.M. 453; *Mallak v Minister for Justice, Equality and Law Refor*m [2012] IESC 59; [2012] 3 I.R. 297; *Meadows v Minister for Justice* [2010] IESC 3; [2010] 2 IR 701; *Rawson v Minister for Defence* [2012] IESC 26; *EMI Records (Ireland) Limited v Data Protection Commissioner* [2013] IESC 34; *Oates v Browne* [2016] IESC 7; [2016] 1 I.R. 481.

22. That is what the Oireachtas has sought to provide for in enacting section 34(10)(a) and (b) of the 2000 Act, *i.e.*, engagement which is meaningful.

23. In *Connelly v An Bord Pleanála* [2018] IESC 31, [2021] 2 I.R. 752, [2018] 2 I.L.R.M. 453, Clarke C.J. said as much when he re-iterated (at paragraphs 9.6 and 9.7) a preference that in all cases the Board should make expressly clear whether it accepted all of the findings of an Inspector, and in circumstances where it was differing with its Inspector, there was an obligation for the Board to set out the reasons for coming to that conclusion in sufficient detail to enable an interested person to know why the Board differed from the Inspector to enable them to assess whether there was any basis for suggesting that the Board's decision was not sustainable.

24. In *Crekav v An Bord Pleanála* [2020] IEHC 400, at paragraph 154, the High Court[3] referred to the failure to incorporate or apply section 34(10) of the 2000 Act (requiring reasons to be given for disagreeing with an Inspector) to the legislation[4] which provided strategic housing development applications directly to An Bord Pleanála as "… *a significant omission* …" and "… *a significant oversight on the part of the Oireachtas.*"

25. In *Crekav*, for example, Barniville J. (as he then was), applying *Connelly*, proceeded on the basis that the Board was under a duty to provide reasons for its decision to refuse to grant permission for a proposed SHD and to provide reasons for differing from the recommendation contained in the report of its inspector to grant permission

[3] Barniville J. (as he then was).

[4] The Planning and Development (Housing) and Residential Tenancies Act, 2016.

for the SHD development. This duty was held to be analogous to the obligations of the Board pursuant to sections 34(10)(a) and 34(10)(b) of the 2000 Act, and the court referred to the decision of the High Court[5] in *Mulholland v An Bord Pleanála (No.2)* [2005] IEHC 306; [2006] 1 I.R. 453.

26. In *Mulholland* Kelly J. (as he then was) held that sections 34(10)(a) and 34(10)(b) of the 2000 Act imposed obligations upon the planning authority: (a) to give reasons irrespective of whether the decision was to grant or refuse permission; (b) to state the main reasons and considerations on which a decision was based; and (c) to state the main reasons for not accepting the recommendation of the Board's inspector and that the pre-existing jurisprudence on the adequacy of reasons continued to apply. In this regard, an administrative decision should provide sufficient information to enable an affected person to consider whether they have a reasonable chance of succeeding in judicially reviewing the decision; can arm themselves for such a review; can know if the Respondent has directed its mind adequately to the issues it has to consider; and give sufficient information to enable the court to review the decision.

27. A similar approach was adopted by the High Court (McDonald J.) in *O'Neill & Ors v An Bord Pleanála* [2020] IEHC 356 and [2021] IEHC 58, which again concerned a successful challenge to the decision of the Board to grant planning permission for a strategic housing development, pursuant to the provisions of the Planning and Development (Housing) and Residential Tenancies Act 2016 on part of the former Premier Dairies site at Finglas Road, Dublin 11, where having reviewed the leading authorities on the question of the adequacy of reasons, McDonald J. held on the facts

[5] Kelly J. (as he then was).

of that case, that the fundamental problem arose from the inconsistencies in the inspector's report and the subsequent broad-brush taken by the Board which led the court to find that there was an insufficiency of reasons. For example, prior to invoking the analysis of Clarke C.J. at paragraph 9.7 of his decision in *Connelly* (the extract of which is referred to above), McDonald J. *inter alia* observed as follows at paragraph 180 in *O'Neill & Ors v An Bord Pleanála* [2020] IEHC 356:

> "*… the Board is given a significant measure of latitude in the way in which it expresses itself and is not required to give reasons in the same detailed way as a court might be expected to do. Nonetheless, given the significance of the issue and the detailed reasons given by the Inspector for taking the contrary view, it is difficult to understand or accept that the Board could properly adopt such a broad-brush approach without spelling out, in some level of detail, the basis upon which it concluded that the views of the Inspector should be rejected*".

