[2024] IEHC 335

THE HIGH COURT
PLANNING & ENVIRONMENT

[H.JR.2021.0001110]

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

BETWEEN

SAVE ROSCAM PENINSULA CLG, SOPHIE CACCIAGUIDI-FAHY, MARTIN FAHY AND PHILIP HARKIN

APPLICANTS

AND

AN BORD PLEANÁLA, GALWAY CITY COUNCIL, THE MINISTER FOR HOUSING, LOCAL GOVERNMENT AND HERITAGE, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

BML DUFFY PROPERTY LIMITED (BY ORDER)

NOTICE PARTY

(No. 6)

JUDGMENT of Humphreys J. delivered on Friday the 7th day of June, 2024

1. Judicial review is a mechanism for scrutiny of the legality, as opposed to the merits or correctness, of a decision. The primary question in this challenge to the lawfulness of a planning permission granted by the board is whether the applicants' planning-related concerns have been adequately translated into valid grounds for *certiorari*, or whether, leaving aside unpleaded points and arguments based on factual misunderstandings or false premises, such concerns constitute merits-based complaints that fall outside the remit of the judicial branch of government.

Judgment history

2. In *Save Roscam v. An Bord Pleanála (No. 1)* [2022] IEHC 202, [2022] 4 JIC 0809, I decided certain issues on costs protection adversely to the applicants and also decided to refer certain related issues to the CJEU.

3. In *Save Roscam v. An Bord Pleanála* (*No. 2*) [2022] IEHC 328, [2022] 6 JIC 0903, I granted leave to appeal on the costs issue.

4. In *Save Roscam v. An Bord Pleanála* (*No. 3*) [2022] IEHC 425, [2022] 7 JIC 1402 I made certain directions in relation to the reference to the CJEU.

5. In *Save Roscam v. An Bord Pleanála* (*No. 4*) [2022] IEHC 426, [2022] 7 JIC 1403, I made the formal order for reference to the CJEU. That reference was subsequently withdrawn following clarification of domestic law on costs by the Supreme Court.

6. In *Save Roscam v. An Bord Pleanála* (*No. 5*) [2024] IEHC 156, [2024] 3 JIC 2501 I allowed a further amendment to the statement of grounds.

7. I now deal with Module I of the substantive challenge.

Geographical context

8. The development is proposed for a semi-rural area lying between existing settlements. It occurs in a largely rural environment not far from the coast to the south, and about 850m from the edge of Roscam village to the east (with Oranmore beyond that), 1.2 km from Murrough (which is in effect a suburb of Galway City since there is a continuously built-up settlement from there to the centre) to the west, and perhaps a similar distance to the built up area around Merlin Park Hospital to the north. There is a small recent residential enclave (Ross Alta) to the north.

9. The north-east corner of the development site is in or near: https://www.google.com/maps/@53.2724439,-8.9828965,3a,75y,240.76h,88.36t/data=!3m7!1e1!3m5!1srN0bMtdA-oPLhXQFlYIzmg!2e0!6shttps:%2F%2Fstreetviewpixels-pa.googleapis.com%2Fv1%2Fthumbnail%3Fpanoid%3DrN0bMtdA-oPLhXQFlYIzmg%26cb_client%3Dmaps_sv.tactile.gps%26w%3D203%26h%3D100%26yaw%3D4.102387%26pitch%3D0%26thumbfov%3D100!7i16384!8i8192?coh=205409&entry=ttu (this image is equivalent to the one included at p. 187 of the Macroworks report submitted by the developer).

10. The built up part of Roscam lies to the south of the Oranmore to Galway road (the N67, or "new" Dublin Road), and north of the coast road, beyond which, to the south, is Galway Bay.

11. To the west of Roscam village is the "old" Dublin Road (R338 – referred to seemingly inaccurately in the statement of grounds as the L5037) which passes Merlin Park University Hospital. To the south of that is the Dublin to Galway railway line, and the development site is to the immediate south of that again.

12. The applicants challenge the validity of a permission to build 102 residential units (houses and apartments) on a former pitch and putt course. The inspector sets out the geographical context at para. 2.1.1 of her report along the lines mentioned above and continues:

> "Rosshill Park Woods, a public woodland amenity, is also situated to the north of the railway line (with entrance and car parking area opposite the new housing development). The SHD site is physically separated from the residential suburbs to the north-east and west by the woodland and the railway. The wider area south of the railway line in the Roscam peninsula, is characterised by grazing farmland and detached one-off housing."

13. At para. 2.1.2 onwards she adds:

> "2.1.2. The proposed development is bounded to the north by the Rosshill Road and the Galway-Dublin Rail Line. The Rosshill Road passes under the railway line north of the site. The eastern boundary of the site is formed by a rural road, which meets Rosshill Road at a T-junction at the northeast corner of the site. Rosshill Road connects to the Old Dublin Road/R338 approx. 800 metres to the north of the site. There is a footpath connection to the Old Dublin Road/R338 north of the railway line. There are retail and community facilities along the Dublin Road and in neighbourhood centres at Roscam and Murrough. The Old Dublin Road/R338 travelling west, connects to Galway City Centre and travelling east connects to the N67/N6 Ring Road around Galway. There is a bus lane along the Dublin Road.
>
> 2.1.3. The site, with a stated area of 4.7 hectares, is a greenfield site with a mixture of hedgerows and stone walls along the boundaries and a number of mature and semimature trees within the site. The site is part of a larger greenfield landholding of approx. 10 hectares that was formally used as a par 3 golf course. The landholding extends to the west and south of the site. The holding is in use as grazing land at present and there are a number of detached rural dwellings beyond this to the south, south-east and south-west. Lands to the south and east are zoned Low Density Residential, with lands proximate to the coast zoned Agriculture/High Amenity.
>
> 2.1.4. There are no watercourses on site. There are no ecological or environmental designations on site. There is an old farmstead in ruins immediately south of the site that encroaches slightly (modern silage concrete apron) into the site. Levels generally fall gently west across the site, however, there is a hill in the western section of the site that slopes steeply to the west.
>
> 2.1.5. The western boundary of the landholding is 136 metres (approx.) from the designated area of the Galway Bay Complex SAC (000268) and 260 metres (approx.) from the designated area of the Inner Galway Bay SPA (004031). The Galway Bay Complex pNHA covers the same area of the SPA and SAC proximate to the site. There is a folly set within an octagonal walled enclosure 100 metres (approx.) to the south of the site. The folly is a Recorded Monument and Protected Structure (RMP No. GA094-070/RPS 8803). The Rosshill Railway Bridge to the north of the site is also a protected structure (RPS 8806, NIAH 30409423)."

Facts

14. The zoning of the lands in question appear to have been agricultural up to at the latest 2005. From then onwards they were low density residential (LDR).

15. The Sustainable Residential Development in Urban Areas Guidelines were adopted in 2009 (https://www.gov.ie/en/publication/a8c85-sustainable-residential-developments-in-urban-areas-guidelines-for-planning-authorities-may-09/) as statutory guidance under s. 28 of the 2000 Act. They were replaced in 2024 but the 2009 version was in force at the relevant time.

16. The 2011 development plan retained the LDR designation.

17. The Design Manual for Urban Roads and Streets (DMURS) was published in 2013 (https://www.gov.ie/en/publication/3360b1-design-manual-for-urban-roads-and-streets/). This is non-statutory guidance, which is incorrectly described by the inspector as a guideline under s. 28 of the 2000 Act, although nothing was pleaded in relation to that error.

