APPROVED **THE HIGH COURT**

PLANNING & ENVIRONMENT

[2024] IEHC 261

Record No.2022/ 987 JR

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

PLANNING AND DEVELOPMENT (HOUSING) AND RESIDENTIAL TENANCIES ACT 2016

Between

KIMMAGE DUBLIN RESIDENTS ALLIANCE CLG

Applicant

and

AN BORD PLEANÁLA, IRELAND and the ATTORNEY GENERAL

Respondents

and

1 TERENURE LAND LIMITED, BEN DUNNE, DUBLIN CITY COUNCIL, SOUTH DUBLIN COUNTY COUNCIL

Notice Parties

JUDGMENT of Ms. Justice Emily Farrell delivered the 13th day of May 2024.

Introduction

1. An Bord Pleanála granted planning permission for a development comprising of 208 apartments and associated works at Carlisle, Kimmage Road West, Terenure, Dublin 12 (ABP-313043-22). The development comprises 104 one-bedroom apartments and 104 two-bedroom apartments. The Applicant challenged this grant of permission on ten core grounds, but Core Grounds 8 and 9 have been abandoned. The Board does not oppose the application for an order of *certiorari* on the basis of Core Ground 5 (as particularised in the Statement of Grounds). No concession is made in respect of the other grounds on which leave to apply for judicial review was granted.

2. The First Notice Party is the developer who has been granted this permission. The developer opposes the grant of *certiorari* on Core Ground 5, and on all grounds.

3. As the Supreme Court has clarified in *Ballyboden Tidy Towns Group v. An Bord Pleanála & Ors* [2024] IESC 4, a notice party is entitled to defend judicial review proceedings in which an order of the Board is challenged, despite a concession having been made by the Board. There is no requirement that the developer must meet a threshold in order to defend these proceedings. The onus remains on the Applicant to persuade the court that the Board's decision, which is presumed to be valid, ought to be quashed.

4. It is not in dispute that the Board granted permission in material contravention of the Development Plan in relation to height. Section 16.7 of the Dublin City Development Plan 2016 - 2022 provides that the maximum height permitted for a residential or commercial development in the area in which this site is situated is 16m. The proposed development comprises of five blocks, each of which exceeds 16m at their maximum, and three of which exceed 20m. Subsequent to the Development Plan being made, the Urban Development and Building Height Guidelines 2018 were made by the Minister for Housing, Planning and Local Government under section 28, Planning and Development Act 2000. Those Guidelines were in effect when the Board made the decision on this application.

5. The Board made an express finding that the grant of permission was made in material contravention of the Development Plan. The Board Order contains the following justification for granting permission in material contravention of the Development Plan:

> "• *With regard to section 37(2)(b)(i) Planning and Development Act 2000, as amended, the proposed development is in accordance with the definition of Strategic Housing Development, as set out in section 3 of the Planning and Development (Housing) and Residential Tenancies Act 2016, as amended, and delivers on the Government's policy to increase delivery of housing from its current under supply as set out in Rebuilding Ireland Action Plan for Housing and Homelessness issued in July 2016.*
>
> *• With regard to section 37(2)(b)(iii) Planning and Development Act 2000, as amended, the proposed development in terms of height is in accordance with*

national policy as set out in Project Ireland 2040 National Planning Framework, specifically National Policy Objective 13 and National Policy Objective 35, and is in compliance with the Urban Development and Building Height Guidelines for Planning Authorities, issued by the Department of Housing, Planning and Local Government in December 2018, in particular Specific Planning Policy Requirement 3. In addition, the unit mix and number of apartments per core is in compliance with the Sustainable Urban Housing: Design Standards for New Apartments, Guidelines for Planning Authorities issued by the Department of Housing, Planning and Local Government in December 2020, in particular Specific Planning Policy Requirement 1 and Specific Planning Policy Requirement 6."

6. The validity of the first of these paragraphs is impugned at Core Ground 7. No concession has been made in respect of Core Ground 7. The first paragraph benefits from the presumption of validity and the challenge based on Core Ground 7 does not require determination at this time. The specific justification for granting permission in material contravention of the Development Plan in respect of unit mix and the number of apartments per core is not impugned.

7. There are two elements to Core Ground 5 - that the Board erred in its interpretation and application of Section 3 of the Urban Development and Building Height Guidelines 2018 in respect of public transport capacity and that the Board failed to give adequate reasons in rejecting the submissions made identifying an absence of public transport capacity.

Material before the Board

8. An issue arose as to the entitlement of the developer to rely on information relating to the capacity of the buses in the Parking Provision Report, rather than within the Planning Report which includes the Material Contravention Statement and Statement of Consistency. Counsel for the Applicant submitted that it had not been relied upon by the developer as the justification for SPPR3 in the Planning Report.

9. I am satisfied that the Parking Provision Report was incorporated into the Planning Report by reference, and that the Board was entitled to take account of all of the information provided by the developer in deciding whether or not Section 3.2 of the Building Height Guidelines was complied with and if SPPR 3 applies. The Planning Report comprises nine chapters, Chapter 7

is the Statement of Consistency and Planning Policy Review and Chapter 8 is the Material Contravention Statement. The Parking Provision Report is referred to in the introductory chapter of the Planning Report, which states that "*the various specialist technical reports and drawings enclosed with this application should be relied upon as the primary source material*." While the stated purpose of the Parking Provision Report relates to parking provision rather than density and the application of the Building Height Guidelines, the Board was entitled to have regard to its contents in deciding whether Section 3.2 of the Building Height Guidelines had been complied with, and if SPPR3 applied. The frequency of the bus services close to the site is specified at para. 6.2 of the Parking Provision Report and is also included at page 5 of the Planning Report. The question of capacity of the bus routes serving the site was not addressed in the Parking Provision Report.

10. The Inspector did not refer to the contents of the Parking Provision Report in considering whether permission should be granted in material contravention of the Development Plan. However, for the reasons set out below, I do not consider that anything turns on this.