28. In circumstances, therefore, where the Board is rejecting the recommendation and analysis of an inspector appointed to carry out a report, the *requirement* for meaningful engagement by the Board imports an *enhanced duty* on it when it is furnishing its reasons to set out why it disagrees with its Inspector: *Flannery & Ors v An Bord Pleanála* [2022] IEHC 83, per Humphreys J. at paragraph 155.

29. In this case, as the Board's order dated 19th May 2020 to refuse permission was different from the recommendation in the report of the Inspector, the Board was required (by virtue of section 34(10)(b) of the 2000 Act) to provide a statement

(under section 34(10)(a) of the 2000 Act) indicating the main reasons for not accepting the recommendation in the report of the Inspector to grant permission.

30. The reference to 'paragraph (a)' – section 34(10)(a) of the 2000 Act - is important and is a reference back to the decision stating "… *the main reasons and considerations on which the decision is based* …", and where conditions are imposed in relation to the grant of any permission the decision shall state "… *the main reasons for the imposition of any such conditions* …", etc.

31. This is a statutory requirement for the Board to *locate* its reasoning for differing with its inspector as part of its main reasons and considerations at that point in its decision *i.e.*, the combination of section 34(10)(a) and (b) of the 2000 Act.

32. To recap, the comments of Clarke C.J. in *Connelly v An Bord Pleanála* [2018] IESC 31; [2021] 2 I.R. 752 (at paragraphs 9.6 and 9.7 of the judgment) emphasised that it would be preferable *in all cases* if the Board made expressly clear whether it accepts all of the findings of an Inspector or, if not so doing, where and in what respect it differs and it would be better if the matter was put beyond inference and was expressly stated:

> "*Where the Board differs from its Inspector then there is clearly an obligation for the Board to set out the reasons for coming to that conclusion in sufficient detail to enable a person to know why the Board differed from the Inspector and also to assess whether there was any basis for suggesting that the Board's decision is thereby not sustainable*…".

33. This reflects the *enhanced obligation* on the Board by virtue of section 34 (10) (a) and (b) of the 2000 Act.

34. Immediately, after making these observations Clarke C.J. in *Connelly* refers to the particular facts of that case where it will be recalled that after receipt of the Inspector's report, a further process intervened between the Inspector's report and the decision of the Board where the Board sought to address the deficiencies raised in the Inspector's report by seeking Further Information in a notice issued pursuant to section 132 of the 2000 Act which led *inter alia* to the receipt of a Natura Impact Statement, and described as follows:

> "*(9.7) But where, as here, a further process intervenes between an Inspector's report and the final decision of the Board then it is obvious that that further process was designed to ascertain whether the concerns set out in the Inspector's report and accepted by the Board could be met by further information. In essence, the general reasons issue in this case comes down to one of assessing whether the Board has given adequate reasons for being satisfied that the initial concerns expressed in the Inspector's report, and which would appear to have found favour with the Board at least on a prima facie basis, had been adequately dealt with by the additional information, including the NIS supplied.*
>
> *(9.8) It seems to me, therefore, that the reasons for the Board's development consent decision in this case can, at a minimum, be found in the Inspector's report and the documents either expressly or*

by necessary implication referred to in it, the s. 132 notice and the further information and NIS subsequently supplied, as well as the final decision of the Board to grant permission including the conditions attached to that decision and the reasons given for the inclusion of the conditions concerned".