18. The Galway City Development Plan 2017-2023 continued the low density residential zoning at the site.

19. The National Planning Framework, Project Ireland 2040, was published in February 2018 (https://www.npf.ie/project-ireland-2040-national-planning-framework/).

20. The Urban Development and Building Height Guidelines for Local Authorities were adopted in 2018 (https://www.gov.ie/en/publication/93d22-urban-development-and-building-height-guidelines-ud-bhg-2018/). These are statutory guidelines under s. 28 of the 2000 Act.

21. The Regional Spatial and Economic Strategy for the North West 2020-2032 contains a strategic plan for the Galway Metropolitan Area, which does not envisage higher density housing on the site.

22. The notice party developer applied for permission for the present development and submitted plans and particulars on 9th July, 2021.
23. Galway County Council submitted an opinion on 9th September 2021 recommending refusal of the application. This did not include views of elected members.
24. The board's inspector recommended the grant of permission. Her report references the submissions made and the following provisions of national, regional and local policy:

> "6.1.1. Project Ireland 2040 - National Planning Framework
> …
> 6.1.2. Section 28 Ministerial Guidelines
> The following list of Section 28 Ministerial Guidelines are considered to be of relevance to the proposed development. Specific policies and objectives are referenced within the assessment where appropriate.
> • Sustainable Residential Development in Urban Areas, Guidelines for Planning Authorities (2009) and the accompanying Urban Design Manual: A Best Practice Guide (2009)
> • Sustainable Urban Housing, Design Standards for New Apartments, Guidelines for Planning Authorities (2020)
> • Urban Development and Building Height Guidelines for Planning Authorities (December, 2018)
> • Design Manual for Urban Roads and Streets (December 2013)
> • Architectural Heritage Protection – Guidelines for Planning Authorities (2011)
> • Childcare Facilities – Guidelines for Planning Authorities 2001 and Circular PL3/2016 – Childcare facilities operating under the Early Childhood Care and Education (ECCE) Scheme.
> • The Planning System and Flood Risk Management (including the associated Technical Appendices) (2009)
> 6.1.3. Regional Spatial & Economic Strategy for the Northern & Western Regional Assembly (RSES) (2020)
> …
> 6.1.4. Galway City Development Plan 2017-2023"

25. As noted above, the DMURS manual is not in fact a s. 28 guideline although listed as such by the inspector.
26. The board concluded that a grant of permission would not materially contravene the development plan in relation to zoning but would contravene the plan in relation to plot ratio/ density. The board decided that this contravention could be justified.
27. An appropriate assessment was conducted by the board which concluded that the relevant European sites would not be adversely affected. An environmental impact assessment was conducted which concluded that adverse effects could be mitigated.
28. Permission was granted with 33 conditions on 28th October 2021.

Procedural history

29. The applicants filed a statement of grounds challenging the board's decision on 17th December 2021.
30. Liberty to file an amended statement of grounds was granted on 20th December, 2021.
31. The amended statement of grounds was filed on 21st December, 2021. Certain grounds were subsequently adjourned generally.
32. A dispute about costs protection then broke out. That problem took some time to resolve as reflected in the judgments referred to above.
33. In the meantime a new development plan was adopted in 2023 which preserved the low density provision for this area albeit with a change in the zoning nomenclature. At p. 279 at table 11.1, two residential zonings were provided for, R (residential) and R2 (sensitive residential infill), with the existing plot ratio preserved for the Roscam lands at p. 292 within an R2 zoning.
34. Following the resolution of the costs issue, all relevant papers were exchanged and a hearing date was fixed.
35. Subsequent to that direction, the applicants brought a motion seeking to amend the amended statement of grounds. This motion was heard on 12th March 2024.
36. As noted above, I granted liberty to file an amended statement of grounds in certain respects and refused liberty to do so in others.
37. The second amended statement of grounds was filed on 5th April 2024.
38. Written submissions were then delivered by the parties, and the matter was listed for hearing commencing on 29th May 2024. On 30th May 2024, an order was made updating the formal name of the notice party. The hearing concluded on 31st May 2024, when judgment was reserved.

Relief sought

39. The reliefs sought in the second amended statement of grounds are as follows:

> "D. Reliefs
> The Applicant seeks the following Orders:

1. An Order of Certiorari pursuant to Order 84 of the Rules of the Superior Courts 1986 as amended and Section 50 of the Planning and Development Act 2000 as amended quashing the decision of the First Respondent, An Bord Pleanála (the Board), dated 28 October 2021, file reference 310797, authorising a proposed strategic housing development involving demolition of existing silage concrete apron, construction of 102 residential units (35 apartments, 67 houses), creche and associated site works at Rosshill, Galway.
2. An Order of Certiorari pursuant to Order 84 of the Rules of the Superior Courts 1986 as amended quashing the Urban Development and Building Height Guidelines for Planning Authorities 2020, or Specific Planning Policy Requirement 4 thereof as invalid, ultra vires and / or unconstitutional.
3. An Order of Certiorari pursuant to Order 84 of the Rules of the Superior Courts (or, if appropriate, pursuant to Section 50 of the Planning and Development Act 2000) quashing the decision of Galway City Council as roads authority to issue a letter dated 7 July 2021 authorising the Developer, Alber Developments Ltd, to apply for permission in respect of development on or beneath a section of the L5037 Old Dublin Road, Galway.
4. Such declaration(s) of the legal rights and/or legal position of the applicant and (if and insofar as legally permissible and appropriate) persons similarly situated and/or of the legal duties and/or legal position of the Respondents as the court considers appropriate.
5. If necessary, an extension of time to seek leave to apply for the above relief in respect of the letter of Galway City Council dated 7 July 2021.
6. A declaration that the Urban Development and Building Height Guidelines for Planning Authorities 2020, or Specific Planning Policy Requirement 4 thereof are invalid, ultra vires and / or unconstitutional, or are contrary to European Union law and should be set aside.
7. A declaration that Specific Planning Policy Requirement 4 of the Urban Development and Building Height Guidelines 2020, the Urban Development and Building Height Guidelines 2020 as a whole, Section 28(1C) and 37 of the 2000 Act, and Section 9(3) of the 2016 Act, and all or any of them are contrary to Article 3 of Directive 2001/42 and should be set aside.
8. A declaration that Section 28 and / or Section 28(1C) of the Planning and Development Act 2000 are unconstitutional and contrary to Article 15.2 of the Constitution.
9. A declaration that the Planning and Development (Housing) and Residential Tenancies Act 2016 is contrary to Article 40.1 and 40.3 of the Constitution and invalid, or are contrary to European Union law and should be set aside.
10. A stay pursuant to Order 84 Rule 20(8)(b) of the Rules of the Superior Courts on all development by Alber Developments Ltd, its assigns, servants and agents, on lands at Rosshill, Galway, pending conclusion of the present proceedings.
11. A Declaratory Order pursuant to Section 7 of the Environment (Miscellaneous Provisions) Act 2011 as amended, Order 99 of the Rules of the Superior Courts as amended, the inherent jurisdiction of the Court, Article 47 of the Charter on Fundamental Rights of the European Union, Articles 4(3) and 19(1) of the Treaty on European Union, and / or Article 9 of the Convention on Access to Information, Public Participation In Decision-Making and Access to Justice In Environmental Matters done at Aarhus, Denmark, on 25 June 1998 (the Aarhus Convention), confirming that Section 50B of the Planning and Development Act 2000 as amended and / or Sections 3 and 4 of the Environment (Miscellaneous Provisions) Act 2011 apply to the Grounds set out at Part E hereof.
12. A Declaratory Order pursuant to Section 7 of the Environment (Miscellaneous Provisions) Act 2011 as amended, Order 99 of the Rules of the Superior Courts as amended, and/or pursuant to the inherent jurisdiction of the Court, that, if and insofar as the Applicants may not be entitled to an Order in the terms of the preceding paragraph, or an Order to equivalent effect, the State has failed adequately to guarantee and defend the Applicants' right to bring proceedings at a cost that is not prohibitively expensive, has failed to ensure the Applicants' right to effective judicial protection, and / or has failed to ensure reasonable predictability in relation to the costs of proceedings, and has accordingly failed to comply with the requirements of Article 47 of the Charter on Fundamental Rights of the European Union, Articles 4(3) and 19(1) of the Treaty on European Union, and / or Article 9 of the Aarhus Convention.
13. A Declaratory Order pursuant to Order 84 Rule 18(2) of the rules of the Superior Courts as amended and Article 4(3) of the Treaty on European Union, that the Minister, Ireland and the Attorney General, and / or the Board, are required by law to pay to the Applicants on the conclusion of the present proceedings, the amount of any costs which the Applicants may be ordered to pay to the other Respondents or Notice Parties, or so much of such sum as may be necessary to ensure that the costs borne by the Applicants in the proceedings are not prohibitively expensive for it.