11. I accept the proposition that it is impossible for a developer to provide perfect information in relation to capacity of public transport which serves the site; in particular that a developer cannot specify the number of people who will seek to avail of public transport when a proposed development is completed. That the information which can be provided to the Board cannot be perfect was accepted by Holland J. in *Ballyboden v An Bord Pleanála I* [2022] IEHC 7. As Holland J. stated in *Mulloy v. An Bord Pleanála & Knockrabo Investments DAC* [2024] IEHC 86*:*

> *"Perhaps, the approach may be affected by the availability of research and data. But what is essential is practicality. I note, for example, that it is routine to estimate, in traffic analysis, the car trips likely to be generated by a development and that was done in the present case."*

12. The proposed development contains 208 apartments, of which 104 will be one-bedroom apartments and the remainder will have two bedrooms. The figure given by the developer for the expected number of residents of the development, which is referred to in the observations of the Applicant and others, is 416. The developer has estimated that 17% of the residents of the proposed development would be reliant on public transport, specifically buses. This estimate was generated by reference to the results of the most recent census regarding the

breakdown of modes of transport used by residents in the area. On that basis, it is anticipated by the developer that 71 residents will be reliant on public transport.

13. No issue has been taken by the Applicants, or by any other party before the Board, with the way in which the developer identified the likely number of residents who would be dependent on public transport, nor has the proportion of residents who are likely to use public transport been challenged. The Applicant's case is not that there was a flaw in the manner in which the developer assessed demand for public transport, but rather that there is a dearth of evidence as to the capacity of public transport.

14. In the Statement of Consistency, the site is described as being "*located within a well-established area, and which is within walking distance of a multitude of services, exceptional public transport options and very good local amenities*." It is stated that the site is well connected to "*excellent public transport services*" and close to "*high quality public transport*".

15. In the Material Contravention Report submitted by the developer, a table is provided to demonstrate "*the following compliances with the Development Management Criteria in the Guidelines*:" within the Material Contravention Statement. The first criterion at the scale of the town was completed as follows:

Development Management Criteria	**Justification for Material Contravention**
At the Scale of the Town	
The site is well served by public transport with high capacity, frequent service and good links to other modes of public transport.	The site is well connected with public transport services. High frequency bus routes which service this area are bus routes 9 and 17 along Kimmage Road West. Route 9 runs from Charlestown Shopping centre to Greenhills College, this route passes through DCU and the City Centre allowing easy access to these major locations. This runs c. every ten minutes. Bus Route 17 runs from Blackrock to Rialto which allows residents to access UCD and Dundrum Business Park which are education

	and employment hubs. This runs at a c. 20 minute frequency. Route 15A runs along Whitehall Road with a frequency of c. 15 minutes at peak times. This stop is within c. 250m of the site Route 54A runs along Kimmage Road Lower with a frequency of c.15 minutes and is c. 600m from the site. These bus routes connect the site to the surrounding areas and wider Dublin area. They have a high frequency occurrence.

16. In the table demonstrating compliance with the SPPRs, it is stated, in respect of SPPR1, "*The site is well connected to good public transport services. The site is served by seven bus routes, many of which are high frequency connecting the site to Dublin City Centre, Phibsborough, Trinity College, DCU, Grand Canal Dock and Tallaght. …*" On that basis, it was stated that the site represents an "intermediate urban location". For SPPR3 it is stated, "*The proposal is in accordance with the Development Management Criteria set out in the table above. This proposal is in accordance with the national and regional guidance as fully detailed in the Statement of Consistency that forms part of this planning report.*"

17. The information provided by the developer identifies the buses which pass the site and stop within reasonable walking distance together with details of their frequency. It is clear from the Parking Provision Report and the totality of the information provided to the Board that the site of the proposed development is served by multiple bus routes, that 10 buses per hour pass the site and that there are additional buses at peak time. The Planning Report expressed the considered opinion that the proposed development meets the criteria under Section 3.2 of the Building Height Guidelines and reiterates "*…it is well served by public transport*."

18. The word 'capacity' is not used in the Planning Report or the supporting documents (save when setting out the criterion which was required to be satisfied). No information is provided by the developer as to how full the buses are or are likely to be when they arrive at the site, nor is there any information which demonstrates whether or how the expected additional 71 persons

could be accommodated on the buses without displacing passengers who currently rely on those services.

19. In an exchange with the court, counsel for the developer accepted that there was no information before the Board as to how many other people are likely to be competing for the available seats on the buses. She stated that such information had not been provided to the Board because of the way in which the developer had approached the question of capacity. She distinguished capacity and occupancy and stated that the capacity was 850 i.e. "*the number of buses multiplied by the number of people that can... get on each bus .. As opposed to looking at the bare seats, shall we say, at that particular stop.*"

20. The absence of evidence relating to capacity of public transport serving the site was raised in the observations of the Applicant and others. The difference between frequency and capacity was highlighted by the Applicant, Marston Planning Consultancy and John O'Callaghan, each of whom referred to *Ballyboden I*. The Applicant submitted:

> "*this application includes no information on the existing capacity of bus networks, only makes comment on the frequency… In discussions with many local residents, it was made very clear that at rush-hour periods during the week the ability to get on a bus is not at all guaranteed as many buses are already full before reaching the bus stops on Kimmage Road West. The assessment in this application is incomplete and cannot be adequately reviewed [in that regard], requiring refusal or invalidation*."

21. Marston Planning Consultancy stated that buses were often at capacity when they arrived at the area in which the site is located and submitted that if public transport services were oversubscribed that would lead to an increased reliance on private cars. The adequacy of the proposed carparking provision was questioned by the planning authority. The Transportation Planning Division expressed "*some concerns in relation to the public transport provision available and its ability to provide sufficient mobility options to residents in light of the low car parking ratio*." In his Report, the Chief Executive did not recommend refusal of permission by reason of the height of the proposed development, or inadequacy of public transport services.