35. It was in that context, therefore, that it was indicated that it may be possible that the reasons for a decision may be derived in a variety of ways, including, for example, from a range of documents or from the context of the decision but this is always subject to the requirement that the reasons must actually be ascertainable and capable of being readily determined in order to ensure that any person affected by the decision can readily determine what the reasons are.

36. Consistent with the expressed preference that the Board make expressly clear - beyond preference - whether it accepts all of the findings of an Inspector or, if not so doing, where and in what respect it differs in *Murphy's Irish Seafood Ltd v Minister for Agriculture, Food and the Marine* [2017] IEHC 353, at para. 72, Baker J. observed that it "… *was not appropriate that reasons are to be gleaned from a series of correspondence over months and where there were concessions by both sides and attempts made to achieve a working arrangement between them*".

37. Consequently as stated earlier, as the Board's decision dated 19th May 2020 to refuse permission was different from the recommendation in the report of the Inspector, the Board was required (by virtue of section 34(10)(b) of the 2000 Act) to provide a statement under *paragraph (a)* (*i.e.*, section 34 (10)(a) of the 2000 Act) indicating the

main reasons for not accepting the recommendation in the report of the Inspector to grant permission.

38. In this regard, in *Clonres CLG v An Bord Pleanála* [2021] IEHC 303 this court (per Humphreys J. at paras. 99 and 100) identified two main reasons for this enhanced duty: first, if the Board is not accepting the Inspector's reasons, it has to come up with reasons of its own; second, the Board is expected to engage with the Inspector's rationale.

39. As the case-law set out above confirms, this enhanced statutory duty is a reflection of the pre-existing public law (administrative/common law) requirement to set out clear reasons why the Board disagrees with the Inspector, which necessarily requires an inquiry, in the first instance, as to what the Inspector recommended and why.

40. The rationale for and meaning of section 34(10)(a) and (b) of the 2000 Act having been set out, I will now address whether or not the Board's decision of 19th May 2020 (ABP-306464-20) refusing planning permission on lands located at Rinville West, Oranmore, County Galway met the aforesaid legal test.

ASSESSMENT & DECISION

The Board's decision dated 19th May 2020

41. The Board's decision and order in this case (ABP-306464-20) dated 19th May 2020 reflects its direction dated 11th May 2020 and in addition to referring to the relevant

Planning Authority, Galway County Council (and its Planning Register Reference Number: 19/1653), it recites as follows:

"***APPEAL*** *by Rachel Konisberry care of James O'Donnell of Planning Consultancy Services, Suite 3, Third Floor, Ross House, Victoria Place, Eyre Square, Galway against the decision made on the 17th day of December, 2019 by Galway County Council to refuse permission to the said Rachel Konisberry.*

Proposed Development *(1) Permission for part demolition of existing agricultural shed. (2) Retention and completion of remainder of agricultural shed. (3) Retention of existing access road. (4) Permission for widening of existing access road, together with additional landscaping and all associated site works, all at Rinville West, Oranmore, County Galway.*

Decision

REFUSE permission for the above proposed development in accordance with the reasons and considerations set out below.

Matters Considered

In making its decision, the Board had regard to those matters to which, by virtue of the Planning and Development Acts and Regulations made thereunder, it was required to have regard. Such

matters included any submissions and observations received by it in accordance with statutory provisions.

Reasons and Considerations

Having regard to the planning history of the subject site and its locational context, it is considered that the development for which retention is sought, which comprises a large shed to be used for agricultural storage and stables as a stand-alone building/facility on a relatively small landholding, by reason of its scale, mass and bulk and its location on elevated ground within a rural area of High Landscape Sensitivity, as set out in Class 3 of the Galway County Development Plan 2015 – 2021, would detract from the visual and residential amenities of the area, would interfere with the character of the landscape, contrary to objectives LCM-1 and LCM 2 of the Development Plan, and would set an undesirable precedent for similar future development in the area. The development for which retention is sought would, therefore, be contrary to the proper planning and sustainable development of the area.