14. An order referring a question or questions of law for determination by the Court of Justice of the European Union.
15. If necessary, an extension of time to apply for leave to seek judicial review of the decision of the Board, pursuant to Section 50(8) of the 2000 Act.
16. Further or other relief.
17. Costs."

Grounds of challenge

40. The core grounds of challenge are as follows:

"E1
Core Grounds
Questions of National Law Relating to the Environment
1. The Decision is invalid because the Board had no jurisdiction to grant permission in respect of a development that materially contravened the development plan in relation to zoning, and it infringed S9(6)(b) (2016 Act) and S10(2)(a) (2000 Act) in purporting to so do.
2. The Decision is invalid because the Board granted permission in material contravention of the Development Plan for the purposes of S9(6) (2016 Act) without first directing itself correctly as to the meaning of that Plan as required by S9(2).
3. The Decision is invalid because the Board failed to have any or any proper regard to relevant guidelines and policy as required by S9(2) (2016 Act) and S28 (2000 Act) before deciding to grant permission for a material contravention of the Development Plan pursuant to S9(6) (2016 Act) and S37(2) (2000 Act).
4. The Decision is invalid because the Board failed to have any or any proper regard to the National Planning Framework as required by S9(2) (2016 Act) and S143 (2000 Act) before deciding to grant permission.
5. The Decision is invalid because it is not open to the Board to grant permission in material contravention of the Development Plan for the purposes of S9(6) (2016 Act) and S37(2)(b)(iii) (2000 Act) where the Development Plan is already compliant with relevant Guidelines and Government Policy.
6. Even were the Board to be correct in the above, it would still be in error in finding that the Height Guidelines warrant a grant of permission in circumstances where the predominant part of the Proposed Development would involve a 2-storey, cul-de-sac dominated approach contrary to paragraph 3.7 of those Guidelines.
7. The Decision is invalid because the Board's Inspector failed to report adequately on the submissions made, or to make recommendations in relation to them, contrary to S146 (2000 Act) as applied by S17 (2016 Act).
8. The Decision is invalid because it imposes conditions relating to road works which the Developer cannot comply with and which are unenforceable against it, contrary to Section 9(4) of the 2016 Act.
9. The Application is invalid because the Developer has no interest in a part of the site, the lands comprising the L5037 Old Dublin Road, and the Council in whose charge that road is has no power to authorise the Developer carry out works on it, or to apply for permission to do so. The purported consent issued by Council to the Developer to apply for permission in respect of road construction works on or beneath that road is ultra vires the Council and invalid.
10. The Application is invalid because the Developer has no interest in a part of the site, the lands beneath the L5037 Old Dublin Road, and the Council in whose charge that road is has no power to authorise the Developer carry out works beneath that road or apply for permission to do so. Any consent to apply for permission to carry out such works is ultra [vires] the Council and invalid.
Questions of European Law Relating to the Environment
11. The Decision is invalid because the Board failed to carry out an EIA in accordance with the requirements of S171A and 172 (2000 Act) as applied by S20 (2016 Act), and failed to comply with A8a and A1(2)(g), 2(1), 3(1) and 5 (EIA Directive), or with S9(1) and 10(3) (2016 Act), in relation to effects on groundwater, protected sites, bats, birds, significance, alternatives, and monitoring.
12. The Decision is invalid because there are gaps or lacunae in the Appropriate Assessment, contrary to Sections 177V and 177R (and, insofar as relevant Sections 177S, 177T and 177U) (2000 Act) as applied by S23 (2016 Act), and contrary to A6(3) (Habitats Directive).
13. The Decision is invalid because the material contravention of the Development Plan which it authorises constitutes a modification of the framework for development consent established by the Plan for which a Strategic Environmental Assessment is required by Article

3 of the Strategic Environmental Assessment Directive (2001/42), or alternatively a determination that such modification is of a minor nature and that an assessment is not required.

14. The Decision is invalid because the 2016 Act is contrary to Article 9 of the Aarhus Convention because it is not fair and equitable; and contrary to Article 20 of the Charter on Fundamental Rights of the European Union because it fails to ensure equality before the law in relation to the exercise of procedural rights of participation in relation to matters covered by the EIA Directive and the Habitats Directive.

15. The Board erred in law in the manner set out in the Grounds above, in failing to exercise its powers and duties under the 2000 and 2016 Acts in accordance with the requirements of the EIA Directive, Habitats Directive and Strategic Environmental Assessment Directive where the provisions of Section 5 of the Interpretation Act 2005 require that those Acts be so interpreted.

Questions of Validity of National Laws having regard to the Constitution

16. The Impugned Decision is invalid because the Board erred in law in applying SPPR4 of the Height Guidelines in circumstances where those Guidelines, and SPPR4 in particular, adopted under S28 (2000 Act) and applied by S9(3) (2016 Act), are ultra vires the Minister, invalid, and unconstitutional, in that they usurp the function of the Council to determine in the Development Plan what is proper planning and sustainable development of the area, and substitute the policy of the Minister, contrary to Article 15.2.2 of the Constitution.

17. If and insofar as the Minister may be authorised by S28(2000 Act) to adopt such Guidelines, S28 in general and S28(1C) in particular are invalid and contrary to A15.2 of the Constitution because they delegate the law making power of the State to the Minister.

18. The Impugned Decision is invalid because it is adopted pursuant to the 2016 Act which is itself invalid and contrary to A40.1 and 40.3 of the Constitution because it fails to ensure equality before the law. The 2016 Act is also contrary to A9 of the Aarhus Convention because it is not fair and equitable; and contrary to A20 of the Charter on Fundamental Rights of the European Union because it fails to ensure equality before the law in relation to the exercise of procedural rights of participation in relation to matters covered by the EIA Directive and the Habitats Directive."