The Inspector's Report and Board Decision

22. The Inspector summarised the bus routes which serve the area at para. 2.4 of the Report. The frequency of each bus was set out. At para. 2.5, the Inspector set out the expected bus services under Bus Connects which had not yet commenced at that time. It is common case that future public transport services are not relevant to the assessment under Section 3.2 of the Building Height Guidelines, or SPPR3. The bus services which had not been commenced were not relied upon by the Inspector, or the Board.

23. The Inspector summarised the observations which had been made and noted that concerns had been expressed in relation to the height of the Development and the submission that "*Bus services are at/near capacity in the area*." The Inspector also summarised the Chief Executive's Report.

24. The Inspector found that "*public transport is available*" at paragraph 11.3.5 and 11.3.6 and concluded, in relation to the zoning of the site and nature of proposed development, that there was no reason to recommend refusal to the Board. It was acknowledged at paragraph 11.4.1 that height was one of the main issues raised by third party observations and by the elected members of South-East Area Committee. The Inspector set out, in tabular form, the criteria in Section 3.2 and stated how he considered they had been met. The response indicated does not replicate the terms of the Material Contravention Statement verbatim, but sets out the facts relied upon by the developer.

25. The Inspector stated:

Criteria	**Response**
The site is well served by public transport with high capacity, frequent service and good links to other modes of public transport.	Public transport is available in the form of Dublin Bus Routes 9, 15A and 54A, with bus stops less than 400 m from the site. Route 9 operates on an off-peak frequency of every 12 minutes, route 15A every 20 minutes and route 54A every 30 minutes. There are therefore approximately ten buses an hour within 400 m of the site. In addition, routes 83/83A provide a combined service every 12 minutes off peak from Stannaway Avenue. GoAhead routes 17/17D provides a service every 20 minutes connecting a range of locations in the south suburbs including Blackrock, UCD, Dundrum, Crumlin and Rialto.

26. At para. 11.4.7, the Inspector concluded that the table, including the extract set out herein, demonstrates that the development complies with Section 3.2. of the Urban Development and Building Height Guidelines and that the criteria were suitably incorporated into the development proposal. The Inspector considered that SPPR3 applied.

27. The issue of public transport and height was considered later under the heading Material Contravention. The Inspector found, at para. 11.4.11, that:

> "*The proposed development contravenes the Dublin City Development Plan in terms of exceeding the maximum permitted height for a development in an area designated as 'Low Rise', 'Outer City" location. I am satisfied that the proposed development demonstrates that it complies with the criteria set out in Section 3.2 of the 'Urban Development and Building Height' guidelines and recommend that the Board grant permission for the development having regard to SPR3 (sic), in addition to NPO 13 and 35 - which seek to improve urban areas through suitable regeneration and increased densities/height*."

28. In considering the issue of transportation, traffic and parking, the Inspector noted the concerns which had been expressed about the availability of public transport within close proximity to the site and the low carparking ratio in the area, which has a high rate of car ownership, at para. 11.9.7. The Inspector stated "*These comments are noted; however, I would not be as concerned about these issues… The nature of this development is such that it allows for a modal shift away from the car as the primary form of transport.…*". At para. 11.9.8 the Inspector stated: "*I have already commented on the existing bus services in the area and the combined frequency of 10 buses an hour off peak from either the Kimmage Road West or the Lower Kimmage Road. In addition, the 83/A offers an additional five buses an hour off peak from Stannaway Avenue and the 17 services provides orbital services through the south city area on a 20-minute frequency. The area is therefore well served by a high frequency of bus services and a consequent good capacity allowing for a conservative 85 passengers per bus. During peak times additional buses operate per hour*."

29. The Inspector concluded that the development was in an area with good public transport provision which is accessible within walking distance of the site. At paragraph 11.12.5, the

Inspector stated that the supporting documentation in relation to transport and car parking gives rise to no concern and that bus service provision is good in the area, in response to the concern which had been raised by the south-east area committee in relation to traffic and car parking.

30. The Inspector considered the development management criteria in Section 3.2 relating to, *inter alia*, proximity to high quality public transport services under the heading material contravention. The Inspector considered the proposed development to be of strategic and national importance, having regard to the definition of strategic housing development pursuant to section 3 of the Planning and Development (Housing) and Residential Tenancies Act 2016, as amended, and its potential to contribute to the achievement of Government policy to increase delivery of housing. Secondly, the Inspector considered that permission should be granted, having regard to guidelines under section 28 of the Act, specifically SPPR3 of the Building Height Guidelines and national policy in Project Ireland 2024 National Planning Framework, in particular objectives 13 and 35.

31. The last reference to public transport is at paragraph 11.14.28, in which the Inspector stated "*The site is located in an area with good public transport in terms of frequency and capacity*…"

32. The Board had regard to the Inspector's Report, and the Building Height Guidelines and decided to grant permission for the proposed development notwithstanding the material contravention of the Development Plan in respect of height. The reasons, which are set out at paragraph 5 above, follow the recommendations of the Inspector.

The Urban Development and Building Heights Guidelines 2018 - Section 3.2 & SPPR 3

33. The Board relied on the Urban Development and Building Heights Guidelines 2018, in particular SPPR3, as a justification for the grant of permission in material contravention of the Development Plan on grounds of height.

34. Section 3.1 of the Guidelines provides that it is Government policy that building heights must be generally increased in appropriate urban locations. There is a presumption in favour of buildings of increased height in our town/city cores and in other urban locations which have good public transport. Broad principles are set out in Section 3.1 and the means by which the Board applies Government policy is set out in Section 3.2, which provides that, where the

Board is satisfied that the criteria are appropriately incorporated into development proposals, it shall apply SPPR3.

35. SPPR3 provides:

> "*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 [in Section 3.2]; 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.*
>
> *...*"

36. If SPPR3 applies, it must be complied with: Section 28(1C) of the 2000 Act. This was confirmed by McDonald J. in *O'Neill v. An Bord Pleanála* [2020] IEHC 356 (para. 145).