In deciding not to accept the Inspector's recommendation to grant permission, the Board considered that the applicant's proposal did not overcome the Board's previous reason for refusal." (Emphasis added).

42. This decision of the Board is described on behalf of the Applicant as 'a compound decision' and 'a copy and paste' of the previous decisions of the Board. In response, the point is made on behalf of the Board, that if its views are the same – *i.e.*, if the reduced proposed development submitted, for example, in 2020, remains unacceptable to the Board – there is nothing wrong with the Board using the same formula of words which were previously used because, it is submitted, the Board was describing the planning effects of the development and not the development itself. However, the issue in this case poses two central questions: first, whether this decision of 11th May 2020 adequately demonstrates, in circumstances where the Board is not accepting the Inspector's recommendation, the Board's own reasons for not agreeing with the Inspector; second, the related question of whether the Board has engaged with the Inspector's rationale.

43. When the decision is broken down further, it can be seen that the Board refused the application in the following circumstances:

    a) the planning history of the subject site and its locational context;

    b) the (proposed retained) development comprised a large shed to be used for agricultural storage and stables as a stand-alone building/facility on a relatively small landholding;

    c) due to its scale, mass and bulk location on elevated ground within a rural area of High Landscape Sensitivity (as set out in Class 3 of the Galway County Development Plan 2015 – 2021), the development would: (i) detract from the visual and residential amenities of the area, (ii) interfere with the character of the landscape, contrary to objectives LCM-1 and LCM 2 of the Development

Plan, (iii) set an undesirable precedent for similar future development in the area; and

d) the (proposed retained) development would, therefore, be contrary to the proper planning and sustainable development of the area.

44. In summary, because of the scale, mass and bulk and location on elevated ground within a rural area of High Landscape Sensitivity, the Board decided that the proposed development would: (1) detract from the visual amenities of the area; (2) detract from the residential amenities of the area; (3) interfere with the character of the landscape; (4) be contrary to objectives LCM-1 and LCM 2 of the Development Plan; and, (5) would set an undesirable precedent for similar future development in the area.

45. After setting out these reasons and considerations, the Board's statement indicated that in deciding not to accept the Inspector's recommendation to grant permission, the Board considered that the applicant's proposal did not overcome the Board's previous reason for refusal.

46. These matters had been previously analysed by the Inspector, who considered that they could be addressed by a 'grant' of permission, subject to eight conditions. However, the Applicant (and the court) are at a loss to know why the Board has disagreed with the Inspector's analysis. Setting out the matters (referred to above) followed by a statement that "*the Board considered that the applicant's proposal did not overcome the Board's previous reason for refusal*" does not represent engagement, let alone meaningful engagement, with the basis for Inspector's

recommendation. It is, rather, a conclusion. The Board must at the very least state concisely *why* it disagrees with Ms. Maxwell's recommendation in her report dated 8th April 2020.

47. In circumstances where the refusal to grant permission was different from the recommendation in the report of the Inspector, the Board's decision dated 19th May 2020 does not comply with the requirement (pursuant to section 34(10)(b) of the 2000 Act) to provide a statement under *paragraph (a)* (*i.e.*, section 34 (10)(a) of the 2000 Act) to indicated the main reasons for not accepting the recommendation in the report of the Inspector to grant permission and nor does it comply with the pre-existing public law (administrative/common law) requirement to set out clear reasons why the Board disagrees with the Inspector.

48. When the Board disagrees with its inspector, there is an enhanced duty on it to set out *why* and to do so in a clear and meaningful way but as the following further assessment confirms, this requirement was not complied with in this case.