Grounds not pursued

41. Correspondence from the applicants' solicitor, dated 21st February 2022 stated:

"[W]e…confirm [that the applicants] are no longer proceeding with Grounds 8, 9.1 and 10, however [we] confirm that we are proceeding with Grounds 9.2 and 9.3"

42. The applicants' submissions clarify what is currently live as follows:

"Ground 7, Inadequate Report

89. Ground 7 is withdrawn.

Grounds 8 and 10, Roads

90. Grounds 8 and 10 have previously been withdrawn. ...

Withdrawn Grounds

185. Grounds 11.4, 11.5, 11.6, 11.7 and 11.8 are withdrawn.

186. Grounds 12, Habitats, is withdrawn in full.

187. Ground 13, Strategic Environmental Assessment, has been rejected in other proceedings and is withdrawn.

188. Grounds 14, 16, 17 and 18 have been adjourned to a separate module."

43. The applicants' written submissions make no reference to ground 15 which in any event is not in fact an independent ground of challenge but rather a gloss on ground 11.

44. Furthermore the applicants' written submissions contain the following:

"61. Ground 3.4, integration of housing with transportation infrastructure under the Regional Spatial and Economic Strategy (RSES) for the North West and the Metropolitan Area Strategic Plan (MASP) for Galway is withdrawn."

45. The applicants subsequently attempted to revive this point in the statement of case, but that is not an acceptable or appropriate procedure.

46. Accordingly we are currently concerned with core grounds:

(i) 1 and 2;
(ii) 3 (insofar as concerns sub-grounds 3.1 to 3.3);
(iii) 4 to 6;
(iv) 9 (insofar as concerns sub-grounds 9.2 and 9.3) (the foregoing being domestic law points); and
(v) 11 (insofar as concerns sub-grounds 11.1 to 11.3) (EU law).

Domestic law issues

47. We can begin with the domestic law grounds. No doubt to keep the court on the alert, these are presented in what the board describes as a "non-linear" manner on the papers, in a sequence

that varies in three versions as between the applicants' pleadings, the applicants' submissions and the statement of case. Indeed in the latter document, the re-programming moves from the non-linear to the virtually stochastic, with the added bonus of an attempt to reintroduce a point previously withdrawn.

48. I can also note that, sub-optimally, the core grounds bear only a limited relationship to the sub-grounds, which in many cases raise separate and distinct points not encompassed even broadly within the heading represented by the core grounds. Thus in a number of instances it will be necessary to address the sub-grounds in detail.

Pleading requirements

49. As discussed in similar terms elsewhere, the rules of pleading are clear and unambiguous. In particular:

(i) applicants are confined to their pleadings: *A.P. v. Director of Public Prosecutions* [2011] IESC 2, [2011] 1 I.R. 729, [2011] 2 I.L.R.M. 100, [2011] 1 JIC 2501 (Murray C.J., Denham J.), *Casey v. Minister for Housing, Planning and Local Government & Ors.* [2021] IESC 42, [2021] 7 JIC 1606 (Baker J.) at §§29 and 31;

(ii) pleading requirements in judicial review are "stringent", allowing "little room for manoeuvre": *People Over Wind & Another v. An Bord Pleanála & Ors (No. 1)* [2015] IEHC 271, [2015] 5 JIC 0106 (Haughton J.);

(iii) "It shall not be sufficient for an applicant to give as any of his grounds for the purposes of paragraphs (ii) or (iii) of sub-rule (2)(a) an assertion in general terms of the ground concerned, but the applicant should state precisely each such ground, giving particulars where appropriate, and identify in respect of each ground the facts or matters relied upon as supporting that ground": Order 84 r. 20(3) RSC;

(iv) it is particularly important, in the case of an allegation of a failure properly to transpose an obligation under EU law, that the requirements of O. 84, r. 20(3) be observed, *Sweetman v. An Bord Pleanála* [2020] IEHC 39, [2020] 1 JIC 3104 (Sweetman XV), *per* McDonald J. at para 103, *Rushe v. An Bord Pleanála* [2020] IEHC 122, [2020] 3 JIC 0502 *per* Barniville J.; attempts to launch for example non-transposition claims not set out on the pleadings are impermissible: *Alen-Buckley v. An Bord Pleanála* [2017] IEHC 311, [2017] 5 JIC 1211 (Costello J.);

(v) "if on the Grounds pleaded there is genuine 'doubt, ambiguity or confusion' an Applicant in Judicial Review cannot have the benefit of it", *per* Holland J. in *Ballyboden Tidy Towns Group v. An Bord Pleanála, The Minister for Housing, Local Government and Heritage, Ireland and the Attorney General* [2022] IEHC 7, [2022] 1 JIC 1001 at para. 308;

(vi) the rules of pleading are well-established, clear and mandatory, and are of particular importance in a context of special complexity such as technical EU-heavy areas of planning law; while exact specification of every jot and tittle of a case is an impossible standard, an applicant can only be permitted to advance at a hearing a point that is acceptably clear from the express terms of the statement of grounds, subject to the grant of any order allowing an amendment: *Reid v. An Bord Pleanála (No. 7)* [2024] IEHC 27, [2024]1 JIC 2401; and

(vii) a court only decides points that are not academic, and that are properly pleaded and actually in dispute between the parties, and even then only when it is necessary and appropriate to do so: *Friends of the Irish Environment v. Government of Ireland* [2023] IEHC 562, [2023] 10 JIC 1904 at §117.

Sub-ground 1.1 – breach of a zoning provision

50. Core ground 1 is:

"1. The Decision is invalid because the Board had no jurisdiction to grant permission in respect of a development that materially contravened the development plan in relation to zoning, and it infringed S9(6)(b) (2016 Act) and S10(2)(a) (2000 Act) in purporting to so do."

51. Sub-ground 1.1 is:

"1.1. The Board erroneously considered that the zoning of the land relates simply to its zoning for a particular purpose, residential development, rather than to its zoning for a particular purpose *where and to such extent as the proper planning and sustainable development of the area, in the opinion of the Council, so requires*."

52. The parties' positions as recorded in the statement of case are summarised as follows:

"Ground 1

62. Ground 1 is that the Board lacked jurisdiction to determine the application, because the Proposed Development would contravene the Development Plan in relation to zoning. This seeks to reverse the decision in O'Donnell on the basis of a point apparently not made: that the controlling issue is the issue of use; zoning means zoning an area for a particular

bundle of uses; and those uses can be defined as the local authority wishes to define them. Hence, if the local authority defines low density and high density residential development as different uses, they are different uses, just as much as light industry and heavy industry may be defined as different uses (so that for instance an integrated circuit fabrication plant might be an acceptable use where a steelworks or knackery might not.)