37. There is no dispute between the parties as to how SPPR3 is engaged or how it applies; the question at issue relates to the way in which capacity of public transport was dealt with by the developer and the Board.

38. The application of the first criterion in Section 3.2 has been considered by the High Court in a number of recent cases: *O'Neill*, *Ballyboden I* [2022] IEHC 7, *Jennings v. An Bord Pleanála* [2023] IEHC 14, *Fernleigh v. an Bord Pleanála* [2023] IEHC 525, *Stapleton v. An Bord Pleanála* [2024] IEHC 3, *Ballyboden V* [2024] IEHC 66 and *Mulloy*.

39. As McDonald J. held in *O'Neill,* the application of SPPR3(A) is dependent on the developer demonstrating to the satisfaction of the Board that "*the site is well served by public transport with high capacity, frequent service and good links to other modes of public transport*". He found this to be "*an express requirement that must be fulfilled if the criteria set out in para. 3.2 of the Guidelines are to be satisfied*." This was followed in *Ballyboden I* and *Fernleigh*. The Board must consider that such criteria have been appropriately incorporated into the planning

application and concur that the proposed development complies with the criteria in Section 3.2, taking account of the wider strategic and national policy parameters set out in the National Planning Framework and the Guidelines. In *Mulloy v. v An Bord Pleanála*, Holland J. summarised the requirements of SPPR3 as follows:

"• *First, the planning applicant must set out how its proposal complies with the criteria.*

• *Second, the Board must "concur".*" (original emphasis)

40. It was held in *O'Neill*, and accepted by the developer in this case, that the developer, and the Board, may not rely on public transport which will subsequently come into operation, but that the site must be currently well served.

41. The issue of public transport capacity is an "*intensely practical – as opposed to theoretical - issue*": per Holland J. in *Ballyboden I.* He also found that capacity and frequency are distinct concepts, although capacity is related to frequency. As Holland J. held, "…. *the answer to the frequency question, while relevant, is not per se the answer to the capacity question*." He held that both frequency and capacity must be considered before the first criterion of Section 3.2 can be considered to apply. In *Ballyboden V,* Humphreys J. followed *Ballyboden I* and held that if the developer had not demonstrated the matters required by Section 3.2, the Board should simply have proceeded without asserting reliance on section 37(b)(iii) on the basis that the Guidelines had been complied with. The problem, he held, was that the developer had addressed frequency but not capacity.

42. The explanation for the need to consider both frequency and capacity is obvious – as Holland J. stated, in *Ballyboden I*:

> "93. … *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'Neill*, 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*."

43. This is the very complaint which has been made in a number of observations in this case – that a person at a bus stop near the site could not be confident of getting on the bus. Insofar as there was any information before the Board regarding the ability of the residents of the proposed development to travel by bus, it was to the effect that currently there was low capacity and that buses were often full when they arrive at the application site. It was accepted by the developer that there was no information before the Board as to how many other people are likely to be competing for the available seats on the buses. (see para. 19 above)

44. In *Jennings*, Holland J. added "*explicitly, that what is to be well-served is the Site as it would be developed pursuant to the Impugned Permission and so the concept of being well-served is relative to the public transport requirements of the Proposed Development.*" (para. 472).

45. The development in *Ballyboden I* was a significantly larger development (1440 units) than that in issue in this case. In *Ballyboden I*, the Inspector had found that access to frequent public transport was very low at the relevant location. The nature of the development in *Jennings* was also materially different to the development in issue. However, what is clear from the authorities is that the assessment of capacity is a practical not a theorical issue and that the nature of the development and projected needs of the residents are relevant.

46. I accept the argument advanced by the developer, relying on *Jennings*, that there is no bright line rule as to the type of assessment required in every case. The Building Height Guidelines do not specify a particular type of assessment which must be carried out to determine capacity.

As I have found (at para. 11), it is not possible to provide perfect information as to the number of additional passengers arising from a proposed development nor is it possible to identify when and where they are likely to travel. What is required is a practical assessment of the current capacity of public transport in light of the additional demand expected to be created by the proposed development. In *Mulloy*¸ Holland J. found, and I agree, that it is not for the courts to prescribe how the practical question should be approached "*But what is essential is practicality.*"

47. In *Jennings*, Holland J. accepted the argument made by the Board, as do I, that the conclusion of the Inspector must be viewed in the context of the profile of the intended occupants of the proposed development and the profile of their transport needs. In this case, the developer has estimated that 17% of the anticipated 416 residents, 71 persons, will be dependent on public transport, which figures are not disputed. Unlike *Jennings*, it is not possible to predict where those residents are likely to be travelling to, or the time of day. In *Jennings*, the proposed development was student accommodation, which was within a short walk, or very short cycle, of UCD; it was expected most of the residents would be students in UCD. The site was close to two bus routes and 1.3km from the Luas. The projection of 9 persons seeking to use public transport at rush hour in that case was not disputed. It was in that context that the conclusions of the Inspector were viewed, and upheld.

48. As in *Ballyboden I*, the evidence which was before the Board in this case was lists of bus routes which serve the site and their frequency. The list of bus services in this case also appears impressive. However, I agree with the following statement by Holland J.:

> "*I think I can take 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 Note 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*." (para. 97)