49. The '*recommendation*' of the Inspector, for example, in this case is set out in the report dated 8th April 2020 of Ms. Bríd Maxwell. The Inspector indicated that she had read the submissions on file, had visited the site, and had due regard to the provisions of the Development Plan and to other matters arising. The Inspector *recommended* that planning permission to retain and complete the development be granted subject to eight conditions. It is clear therefore that the conditions which Ms. Maxwell proposed were an important part of her reasoning or rationale. Typically, the format in which an

inspector sets out a recommendation copies the style of the Board's order and that was no different in this case, as is clear from the following:

"*7 Recommendation*

7(1) I have read the submissions on file, visited the site and had due regard to the provisions of the Development Plan and all other matters arising. I recommend that planning permission to retain and complete the development be granted subject to the following conditions.

Reasons and Considerations

Having regard to the nature and extent of the development to be retained and to the existing character and pattern of development in the vicinity, if is considered that, subject to detailed mitigation measures as outlined within the application and to compliance with the conditions set out below, the proposed development to be retained would not seriously injure the amenities of the area or of property in the vicinity and would therefore be in accordance with the proper planning and sustainable development of the area.

CONDITIONS

(1) The development shall be carried out and completed in accordance with the plans and particulars lodged with the application except as may otherwise be required in order to comply with the following conditions. Where such conditions require points of detail to be agreed with the planning authority, these matters shall be the subject of written agreement and shall

be implemented in accordance with the agreed particulars. Reason: In the interest of clarity.

(2) Demolition works shall be completed within three months of the date of permission. No additional buildings shall be erected on the site unless otherwise authorised by a prior grant of permission. Reason: In the interest of visual amenity.

(3) The roadside boundary shall be set back to provide for sight distances in accordance with submitted details. New roadside boundary shall consist of natural local stone and shall be completed within 6 months of the grant of permission. Reason: In the interest of traffic safety and in the interest of visual amenity.

(4) The stables shall be used only in strict accordance with a management schedule to be submitted to and agreed in writing with the planning authority, prior to commencement of development. The management schedule shall be in accordance with the European Communities (Good Agricultural Practice for Protection of Waters) Regulations, 2017 (SI No 605 of 2017), and shall provide at least for the following: (1) Details of the number and types of animals to be housed. (2) The arrangements for the collection, storage and disposal of slurry. (3) Arrangements for the cleansing of the buildings and structures.

Reason: In order to avoid pollution and to protect residential amenity.

(5) Slurry generated by the proposed development shall be disposed of by spreading on land, or by other means acceptable in writing to

the Planning Authority. The location, rate and time of spreading (including prohibited times for spreading) and the buffer zones to be applied shall be in accordance with the requirements of the European Communities (Good Agricultural Practice for the Protection of Waters) Regulations, 2017 (SI No 605 of 2017). Reason: To ensure the satisfactory disposal of waste material, in the interest of amenity, public health and to prevent pollution of water courses.

(6) *Water supply and drainage arrangements for the site, including the disposal of surface and soiled water, shall comply with the requirements of the planning authority for such works and services. In this regard- (a) uncontaminated surface water run-off shall be disposed of directly in a sealed system, and (b) all soiled waters, shall be directed to a storage tank. Drainage details shall be submitted to and agreed in writing with the planning authority, prior to commencement of development. Reason: In the interest of environmental protection, public health and to ensure a proper standard of development.*

(7) *All foul effluent and slurry generated by the proposed development and in the farmyard shall be conveyed through properly constructed channels to the storage facilities and no effluent or slurry shall discharge or be allowed to discharge to any stream, river or watercourse, or to the public road. Reason: In the interest of public health.*

(8) The landscaping of the development shall be completed in the first planting season following grant of permission. Reason: In the interest of visual and residential amenity."

50. In the circumstances of this case, where the Board rejected the recommendation and analysis of the Inspector, an enhanced requirement for meaningful engagement (as a matter of statute and administrative law) suggests that the Board should have set out *why* it differed with the recommendation of the Inspector in relation to her views on: (a) the visual amenities of the area; (b) the residential amenities of the area; (c) the character of the landscape; (d) objectives LCM-1 and LCM 2 of the Development Plan; and (e) the setting of an undesirable precedent for similar future development in the area.

51. In this regard, it is useful to consider how the first of these five factors - the issue of visual amenities of the area/visual impact - was treated by the Inspector and the Board.