63. Board's Position on Ground 1. The Board's Decision is not invalid as alleged. This ground of challenge is based on an erroneous premise. Merely because something is described as a zoning objective by a particular council in a particular Development Plan (in this case, the application site is subject to the 'Low Density Residential' (LDR) zoning objective in the Development Plan) does not make it a zoning objective as a matter of interpretation of the 2000 Act. The subject lands are zoned for residential use in the Development Plan. The Board (see e.g., page 8 of the Board Order) and its Inspector (see e.g., §11.1.1 of the Inspector's Report) correctly considered that the proposed development does not materially contravene the Development Plan in relation to zoning. The inclusion of a provision concerning the density of housing, as has occurred with the LDR zoning objective here, does not relate to a distinction between different types of development and so is not a zoning objective. A density provision such as the one at issue here does not distinguish between particular types of development permitted and thus does not relate to the purposes for which the land can be used in the sense of the 2000 Act. It is not a zoning provision. The Applicants' submissions accept that if the Court's judgment in O'Donnell v. An Bord Pleanála [2023] IEHC 381 at §61 to §81 is followed, it means that this ground of challenge fails. Faced with that difficulty, the Applicants contend that this recent judgment is incorrect and should not be followed. The Applicants' position in that regard is unusual and without merit. The Applicants have not articulated a Worldport [2005] IEHC 189 basis on which this Court should depart from the judgment in O'Donnell. There is nothing in the case law cited by the Applicants in this regard that in any way articulates a basis for this Court declining to follow O'Donnell. The fundamental flaw in the Applicants' submissions on this point is that nowhere do the Applicants actually explain, by reference to relevant case law or otherwise, how or in what manner the High Court in O'Donnell was incorrect in stating that a provision in a development plan regarding density is a regulation of a matter of detail in relation to the types of permitted development involved, but does not relate to a distinction between different types of development, and is therefore not a zoning objective. At its height, the Applicants ask this Court to depart from O'Donnell based on an irrelevant point that itself is based on irrelevant case law (in the sense that said case law does not address the issue at hand and (on a correct reading) does not underpin or support the Applicants position at all or contain any basis for departure by this Court from the judgment in O'Donnell). The Applicants' submissions (§115) say the Court in O'Donnell 'slipped into error in several respects' and then proceeded to identify no errors. The Board submits that O'Donnell binds the Court – in circumstances where it is a recent decision of the High Court which is not in 'clear error', where there is no basis for suggesting it was not based upon a review of significant relevant authority, and where there are no 'substantial reasons' for believing that the judgment was wrong. The factors, as outlined by Holland J. in Ballyboden Tidy Towns Group [2023] IEHC 722 at §210-§211, in declining to depart from O'Donnell apply equally to the part of the judgment that the Applicants ask the Court to depart from here.

64. The Notice Party argues that the point at issue in this Core Ground has already been fully dealt with in the O'Donnell case, which considered the law on the issue what constituted a zoning objective, as opposed to a regulation of detail. The findings in that case are fatal to the arguments of the Applicants unless the Court decided to reverse itself.

65. Moreover, no adequate Worldport argument has been made out by the Applicants in that the Court in O'Donnell did in fact review the relevant case law, the decision contained no clear error and there are no substantial reasons which would tend to suggest that the case was wrongly decided."

53. The problem with the applicants' argument is that a plan provision in relation to density is not a provision in relation to zoning: *O'Donnell v. Bord Pleanala & Ors*, [2023] IEHC 381, [2023] 7 JIC 0501.

54. The applicants argue that that decision was wrong. But they have provided no persuasive basis for such a conclusion. It would be tedious and unnecessary to go through their arguments in detail because those arguments are contrived. It is always possible to find some case not cited in any given judgment – that doesn't make the decision *per incuriam* or bring *Worldport Ireland Limited & Companies Act* [2005] IEHC 189, [2005] 2 JIC 1604 (Clarke J.) into play so as to erase a previous approach. *Quinlan v. An Bord Pleanála & Dublin City Council* [2009] IEHC 228, [2009] 5 JIC 1303 (Dunne J.) doesn't decide anything inconsistent with *O'Donnell.* The other cases relied on (such as *Patterson v. Murphy* [1978] I.L.R.M. 85, [1978] 5 JIC 0401, (Costello J.), *Galway County Council v.*

Lackagh Rock Ltd [1985] I.R. 120, [1985] 5 JIC 2202, (Barron J.) *Monaghan UDC v. Alf-a-Bet Promotions Ltd* [1980] I.L.R.M. 64, [1980] 3 JIC 2403, (O'Higgins C.J.), *Monaghan County Council v. Brogan* [1987] I.R. 333, [1987] I.L.R.M. 564, [1986] 11 JIC 2601 (Keane J.), *Waterford County Council v. John A. Wood Ltd,* [1998] IESC 32, [1999] 1 I.R. 556, [1999] 1 I.L.R.M. 217, [1998] 10 JIC 2902 (McGuiness J.)) are basically irrelevant to the specific issue decided in *O'Donnell*.

55. The applicants' argument is an assertion of wrongness or disagreement rather than anything particularly compelling. All they have established is that since the 2000 Act doesn't expressly specify the answer in detail, different views might be capable of being formulated. In such circumstances it makes sense to stick to the view already articulated.

56. That is consistent with the approach taken in *Ballyboden Tidy Towns Group v. An Bord Pleanála & Others* [2023] IEHC 722, [2023] 12 JIC 2107 at §210-§211, by Holland J. and in *Mulloy v. An Bord Pleanála* [2024] IEHC 86, [2024] 3 JIC 1202.

57. As the board eloquently says:

> "19. The Applicants' submissions (§115) say the Court in O'Donnell 'slipped into error in a number of respects' then proceed to identify no errors. At §74, the Court stated that 'the purpose of zoning provisions generally, and zoning objectives in particular, is to specify the purposes for which the lands may be used, which in turn means the particular type or category of works and uses which may be carried out on such lands' which is patently correct. The fundamental flaw in the Applicants' submissions on this point is that nowhere does they actually explain, by reference to relevant case law or otherwise, how or in what manner the High Court was incorrect in stating that a provision in a development plan regarding density is a regulation of a matter of detail in relation to the types of permitted development involved, but does not relate to a distinction between different types of development, and is therefore not a zoning objective."

58. The applicants try to invoke abstract high-level legal principles about their entitlement to pursue points not argued but, while that is valid at a theoretical level and would apply in some other case, the relevance of it hasn't been made out in this case. And even if the applicants' quibbling counterfactually constitutes a point not argued, it doesn't constitute a *good* point that wasn't argued, and certainly not a point that is good enough to countermand existing jurisprudence.

59. As the notice party correctly points out:

> "46. Whilst, as is pointed out in the Applicants' submissions at §126, 'a point not argued is a point not decided' (as was confirmed in Enniskerry Alliance v. An Bord Pleanála [2022] IEHC 6 at §6), it is submitted that it is clear that the point in question must be relevant to the issues under consideration in order to bring the matter within the confines of Worldport for the purposes of departing from a decision of the High Court. It is further submitted that that is not the case here."

Sub-ground 1.2 – misinterpretation of the concept of zoning

60. Sub-ground 1.2 is:

> "1.2. The Board erroneously considered that the definition of strategic housing development in the 2016 Act was relevant in determining the limits of zoning. While the Board is entitled to consider an application for more than 100 housing units on lands zoned for residential use or for a mixture of residential and other uses, it is not authorised to grant permission where the proposed development, or part of it, contravenes materially the development plan in relation to the zoning of the lands."

61. This sub-ground is obscure as pleaded. It is not immediately apparent how the alleged erroneous consideration occurred – there is no route-map from the decision to *certiorari*. Confoundingly, some of the applicants' thought processes here and elsewhere in the pleadings seem to take written form in the facts section rather than the grounds section:

> "17. The Inspector considered the definition of strategic development in the 2016 Act to be important in interpreting the limits of the Board's powers.
>
> 17.1. Many residents raised this as an issue in their submissions.
>
> 17.2. The Inspector rejected it. She stated that, 'A number of third party submissions argue that the scheme by reason of its density and deviation from the plot ratio standard in Figure 11.13 would contravene materially the zoning objective'; but she did 'not concur with this view.' She felt that, 'The land use zoning relates to the use of land solely or primarily for a particular purpose as opposed to any wider policy considerations. While the wider policy considerations in relation to density, landscape / tree protection and drainage, may be specific to the LDR zoned lands at this location. These [sic] are separate policy matters and do not form part of the land use zoning.' She therefore deferred consideration of them to later: she split the issue.
>
> 17.3. She then said that, 'On the basis that the uses proposed are compatible with the zoning objective I am satisfied that the proposed development is acceptable in principle and would not contravene materially the development plan with regard to the zoning of the land.'