49. Similarly, in *Fernleigh* Holland J. held:

> "*214. It will be seen that this requirement of public transport has three elements: frequency, high capacity and quality of service. All three are required. Service is a function not merely of supply – frequency and capacity – but of demand. That demand emanates from both the Site and from the other sources of demand for the service – in the case of the Luas, from the general catchment of the station serving the Site and from up and down the Luas line. As to service, what is required is that the Site be "well-served". That at least, in substance, requires that the service be adequate to meet the demand to be generated by the Site for the particular transport system being considered (in this case the Luas), having regard, inter alia to the effect on availability of service of the other demands on that transport system. It may be that these phenomena cannot be precisely measured but that does not mean that they may not be informatively and usefully estimated or may be ignored. The same can be said of the adequacy and performance of roads yet surveys and reports on such matters are routine. In that regard I refer to a question I posed at trial - whether in the planning process anyone had looked empirically at the question whether the practical capacity of the Luas at is now such that it will well serve the Proposed Development. Or whether at rush hour, as the objectors said (I might as well have added reference to DLRCC's concerns), it is already full of people from further out the line and the future residents of the Proposed Development aren't going to get on because it will be full by the time it gets to Glencairn Luas stop. Counsel for the Board, properly, replied that there was no evidence of that exercise having occurred.*"

50. In *Fernleigh*, satisfying compliance with Section 3.2, in relation to the adequacy of capacity of public transport, was dependent on the Luas. The site was close to two Luas stops. As Holland J. noted, at para. 242, the central plank of the Board's case in *Fernleigh* was that mere proximity of the site to the Luas *ipso facto* satisfied the Section 3.2 criterion, as the Luas is a high capacity, high frequency service. He held that even if the Board could rely on the definition of the Luas as a high-capacity, high frequency service, "*the Board would have to go further and argue, which it did not, that the high-capacity of the Luas thus formally defined, will be in substance available to the expected demand from the site… Such as to render the site, in particular, "well-served""*. In this case, the developer relies on the theoretical capacity of the various bus routes, without any information suggesting that the residents of this site would be able to avail of that bus service.

51. As in the *Fernleigh* and *Ballyboden I* cases, I am not in a position to assess the capacity of the bus services, or to decide whether the reality is as stated in the observations. However, on the basis of the information which the developer put before the Board, it cannot be said that the developer has demonstrated that the site is currently served by high-capacity public transport, which is necessary in order to engage SPPR3. Reliance on the theoretical capacity of the buses of 850, with more at peak times, goes no further to demonstrate capacity, than reliance on the NTA description of the Luas as a high-capacity service did in *Fernleigh*. It was conceded by the developer, that no information had been provided as to how many other people were likely to be competing for seats on the buses. The question whether the site is, as a matter of fact, "*well served*" by the bus routes has not been answered – it is not possible to know the extent to which the capacity of 850 passengers (more at rush hour) is in fact available in a practical sense to the expected 71 passengers from the proposed development.

52. I do not consider *Fernleigh* to be distinguishable on the grounds that the planning authority had recommended refusal of the application on grounds of lack of capacity. This is a matter which must be demonstrated by the developer. As in *Fernleigh*, there was a failure to engage with the assertion of practical as opposed to theoretical capacity problems with the public transport relied upon. It has effectively been conceded by the developer that it relies on theoretical capacity rather than actual capacity to serve the site in question.

53. The developer accepts that, applying the *Worldport* principles, it is not open to me not to follow *O'Neill v. An Bord Pleanála* [2020] IEHC 356, *Ballyboden I* [2022] IEHC 7, *Jennings v. An Bord Pleanála* [2023] IEHC 14, *Fernleigh v. an Bord Pleanála* [2023] IEHC 525, *Stapleton v. An Bord Pleanála* [2024] I EHC 3, *Ballyboden V* [2024] IEHC 66 and *Mulloy v An Bord Pleanála* [2024] IEHC 86.

54. The developer did not demonstrate that the site was well served by high capacity public transport. Accordingly, the Board could not reasonably concur with the assertion that the site was well served by public transport with high capacity. Accordingly, the Board was not entitled to rely on SPPR3 of the Building Height Guidelines to justify the grant of permission in material contravention of the maximum height permitted by Section 16.7 of the Development Plan.

Adequacy of reasons for rejection of submission regarding lack of capacity

55. The developer contends that this element of Core Ground 5 is inadequately pleaded. On a "*fair and reasonable reading*" of the Statement of Grounds (per. Haughton J. in *People Over Wind v. An Bord Pleanála (No. 1)* [2015] IEHC 271 and Simons J. in *The Board of Management of St. Audeon's National School v. An Bord Pleanála* [2021] IEHC 453), I am satisfied that the argument advanced by the Applicant in relation to the adequacy of reasons given by the Board was contained in the Statement of Grounds, in particular at Core Ground 5 and paras. E 41 and 45. I do not consider that the obligation in Order 84 Rule 20 of the Rules of the Superior Courts to provide particulars of a ground relied upon required the Applicant to identify the specific documents in which the issue of public transport capacity had been raised before the Board – the issue of capacity was clearly raised in a number of observations, as the Inspector noted. The Respondent and Notice Party had sufficient notice of the ground relied upon, and the facts or matters relied upon, to enable them to respond to the Statement of Grounds and defend the claim advanced by the Applicant.

56. The Inspector had identified building height as one of the main issues of concern raised in the observations; frequency and capacity of public transport were matters which were required to be demonstrated by the developer and considered by the Board before it could invoke SPPR3 to justify the grant permission in material contravention of the Development Plan in relation to height.

57. In *Fernleigh*, Holland J. found that capacity was a main issue for the Board as it was a criterion for application of SPPR3 in justifying material contravention of the Development Plan. He also found that it was a main issue as the inadequacy of public transport to serve the site was an explicit basis of Dun Laoghaire Rathdown County Council's recommendation that permission be refused. I am satisfied that capacity was a main issue in this case as it is a criterion which is required to be satisfied under Section 3.2 and as the question whether the developer had demonstrated compliance had directly been put in issue by a number of observers.

58. While the assertion was made by the developer that the site was well served by public transport and that compliance with Section 3.2 of the Building Height Guidelines had been demonstrated,

the developer provided no evidence or information relating to the capacity of the buses serving the site.

59. As the developer submits, the Inspector considered the submissions received which indicated that public transport was at /near capacity, but the Inspector did not accept that the bus services were oversubscribed. At para. 11.4.7 the Inspector stated that the table at para. 11.4.4 demonstrated that the development complied with the criteria in section 3.2. In the section of the report identifying the response to the criterion relating to public transport, the bus routes which served the site and frequency thereof were specified; no information was included in relation to capacity.