Visual Amenities/Impact

52. At paragraph 6.3 of Ms. Maxwell's Report dated 8th April 2020, the Inspector records the following as representing the Board's reasoning for refusal on the question of, *inter alia*, "visual amenities" in its decision in ABP302880:

"*Having regard to the planning history of the subject site, and its locational context, it is considered that the development for which retention is sought, which comprises a large shed to be used for*

agricultural storage and stables as a stand-alone building/facility on a relatively small landholding, by reason of its scale, mass and bulk, and its location on elevated ground within a rural area of High Landscape Sensitivity (Class 3) in the Galway County Development Plan 2015 – 2021, would detract from the visual and residential amenities of the area, would interfere with the character of the landscape, contrary to objectives LCM-1 and LCM 2 of this Development Plan, and would set an undesirable precedent for similar future development in the area. The development for which retention is sought would, therefore, be contrary to the proper planning and sustainable development of the area."

53. At paragraph 6.4 of her report dated 8th April 2020, the Inspector then sets out how the Applicant in this case (the first party appellant) sought to address the decision of refusal based on visual amenities/impact:

"*The first party submits that in order to address the issue of scale, mass and bulk it is proposed to reduce the size of the structure by way of demolition of 67.77sq.m. This will involve a reduction in the length of the structure by approximately 5.5m. In addition, further landscaping and screen planting is proposed including the provision of native climbers along the walls of the building and additional planting along the raised berm in the vicinity of the building. I note that the application is accompanied by a visual impact assessment by James O'Donnell Planning Consultant which refers to Objective LCM1 Landscape Sensitivity Classification requiring Visual impact*

assessment and LCM 2 Landscape Sensitivity Ratings requiring that in areas of high landscape sensitivity the design and the choice of location of proposed development in the landscape are critical considerations. The assessment concludes that subject to implementation of the mitigation as outlined no adverse effect on the amenities of the area will arise and the development proposed for retention can be successfully assimilated at this location."

54. The Inspector then sets out her *assessment* of the Applicant's proposal (set out at paragraph 6.4 above) at paragraphs 6.5 of her report dated 8th April 2020 as follows:

"*Having considered the submitted material and having visited the site and reviewed the visibility of the existing structure from the surrounding area I am inclined to concur that the dark colour of the structure, location and elevation on the site and set back from the public road coupled with the comprehensive landscaping and mitigation measures as outlined will aid integration of the structure into the landscape. On the issue of the visual impact of the access road to the stables, I consider that its route which follows the contours of the site coupled with its rough cast finish and landscaping appropriately mitigates its visual impact. On balance I consider that the development proposed for retention and completion is acceptable in terms of its visual impact. As regards visual impact on the recorded monument GA0950131 which is 85m from the structure, I note the submitted archaeological assessment by Dominic Delany and Associates Archaeological Consultants which concludes that the*

development has not impacted on the recorded monument or its associated area of archaeological constraint or the visual amenity of the monument. I consider that the conclusion is reasonable."

55. It is against this context that the Recommendation of the Inspector has to be read. As mentioned earlier, at paragraph 7.1 (under the sub-heading 'Recommendation') of her Report dated 8th April 2020, the Inspector confirms that having read the submissions on file, visited the site and having had due regard to the provisions of the Development Plan and all other matters arising, she recommends that planning permission to retain and complete the development be granted subject to eight conditions. Some of the conditions relate specifically to 'visual impact.' Condition 2 provides, for example, that "… *demolition works shall be completed within three months of the date of permission. No additional buildings shall be erected on the site unless otherwise authorised by a prior grant of permission* …" and the reason given is "… *in the interest of visual amenity".* Condition 3 has a dual purpose and provides that "… *the roadside boundary shall be set back to provide for sight distances in accordance with submitted details. New roadside boundary shall consist of natural local stone and shall be completed within 6 months of the grant of permission* …" and the reason given is "… *in the interest of traffic safety and in the interest of visual amenity.*" Condition 8 provides that "… *the landscaping of the development shall be completed in the first planting season following grant of permission* …" and the reason given is "… *in the interest of visual and residential amenity.*"

56. The Inspector's report engages in a meaningful way with the response of the Applicant to the Board's initial refusal, based on visual impact/visual amenities grounds and articulates a clear rationale for its decision.