17.4. She then examined Section 9(6) of the 2016 Act. She found that the Proposed Development was a strategic housing development. She said that, 'In addition, I am satisfied that the definition of SHD, in so far as it addresses the zoning of land, is concerned with the mix of uses permissible as opposed to any wider policy considerations and I am therefore satisfied that it is open to the Board to consider granting permission for the proposed development under the provisions of the 2016 Act.'

17.5. In considering that permission can be granted for any development that qualifies as a strategic housing development, the Inspector eliminated the key protection of zoning afforded by Section 9(6) of the 2016 Act.

17.6. The Board did not differ from the Inspector's conclusion in this respect."

62. One can pause here to ask what is plot ratio? That is not defined in Murdoch and Hunt's *Dictionary of Irish Law* 6th ed. The Dublin City Development Plan gives one definition:

"16.5 Plot Ratio

Plot Ratio

Plot ratio is a tool to help control the bulk and mass of buildings. It expresses the amount of floorspace in relation (proportionally) to the site area, and is determined by the gross floor area of the building(s) divided by the site area. Plot ratio will apply to both new buildings and extensions to existing buildings.

The gross floor area is the sum of floorspace within the external walls of the building(s), excluding basements but including plant and tank rooms and car parking areas above ground level. In the case of a group of buildings with a common curtilage, the floor areas will be aggregated. The site area includes only such land as lies within the curtilage of the related building.

Plot ratios can determine the maximum building floorspace area or volume on a given site, but on their own cannot determine built form. The same area or volume can be distributed on a site in different ways to generate very different environments.

Consequently, plot ratio standards need to be used in conjunction with other development control measures, including site coverage, building height, public and private open space, the standards applied to residential roads, and parking provision."

63. This is similar if not equivalent to that used in the relevant Galway City Development Plan 2017-2023, at p. 234:

"Plot Ratio - The plot ratio for a development is the gross floor area of buildings on a site divided by the gross site area. The gross floor area is the sum of all floor space within the external walls of the building(s), excluding plant, tank rooms, basement storage areas (where floor to ceiling height is less than 2.1 m) and parking areas. In the case of a group of buildings with a common curtilage the floor area will be aggregated. The gross site area includes only such land as lies within the curtilage of the related buildings and in particular does not include adjoining public road area. Plot ratios are written as the ratio of gross floor area to the gross site area, for example, 2:1."

64. The applicants in effect misread the inspector as impermissibly using the definition of SHD to trump the zoning limitations of the board's powers. This invokes the applicants' fallacy that decisions must be read in the most erroneous way possible so that they can get their order of certiorari: *M.R. (Bangladesh) v. The International Protection Appeals Tribunal & Anor* [2020] IEHC 41, [2020] 1 JIC 2903 at §7.

65. All the inspector is saying is that if the zoning provision allows for housing, even among a mix of uses, the definition of SHD allows contravention of the plan in respect of other "policy considerations" such as plot ratio and density. That valid reading of her report is available and should be adopted, as opposed to the strained and inaccurate reading championed by the applicants as a royal road to invalidity.

Sub-ground 1.3 – failure to consider relevant factors

66. Sub-ground 1.3 is:

"1.3. The Board erroneously failed to consider that part of the Council's reasoning behind the low density of proposed development for the Rosshill peninsula was to protect the sensitive environment of the area, and that this was a key element of what was required for the proper planning and sustainable development of the site, and an element of the zoning."

67. This seems to be a duplicate in substance of sub-ground 3.2, and fails for similar reasons, which are outlined below.

Sub-grounds 2.1 to 2.4 – misinterpretation of the plan

68. Core ground 2 is:

"2. The Decision is invalid because the Board granted permission in material contravention of the Development Plan for the purposes of S9(6) (2016 Act) without first directing itself correctly as to the meaning of that Plan as required by S9(2)."

69. Sub-grounds 2.1 to 2.4 are as follows:

"2.1. The Board failed to have any or any adequate regard to the density permitted under the Development Plan, which is calculated based on a site ratio of 0.2:1, relates to the gross site area of the individual plot, including only areas within the curtilage of the related buildings, and excludes roadways.

2.2. The Board failed to realise that a plot ratio of 0.2:1 means a maximum 200m2 of floor area for every 1,000m2 of open space within the curtilage of the relevant buildings.

2.3. The Board failed to acknowledge the requirement that the plot ratio was intended as a maximum which would only be permitted if there was agreement on an overall layout for the area.

2.4. The Board failed to consider that the plot ratio resulted from a consideration of the environmental sensitivity of the site, as set out in the Appropriate Assessment of the Development Plan."

70. I can add that the applicants' idiopathic definition of plot ratio at sub-ground 2.2 is clearly incorrect having regard to the definition of plot ratio as set out above.

71. The parties' positions as recorded in the statement of case are summarised as follows:

"Ground 2 and 3.2

32. Ground 2 is that the Board misinterpreted the Development Plan: either it misunderstood the density requirement, or it misunderstood the Council's environmental reasoning for the density requirement. The Board insists it did not misunderstand the former, but has nothing to say about the latter. In essence the Council decided not to allow higher density in this area (as suggested generally by government policy), and instead set a lower density. This was a deliberate choice by the Council, having had regard to the Guidelines and the likely impact of development on the Galway Bay SAC and SPA sites: the Guidelines recommend a density of 35-50 units "generally", but do not make that density mandatory in all cases. Environmental protection suggests a lower density in Roscam. The Council decided to set a lower density here; but the Board gave no reason for not respecting that choice, and gave no indication of understanding the Council's reasoning. Though the Board purported to give reasons, its reasons do not establish why it did this.

33. Board's Position on Grounds 2 and 3.2. The Board's Decision is not invalid as alleged. The Board did not misunderstand the density requirements in the Development Plan (and the Applicant has failed to establish that it did). The reasons provided by the Board for its Decision were adequate and complied with the relevant legal principles on reasons. The Applicants (§31 and §33 of their submissions) appear to be saying that the Board did direct itself correctly regarding the meaning of the Development Plan concerning density requirements but failed to give adequate reasons to explain how it (correctly) interpreted those density requirements. That is not a basis for quashing the Board's Decision. It is unclear in light of the Applicants' submissions if they are maintaining Core Ground 2 and sub-grounds 2.1 to 2.4 in the Second Amended Statement of Grounds, given that the only plea as regards reasons is at sub-ground 2.5 'If and insofar as the Board may have considered these matters, it failed to give any or any adequate reasons in relation thereto as required by Section 10(3) of the 2016 Act.' The Board maintains the pleas advanced in its Statement of Opposition in response to Core Ground 2 and sub-grounds 2.1 to 2.4 in full. There is no substance to the complaints advanced at Core Ground 2 and sub-grounds 2.1 to 2.4. As regards the actual pleaded 'reasons' complaint at sub-ground 2.5, same reveals no valid complaint. Section 10(3) of the 2016 Act, inter alia, requires the Board to state the main reasons and considerations on which the decision is based and for contravening materially the Development Plan. Those requirements have been met in this case. On pages 8 to 10 of the Board Order, it states that the Board considered that, having regard to the provisions of s.37(2)(b)(iii) of the 2000 Act, the grant of permission in material contravention of the Development Plan with respect to a specific objective relating to plot ratio, would be justified for detailed reasons and considerations. It is clear from the Board's Decision as to why it decided to grant permission in material contravention of the Development Plan with respect to the specific objective relating to plot ratio. The location and nature of the subject site were expressly referenced and evidently considered in the relevant part of the Board Order.