60. The Inspector noted the concerns which had been raised in relation to availability, or capacity, of public transport in the context of transportation traffic and parking and stated that he did not share those concerns (para. 11.9.7). At para. 11.9.8 the Inspector referred to the number of buses serving the site and stated that "*The area is therefore well served by a high frequency of bus services and a consequent good capacity allowing for a conservative 85 passengers per bus. During peak times additional buses operate per hour*." (see also para. 28 above)

61. Para. 11.9.8. is the only portion of the Inspector's Report which provides any explanation whatsoever for finding that there was "*good capacity*" on public transport. No finding is made in relation to capacity in the parts of the Report relating to Development Height or Material Contravention.

62. Whilst frequency is clearly relevant to capacity, they are two distinct issues – it is entirely possible that, despite good frequency, there may be insufficient capacity of public transport service in a particular area by reason of the passengers who already use that service.

63. In its written submissions, the Applicant states that "*the only* actual *evidence as to capacity is that contained in submissions to the effect that bus services are at capacity*". The information and evidence before the Inspector did not include any evidence of the capacity of the buses which serve the site, generally, nor was there any evidence of spare capacity. The Applicant has not challenged the Inspector's reliance on 85 seats per bus although there was no such evidence before the Board, nor was there any evidence to contradict the various submissions which questioned the availability of capacity on the bus routes.

64. The developer was required to demonstrate, and the Board was required to concur, that "*The site is well served by public transport with high capacity, frequent service and good links to other modes of public transport*" in order that SPPR3 would apply. As has been accepted by the developer, the observations made by the Applicant and other parties had clearly put the issue of public transportation in issue. The observations contended that there was insufficient capacity within the public transport system to absorb the residents of the proposed development who are anticipated will use public transport (estimated by the developer to be 71 persons) and this was raised in the context of the application of Section 3.2 of the Building Height Guidelines and SPPR3. The observations included complaints that buses are operating above capacity, many buses are already full before they reach the bus stops on Kimmage Road West, that inadequate capacity exists to cater for the development and that it is currently difficult to get onto a bus on these routes. The public are not required or expected to deploy expertise in their submissions to the Board.

65. No reasons were given by the Board for rejecting those submissions or for finding that the developer had demonstrated compliance with Section 3.2, in particular that the site was "*well served by public transport with high capacity*".

66. The developer points to paras. 11.9.7 and 11.9.8 as providing the reasons for the rejection of the third-party submissions regarding capacity. I do not consider that paras. 11.9.7 and 11.9.8 provide reasons for rejecting the submissions made by the Applicant and others regarding public transport capacity and the application of SPPR3.

67. The Inspector is entitled to prepare the Report as he considers appropriate, and to cross-refer to other paragraphs or sections when dealing with specific issues. However, I note that paras.11.9.7 and 11.9.8 did not purport to consider whether SPPR3 applied, nor were they incorporated into the Development Height or Material Contravention sections within the Report or the findings in relation thereto.

68. None of the evidence before the Board contradicted the observations made on this issue. In oral submissions, it was conceded by the developer that the only information as to how full the buses were was that contained in the observations. The Board was not entitled to conclude that there was high capacity solely from the evidence of frequency and the potential capacity of an

empty bus, in light of the concerns raised by the observers and the Planning Authority in relation to capacity. I note that the Chief Executive did not recommend refusal of permission.

69. In *Fernleigh Residents v An Bord Pleanála* [2023] IEHC 525, Holland J. held:

> "*274. Had no issue been raised in that regard, it may have been that the Board could have relied the general high capacity of the Luas to ground an inference that its high capacity will well-serve this Site. I need not decide that question as the issue was raised. It is the relevance of that general high capacity which restrains me, just about on balance, from finding there was no relevant material before the Board. But once the issue was raised not merely by members of the public but by DLRCC (after all, the statutory planning authority for the area) and not least by its elected members in a report to the Board having statutory status – the Board was obliged to engage with the issue and with those submissions, to base its rejection of them in materials before it and to give clear and cogent reasons for its decision. It did not do so. Its decision will be quashed accordingly.*

70. The developer is correct in its submission that the Board was not obliged to provide a detailed treatise of each of the issues raised in the observations. However, the Board was required to provide reasons for its decision, and to provide the main reasons and considerations on which its decision was made: section 10(3)(a), of the 2016 Act. As Humphreys J. found in *Balscadden Road Residents Association v. An Bord Pleanála* [2020] IEHC 586, broad reasons must be provided regarding the main issues.

71. It is necessary that the reasons given are adequate to enable an interested party to know why the Board made its decision, including to know why submissions on a main issue were not accepted. The Supreme Court confirmed in *Sherwin v. An Bord Pleanála* [2024] IESC 13 that the correct approach to a review of the reasons provided in a decision of the Board remains that set out in *Connelly v. An Bord Pleanála* [2018] IESC 31.

72. O'Donnell J. (as he then was) held in *Balz v. An Bord Pleanála* [2019] IESC 90, [2020] 1 ILRM 367

> " *57. ... 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."

73. I agree with the following *dictum* of Holland J. in *Stapleton v Bord Pleanála* [2024] IEHC 3:

"*If the acceptance of one and the rejection of the other is unreasoned it is unacceptable. If it is reasoned, all that is required is that the reasons be briefly stated – which, given the reasoning which has, ex hypothesi, occurred, should not ordinarily be too burdensome."*

74. I find that the Board has failed to provide adequate reasons for rejecting the submissions made to the effect that the public transport system has insufficient capacity to absorb the additional passengers which are anticipated will be generated by the proposed development. For this reason also, I consider that the Board's reliance on SPPR3 as a justification of the grant of permission in material contravention of the height limit in the Development Plan is invalid.