57. In contrast, when it comes to the Board's decision, it refused the application for the following reasons:

    - the planning history of the subject site and its locational context;
    - the (proposed retained) development comprised a large shed to be used for agricultural storage and stables as a stand-alone building/facility on a relatively small landholding;
    - due to its scale, mass and bulk location on elevated ground within a rural area of High Landscape Sensitivity (as set out in Class 3 of the Galway County Development Plan 2015 – 2021), the development would: (i) detract from the visual and residential amenities of the area, (ii) interfere with the character of the landscape, contrary to objectives LCM-1 and LCM 2 of the Development Plan;
    - set an undesirable precedent for similar future development in the area; and
    - the (proposed retained) development would, therefore, be contrary to the proper planning and sustainable development of the area.

58. As mentioned earlier in this judgment, the Board added that "… *in deciding not to accept the Inspector's recommendation to grant permission, the Board considered that the applicant's proposal did not overcome the Board's previous reason for refusal.*"

59. Again, taking the example of visual amenities/visual impact, the Board did not state why it disagreed with the Inspector's assessment that, on balance she considered that the development proposed for retention and completion was acceptable in terms of its *visual impact* for the following reasons:

    (a) the dark colour of the structure, location and elevation on the site and set back from the public road, coupled with the comprehensive landscaping and mitigation measures, *i.e.*, demolition, landscaping and planting (including screen planting), will aid integration of the structure into the landscape;

    (b) the route of the access road to the stables which follows the contours of the site, coupled with its rough cast finish and landscaping appropriately mitigates its visual impact;

    (c) the archaeological assessment concluded that the development has not impacted on the recorded monument or its associated area of archaeological constraint or the visual amenity of the recorded monument GA0950131, which is located 85 metres away from the structure.

60. Having regard to the applicable jurisprudence set out in the earlier part of this judgment, the Board has not, for example, set out (even in the most cursory manner) *why* it has taken a different view from the Inspector's assessment in relation to these matters.

61. Accordingly, the decision of the Board in this instance does not meet the *Connelly* requirement of first, enabling a person affected by the decision – in this instance Ms. Konisberry – understanding why the Board differed from the Inspector's rationale and, second, whether Ms. Konisberry had grounds for judicially reviewing the

decision. Third, notwithstanding the comprehensive submissions and hypothetical analogies posited by Mr. O'Connell SC (for the Board), it is not clear why the Board differed from its Inspector. In this regard, I do not think it is correct to characterise the Applicant's position as "*evidently*" knowing why the permission was refused but disagreeing with "*the merits*" of the Board's decision or that there was "*sufficient*" information to assess the 'pros and cons' of a judicial review application. This case is centred on reasons and within that subset, the reasons where the Board disagrees with its Inspector and is not, in the first instance, engaged in arguments about a merits-based approach, *O'Keeffe* irrationality or the expert judgment of the Board.

62. Further, having regard to the nature of the Board's decision, I do not think it is correct to describe the Applicant's central challenge to the Board's decision of 19th May 2020 as seeking to overextend or conflate algorithmic factors into aesthetic or planning judgment of fact and degree, or that the Applicant has failed to consider and recognise the context within which the Board made its decision. The Applicant's case is relatively straightforward: the Board had a duty to explain in a meaningful way why it disagreed with its Inspector's recommendation.