34. Further, the LDR zoning of the subject lands was properly considered in the Inspector's Report (see e.g., §6.1.4 and §11.1.1 of the Inspector's Report), as were the submissions made concerning the exceedance of the development plan density standard that contended that the low-density restrictions at this location are a response to environmental and infrastructural constraints in the area (see §11.2.2 of the Inspector's Report). Sub-ground 3.2 alleges that the Board failed to have regard to a relevant consideration, namely that 'The Board erroneously failed to acknowledge that part of the Council's reasoning behind the low density of proposed development for the Rosshill

peninsula was to protect the sensitive environment of the area'. But that is incorrect. The LDR zoning of the subject lands was properly considered in the Inspector's Report as were the submissions made in relation to the exceedance of the development plan density standard that contended that the low-density restrictions at this location are a response to environmental and infrastructural constraints in the area (see e.g., §6.1.4, the third bullet point at page 20 (§8.1), the third bullet point at page 27 (§9.1.1), §11.1.1 and §11.2.6 (at page 41) of the Inspector's Report).

35. The Notice Party argues that the Applicants appear to have confined their claims in this regard to a reasons complaint. In this context, the Board were obliged to give the main reasons for the main issues, which they duly did. The Plot Ratio of the proposed development was set out in detail in the Planning Report and Statement of Consistency and the Architectural Design Statement submitted with the application, and were fully considered by the Board's Inspector, and thereby the Board, including in the context of the Development Plan and the submissions made by the Chief Executive of Galway City Council.

36. It is clear from pages 8-10 of the Board Order that these matters were fully addressed by the Board in granting permission in material contravention of the Development Plan in this regard."

72. Critically, the applicants have in fact accepted that the board did understand the plan. The Applicants' submissions state (§33):

"It should also be noted that the Board does appear to have understood the density and plot ratio issue. The Board's Opposition makes clear that the location of the problem is in the reasoning rather than the understanding."

73. No misunderstanding of the plan can therefore be advanced now. The sub-grounds that make that point must therefore be dismissed.

74. I can note that a separate plot ratio point is sought to be made under sub-ground 3.1 which I deal with below.

Sub-ground 2.5 – reasons regarding plot ratio

75. Sub-ground 2.5 is:

"2.5. If and insofar as the Board may have considered these matters, it failed to give any or any adequate reasons in relation thereto as required by Section 10(3) of the 2016 Act."

76. The phrase "these matters" means the matters in sub-grounds 2.1 to 2.4, i.e.:

(i) failure to have any or any adequate regard to the density permitted under the Development Plan, based on a site ratio of 0.2:1, which the applicants say relates to the gross site area of the individual plot, including only areas within the curtilage of the related buildings, and excludes roadways;

(ii) failure to realise that a plot ratio of 0.2:1 means a maximum 200m^2 of floor area for every 1,000m^2 of open space within the curtilage of the relevant buildings;

(iii) failure to acknowledge the requirement that the plot ratio was intended as a maximum which would only be permitted if there was agreement on an overall layout for the area; and

(iv) failure to consider that the plot ratio resulted from a consideration of the environmental sensitivity of the site, as set out in the Appropriate Assessment of the Development Plan.

77. At para. 3.1.2, the inspector sets out a table of key data regarding the development:

"Site Area 4.7 ha (gross); 2.84 ha (net) minus road works, pumping station, wooded parkland.
No. of Residential Units 102
Density 36 units per hectare
Plot Ratio 0.41
Site Coverage 17%
Childcare Facility 399 sqm
Other Uses Commercial / Retail 188.56 sqm
Open Space 4437 sq.m (15.6%)
Height 2-4 storeys
Car Parking 183 no. spaces.
Cycle Parking 240 no. spaces.
Part V 10%"

78. At para. 6.1.4 she acknowledges the plan provisions regarding plot ratio:

"There are specific development objectives for LDR lands subject of this application, shown in Fig. 11.13 of the CDP, entitled LDR 'Roscam Pitch and Putt and adjacent lands'. These specific objectives are 'subject to design, environmental assessments, water and wastewater services and traffic safety. Communal open space and recreational facilities may be a requirement in certain circumstances':

• The maximum plot ratio density of 0.2:1 shall only be considered following agreement on an overall layout of the area.
• This layout will have regard to the sylvan character of the site and where appropriate the protection of existing trees and the Roscam Folly.
• Development will only be considered where it accords with strategic main drainage proposals."

79. At para. 7.0 she acknowledged the developer's statement of material contravention regarding plot ratio and density:

"Galway City Development Plan 2017-2023
Proposal considered in the context of various requirements of the City Plan.
• Site zoned for Low Density Residential. Principle of residential development acceptable.
• Material contravention statement submitted in respect of density / plot ratio standards for lands zoned LDR based on national requirements and other provisions of City Plan in relation to density."

80. At para. 8.1 she acknowledged submissions on this issue:

"8.0 Third Party Submissions
A total 40 submissions have been received from local residents and residents groups and other interested parties. Given the level of overlap between issues raised in the submissions received key points are summarised by theme below.
Policy Context
• Material contravention of zoning objective and Section 11.2.8 (Fig. 11.13) requirements in relation to plot ratio, protection of character, tree protection and drainage."

81. At para. 11.1.1, she sets out the (correct) view that contravention of the plan in relation to plot ratio and similar matters is not a contravention in relation to a zoning provision:

"The Galway City Development Plan 2017-2023 is the operative development plan. The SHD site is zoned 'Low Density Residential' the objective of which is 'to provide for low-density residential development which will ensure the protection of existing residential amenity'. This zoning also applies to the surrounding lands to the east, west and south. The City Plan identifies uses that are compatible with and contribute to the zoning objective and these include residential, local shops, and childcare facilities (Section 11.2.8 refers). There are policy requirements in Section 11.2.8 - Fig. 11.13 in relation to plot ratio, landscape character / tree protection and drainage that relate specifically to the LDR zoning at this location. A number of third party submissions argue that the scheme by reason of its density and deviation from the plot ratio standard in Figure 11.13 would contravene materially the zoning objective. I do not concur with this view. The land use zoning relates to the use of land solely or primarily for a particular purpose as opposed to any wider policy considerations. While the wider policy considerations in relation to density, landscape / tree protection and drainage, may be specific to the LDR zoned lands at this location. These are separate policy matters and do not form part of the land use zoning. These matters are considered in later sections of the assessment. On the basis that the uses proposed are compatible with the zoning objective I am satisfied that the proposed development is acceptable in principle and would not contravene materially the development plan with regard to the zoning of the land."