Severance

75. Neither the Board nor the developer included a plea that the decision of the Board could withstand a finding that Core Ground 5 was made out. While the Applicant opposes that argument, it has not raised a pleading point in this respect. The developer contends that if Core Ground 5 succeeds, the justification for granting permission in material contravention of the height requirement in the Development Plan by reference to SPPR3 can be severed. The Applicant submits that it cannot be severed, and that the entire permission should be quashed.

76. Where one, or more, of the reasons for a decision is invalid, the entire decision is not necessarily invalidated thereby. This is clear from the authorities including the recent judgment in *Ironborn Real Estate Limited v. Dun Laoghaire Rathdown County Council* [2023] IEHC 477 and *Murtagh v. An Bord Pleanála* [2023] IEHC 345. As Owens J. held in *Murtagh*:

"*where some of the reasons for a decision are invalid and a decisive standalone valid reason given by the decision-maker produces the same result, then that result does not depend on any invalid reason. The valid reason for the decision remains valid and disposes of the matter*." (para. 77).

77. In considering whether severance is possible, the significance of the Development Plan must be borne in mind. This is clear from *Ballyboden I* and *Fernleigh.*

78. In *Ballyboden I*, Holland J. held:

> "*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.*"

79. Having found that the Board was not entitled to rely on SPPR3, it is necessary to decide whether the Board's decision is supported by other reasons.

80. The Board's decision stated that "*the grant of permission in material contravention of the Dublin City Development Plan 2016-2022 would be justified for the following reasons and considerations*". Reasons or considerations are specified at two bullet points. The first such reason is challenged at Core Ground 7, which issue has not been argued and does not yet arise for consideration. Therefore, the presumption of validity applies in relation to that reason, and I consider it as valid, as I must.

81. The reason or justification which I have found to be invalid is within the second bullet point, which states:

> *"With regard to section 37(2)(b)(iii) Planning and Development Act 2000, as amended, the proposed development in terms of height is in accordance with national policy as set out in Project Ireland 2040 National Planning Framework, specifically National*

Policy Objective 13 and National Policy Objective 35, and is in compliance with the Urban Development and Building Height Guidelines for Planning Authorities, issued by the Department of Housing, Planning and Local Government in December 2018, in particular Specific Planning Policy Requirement 3."

82. Counsel for the developer submitted that as the National Policy Objectives and Ministerial Guidelines are referred to separately in section 37(2)(b), and that NPO 35 is not referred to in the Building Height Guidelines, they should be considered separately and that the Board decision should be regarded as having provided two separate reasons in this paragraph.

83. NPO 13 provides:

'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.'

84. NPO 35: "*To increase residential density in settlements through a range of measures including restrictions in vacancy, re-use of existing buildings, infill development schemes, area or site-based regeneration and increased building heights*."

85. Neither NPO 35 nor NPO 13 set out the criteria or circumstances in which increased height is permissible or desirable, although they refer to certain types of areas.

86. The Building Height Guidelines were expressly made by the Minister for Housing, Planning and Local Government to give effect to Government Policy as set out in the National Planning Framework and to put key National Policy Objectives into practice.

87. At para. 1.1, it is stated that the Guidelines "*intended to set out national planning policy guidelines and building heights in relation to urban areas, as defined by the census, building from the strategic policy framework set out in Project Ireland 2040 and the National Planning Framework*."

88. At para.1.6, the Guidelines state:

> *"these guidelines outline wider and strategic policy considerations and a more performance criteria driven approach that planning authorities should apply alongside their statutory development plans in securing the strategic outcomes of the National Planning Framework.*"

89. The Guidelines are stated to "*Expand on the requirements of the National Planning Framework*" and to apply those requirements "*in setting out relevant planning criteria for considering increased building height in various locations but principally (a) urban and city-centre locations and (b) suburban and wider town locations*."

90. The National Planning Framework is considered in general terms in the Guidelines. Whilst the developer correctly notes that NPO 35 is not expressly referred to in the Building Height Guidelines, NPO 13 is identified as a one of the "*directly relevant national policy objectives that articulate developing on a compact urban growth programme*." NPO 35 is expressed in very general terms. The Guidelines provide for the "performance criteria" which are referred to in NPO 13.

91. The Guidelines provide:

> "*1.19 Meeting the scale of the challenge set out in NPO 13 above requires new approaches to urban planning and development and securing an effective mix of uses.*
>
> *…*
>
> *1.20 A key objective of the NPF is therefore to see that greatly increased levels of residential development in our urban centres and significant increases in the building heights and overall density of development is not only facilitated but actively sought out and brought forward by our planning processes and particularly so at local authority and An Bord Pleanála levels.*
>
> *1.21 Increasing prevailing building heights therefore has a critical role to play in addressing the delivery of more compact growth in our urban areas, particularly our cities and large towns through enhancing both the scale and density of development and our planning process must actively address how this objective will be secured.*"

92. SPRR3 provides:

> "*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.*
>
> …" (emphasis added)

93. Section 37(2)(b) empowers the Board to grant permission in material contravention of a development plan only

> "*where it considers that—*
>
> *(i) the proposed development is of strategic or national importance,*
>
> *(ii) there are conflicting objectives in the development plan or the objectives are not clearly stated, insofar as the proposed development is concerned, or*
>
> *(iii) permission for the proposed development should be granted having regard to regional spatial and economic strategy for the area, guidelines under section 28, policy directives under section 29, the statutory obligations of any local authority in the area, and any relevant policy of the Government, the Minister or any Minister of the Government, or*
>
> *(iv) permission for the proposed development should be granted having regard to the pattern of development, and permissions granted, in the area since the making of the development plan.*"

94. Having considered the Building Height Guidelines and Project Ireland 2024 National Planning Framework, in particular NPO 13 and NPO 35, together with the terms of the Board's Direction and Order, I am satisfied that it is not possible to conclude that the Board's specific justification

for granting permission in material contravention of the height requirement in the Development Plan can withstand the severance of the invalid reason. The Building Height Guidelines were made to give effect to the National Planning Framework and in particular NPO 13. As appears from Section 3.1 and 3.2 of the Building Height Guidelines, the purpose of SPPR3 is to give effect to Government policy that building heights must be generally increased in appropriate urban locations. This gives effect to NPO 35 which provides that it is an objective to "*increase residential density in settlements through a range of measures including … increased building heights.*"

95. Therefore, I find that the reason for justifying the material contravention based on SPPR3, which I have found to be invalid, is intermingled with the reason or consideration regarding the Project Ireland 2024 National Planning Framework, in particular NPO 13 and NPO 35. I do not consider that it can be severed from the Board's reliance on the National Planning Framework, in particular NPO 13 and NPO 35.