63. Equally, the Applicant has not sought to challenge the Board's decision in this case in a manner which is contrary to the decision of the High Court (Hedigan J.) in *West Wood v An Bord Pleanála* [2010] IEHC 16, where the court (at paragraph 59) stated that the law in this jurisdiction did not go as far as to impose a duty on the Board to cite what may be acceptable to an applicant in a future application in order to comply with its duty to give reasons. Rather, the Applicant's challenge was squarely based on the traditional rubric that the Board's decision should have explained why it differed

from the Inspector so as to enable Ms. Konisberry to: (i) assess whether she had reasonable chance of succeeding in judicially reviewing the decision; (ii) consider arming herself for such a review; (iii) consider whether the Board directed its mind adequately to the issues it had to consider; and (iv) assess whether sufficient information was furnished to enable a court to review the decision and was not an over-legalistic parsing of the decision of the Board.

64. The requirement of the Board to simply state *why* it disagreed with an Inspector's rationale does not in my view chime with the suggestion that it is appropriate to ask a person in the position of Ms. Konisberry to 'turn back' to previous reports, decisions and documentation in order to attempt to ascertain the Board's rationale for differing with the Inspector's recommendation. Further in this regard, the decision of 19th May 2020 failed to provide how such reasons would be ascertainable and capable of being readily determined in order to ensure that any person affected by the decision could readily determine what the reasons are.

65. Additionally, and while it would not seem to be an onerous task, there is no engagement by the Board as to why it differed with the Inspector's views in relation to the other matters including, for example, interference with the character of the landscape and setting an undesirable precedent for similar future development in the area, *etc*.. Further, one is left to simply speculate what the Board means when it refers to '*detracting from the residential amenities of the area*.'

66. As mentioned earlier, the statement that "*[i]n deciding not to accept the Inspector's recommendation to grant permission, the Board considered that the applicant's*

proposal did not overcome the Board's previous reason for refusal", is a formulaic conclusion and not a rationale. In the recitals prior to (and which presumably were intended to lead to) this conclusion (as set out above), there is no reasoning as to why the Board disagreed with the Inspector's recommendation.

67. The failure of the Board in this regard is further compounded by two related factors: first, it is common case between the parties that the following formula of words was a *repetition* of the previous decisions of the Board (and, in part, of the Planning Authority): "…*due to its scale, mass and bulk location on elevated ground within a rural area of High Landscape Sensitivity (as set out in Class 3 of the Galway County Development Plan 2015 – 2021), the development would: (i) detract from the visual and residential amenities of the area, (ii) interfere with the character of the landscape, contrary to objectives LCM-1 and LCM 2 of the Development Plan*"; second, (and related to this first point) the Board did not address the fact that Ms. Maxwell in her report, assessment and recommendation of 8th April, 2020 had engaged with the new proposal submitted by the Applicant which was redesigned, smaller, with screened and visually assimilated stables and shed.

68. One is left to speculate as to what the Board's rationale was in disagreeing with the recommendation in Ms. Maxwell's Report dated 8th April 2020. Indeed, it is not clear from the face of the decision whether the reference to not overcoming the Board's previous reason for refusal is a reference to the Board's 2017 or 2019 decision.

69. Accordingly, I find that the Board's decision of 19th May 2020 to refuse a grant of planning permission for a proposed development on lands located at Rinville West,

Oranmore, County Galway does not comply with the requirements of section 34(10)(a) and (b) of the 2000 Act, or with the requirement of established case law, to set out reasons why it differs from the recommendation to grant permission in the report dated 8th April 2020 of the Board's Planning Inspector, Ms Bríd Maxwell.

PROPOSED ORDER

70. I propose, therefore, to make an order of *certiorari* quashing the decision of An Bord Pleanála dated 19th May 2020 (ABP-306464-20) refusing permission for the proposed development on lands located at Rinville West, Oranmore, County Galway ("the lands") comprising *inter alia*: (1) permission for part demolition of existing agricultural shed; (2) retention and completion of remainder of agricultural shed; (3) retention of existing access road; and (4) permission for widening of existing access road, together with additional landscaping and all associated site works.

71. I will put the matter in before me at 10:30 on Wednesday 10th April 2024 to address any further ancillary or consequential matters which arise, including the question of costs.