96. The first reason given by the Board for justifying the material contraventions in relation to height, unit mix and number of apartments at the core of each block, is:

> "• *With regard to section 37(2)(b)(i) Planning and Development Act 2000, as amended, the proposed development is in accordance with the definition of Strategic Housing Development, as set out in section 3 of the Planning and Development (Housing) and Residential Tenancies Act 2016, as amended, and delivers on the Government's policy to increase delivery of housing from its current under supply as set out in Rebuilding Ireland Action Plan for Housing and Homelessness issued in July 2016.*"

97. As stated above, this reason is regarded as valid and is unchallenged for the purposes of this judgment. I am satisfied that *on its own*, it is insufficient to justify the grant of permission in material contravention of the Development Plan. The reason given is entirely generic; no site specific, or development specific factors were considered.

98. Had the Oireachtas intended that permission could be granted in material contravention of the Development Plan for *every* strategic housing development, no doubt the 2016 Act would have contained such a provision. Section 9(6) of the 2016 Act provides that the Board may grant permission for a proposed strategic housing development in material contravention of a Development Plan except in relation to zoning. Section 9(6)(c) restricts that power to cases

where the Board considers that if section 37(2)(b) of the 2000 Act were to apply, it would grant permission for the proposed development. Section 37(2)(b)(i) provides for the grant of permission where the Board considers that "*the proposed development is of strategic or national importance"*. If the Board could grant permission which materially contravenes a Development Plan simply on the grounds that the application is a "*strategic housing development*", which, by definition, includes every housing development of 100 or more houses on appropriately zoned land and which necessarily increases the delivery of housing, section 9(6)(c) would be otiose. There is a presumption against superfluous statutory provisions: *Cork County Council v. Whillock* [1993] 1 IR 231.

99. Such an interpretation is not compatible with the significance of a Development Plan within the statutory scheme as highlighted by the material contravention requirements of both the 2000 and 2016 Acts, and by the Ministerial Guidelines, including SPPR3 of the Building Height Guidelines. As McCarthy J. held in *Attorney General (McGarry) v. Sligo County Council* [1991] 1 IR 99, 113, a development plan "*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 …*". The Oireachtas placed development plans at the centre of planning law and practice and has restricted the circumstances in which permission may be granted in material contravention of such plans.

100. I am not satisfied that the Board intended the first justification to be a "*decisive standalone*" reason for granting permission in material contravention of the Development Plan in relation to height. In this regard, I rely on the wording of the Board's Order and the fact that the Board carried out a development specific assessment in relation to the material contravention in relation to height and unit mix and number of apartments per core, at bullet point two. Had the Board intended the reason given at bullet point one to be a standalone ground, the development specific assessment would have been entirely unnecessary. I do not accept that the Board carried out such an assessment despite intending it to be unnecessary. By reason of the importance of the development plan at the heart of the planning process, I am satisfied that the Board did not intend bullet point one to support the grant permission in material contravention of the height limits in the Development Plan, as that reason was did not involve consideration of any development or site specific factors.

101. In this case, the Board has decided not to oppose the grant of *certiorari* by reason of the issues raised in Core Ground 5. It follows therefrom that the Board does not contend that its reliance on SPPR3, as a reason for justifying the grant of permission in material contravention of the Development Plan, was not a peripheral and insignificant matter. As Donnelly J. held in *Ballyboden v. An Bord Pleanála* [2024] IESC 4, where the Board concedes a ground on the basis of its view of the law, the Board's view on the law amounts to no more than a legal opinion and may not be admissible. However, she stated:

> "*Where the Board concedes on a matter of fact and not of law, considerable weight will be accorded to that concession, provided, of course, that the "fact" is properly placed in evidence before the court. A notice party may have an uphill, or perhaps an almost impossible battle, in attempting to dispute such a fact; particularly if the fact relates to an internal matter within the Board's decision-making procedure of which a notice party would be unaware. The High Court would of course be careful to ensure proceedings are not unduly drawn out where the concession appears wholly correct but the position remains that the notice party has an entitlement to contest even where the decision-maker concedes. That entitlement is based upon the fundamental principle that it is for the court to make the proper assessment of the validity of the impugned decision*."

102. It appears to me that the fact that the Board has not contended that the justification by reference to SPPR3 is not severable, is not uniquely a question of law as that question depends on whether there is intermingling of reasons or whether the invalid reason can be regarded as peripheral and insignificant in the Board's reasoning, and discernibly discrete. In *Fernleigh*, Holland J. stated, "*what matters is that, whatever its reason, the Board did not argue that its decision under s.37(2)(b)(iv) should save the Impugned Permission from any infirmity of its invocation of s.37(2)(b)(iii).*" The Board's concession reinforces, but did not influence, my view that the invalid reason is not severable.

Conclusion and Order

103. I find that the reason given by the Board for justifying the grant of permission in material contravention of the Development Plan, which provides for a maximum height of 16m at the site of the proposed development, is invalid. I do not consider that it is possible to sever that reason from the Board's decision.

104. Therefore, I shall grant an order of *certiorari* quashing the Board decision to grant permission to the developer for the construction of 208 apartments and associated works at Carlisle, Kimmage Road West, Terenure, Dublin 12 (ABP-313043-22).