82. The critical discussion is at section 11.2 of her report:

"11.2.1. The proposed development has a stated density of 36 units per hectare and a plot ratio of 0.41:1 based on a stated net site area / developable area of 2.84 ha. The density calculation excludes woodland areas and treelines that are protected (in general terms) under a specific objective (Fig. 11.3) relating to the LDR zoned lands. I consider this to be a reasonable[1] . It is of note that when these areas are included the overall density calculation falls to 25.5 units per hectare (gross).
11.2.2. The City Plan identifies the subject lands for 'low density residential development'. A specific objective relating to the SHD site and other LDR lands at this location specifies a maximum plot ratio of 0.2:1 (Fig. 11.13 refers). The density requirements are not expressed as units per hectare, however, the plot ratio maximum equates to a density of 18 units per hectare (approx.). Many of the submissions received from third parties and from An Taisce a prescribed body express concern in relation to the exceedance of the development plan density standard arguing that the low density restrictions at this location are a response to environmental and infrastructural constraints in the area. The submissions argue that the proposed development would be out of character with the established character of the area. The CE's Report argues that the proposed development involves the introduction of higher density residential development on the periphery of the city that leapfrogs serviced residential lands. The Report states that the development is not responsive to its urban fringe location and is not in keeping with the existing development in the Roscam area. The

Report states that the proposed development is not consistent with the requirements of the residential development strategy and core strategy of the CDP. The CE's Report also states that there is a potential for conflict with the G zoning 'to provide for the development of agriculture and protect areas of visual importance and/or areas of high amenity' that applies to lands within the Roscam peninsula that are not zoned LDR.

11.2.3. The applicant makes a case for the proposed density stating that the objective of the development plan in relation to plot ratio would severely limit the potential yield from the zoned lands. It is noted that the plot ratio of 0.2:1 would yield in the region of 50 no. units on the developable site area of 2.8 ha and 84 no. units on the overall site area of 4.7 ha, a density of c. 18 units per hectare. It is argued that the density envisaged by the City Plan fails to meet policy guidance in the NPF for the efficient and sustainable development of zoned lands and policy in the Section 28 Sustainable Residential Development in Urban Areas Guidelines (2009) which promote densities in the range 35-50 units per hectare at locations such as this.

11.2.4. The site is at a transitional location on the periphery of an urban area. The SHD site is a zoned and serviceable site within the Galway MASP[2] area that is within c. 5 km of Galway City Centre and c. 850 metres from the Dublin Road (R338) transport corridor. The Dublin Road (R338) is identified in the Galway Transport Strategy and in the RSES as a strategic public transport route. Significant upgrades are proposed to provide for improved pedestrian, cyclist and public transport facilities along this route. This includes a proposed Bus-Connects route that was the subject of a nonstatutory public consultation in late 2020. The site is south of and proximate to two large suburbs at Murrogh and Roscam that have neighbourhood services and bus stops at distances of c. 1-1.5 km from the site. I would accept the view of the PA and third parties that the site and its environs are semi-rural in character and that access into and out of this area is restricted. This is due in part to severance caused by the railway and to an absence of pedestrian, cycle and public transport connections into the wider transportation network. The current limitations in respect of accessibility and services do not alter the fact that the site is at the urban fringe and within the Galway MASP area. While the lands are not identified as strategic housing lands in the MASP, they are zoned for residential development and are part of the housing capacity lands detailed in the Core Strategy of the City Plan. The core strategy includes a total of 302 ha of LDR zoned lands across the city with an anticipated capacity of 815 units. While the expected number of units on the SHD site is lower (c. 18 units per hectare) the gross density proposed in this instance (c. 25 units per hectare) is not significantly in excess of what is envisaged and when considered in the context of the wider LDR zoned lands at this location I am satisfied that the proposed development would not exceed to any material extent, the core strategy allocation for the area. In relation to the conflicts with other zoning objectives, I would note that the G zoned lands referenced in the CE's report are at a remove from the SHD site along the coastal edge.

11.2.5. Recent planning policy at national and regional levels encourage higher densities in urban areas. The National Planning Framework (NPF) 2018 promotes the principle of 'compact growth'. Objectives 27, 33 and 35 of the NPF prioritises the provision of new homes at locations that can support sustainable development and encourage increased densities in settlements where appropriate. While some of the third party submissions argue that the proposed development would be contrary to these objectives, I do not accept this argument given the sites wider context within the urban area of Galway. Section 28 guidance, in the Sustainable Residential Development in Urban Areas Guidelines (2009), the Urban Development and Building Height Guidelines (2018), and the Sustainable Urban Housing Design Standards for New Apartments Guidelines (2020), assist in determining appropriate densities within urban areas. There is a reference in one third party submission to Circular Letter: NRUP 02/2021 21 April 2021 (Residential Densities in Towns and Villages). However, the guidance contained in that circular relates to towns and villages (not cities) and is not applicable in this instance.

11.2.6. The Guidelines on Sustainable Residential Development in Urban Areas (2009) recommend net residential densities in the general range of 35-50 dwellings per hectare on outer suburban/greenfield sites[3] in large towns and cities. The guidelines state that development at net densities less than 30 dwellings per hectare should generally be discouraged in the interests of land efficiency, particularly on sites in excess of 0.5 hectares. The proposed density of 36 dwellings per hectare (net) is at the lower end of this density range. The more recent Urban Development and Building Height Guidelines (2018) state that increased building height and density will have a critical role to play in addressing the delivery of more compact growth in urban areas. The guidelines caution that due regard must be given to the locational context, to the availability of public transport services and

to the availability of other associated infrastructure required to underpin sustainable residential communities. SPPR4 requires that in planning the future development of greenfield or edge of city locations planning authorities must secure the minimum densities set out in the Sustainable Residential Development in Urban Areas Guidelines. Section 2.4 of the Sustainable Urban Housing Design Standards for New Apartment Guidelines (2020) provide guidance in relation to the types of locations in cities and towns that may be suitable for increased densities, with a focus on the accessibility of the site by public transport and proximity to city/town/local centres or employment locations. I consider that the site meets the definition of a peripheral / less accessible urban location[4] and this is acknowledged in the CE's Report. Such locations are generally suitable for small-scale higher density development, or residential development of any scale that will include a minority of apartments at low-medium densities. It is noted that this will vary but would be broadly less than 45 dwellings per hectare net. The CE's Report argues that the environmental sensitivities and the un-serviced nature of the site influences the achievement of such quantum's. I consider that the proposed development, with a density of 36 units per hectare and a mixture of apartment and housing units, is generally consistent with national policy in relation to density at less accessible urban locations. The density provisions of the Galway City Plan Development Plan, equating to 18 units per hectare (approx.) falls substantially short of the density standards envisaged in national planning policy.

11.2.7. The application includes a Material Contravention Statement in respect of (inter alia) density, and this statement is referenced in the public notices. The Board, therefore, has recourse to the provisions of Section 37 (2) (b) of the Planning and Development Act should it consider a material contravention to be justified in this instance. I consider that the density proposed is acceptable in this instance given the locational context of the site and is in accordance with national policy. Based on the foregoing, and without prejudice to the consideration of other matters, I consider that a material contravention in relation to density is justified having regard to the provisions of the NPF, RSES and Section 28 guidance. This is addressed further in Section 11.10

Material Contravention Density."

83. The footnotes are:

"1 Guidance on calculation of net densities in Appendix A of the Sustainable Residential Development in Urban Areas Guidelines (2009) refers.

2 Metropolitan Area Strategic Plan

3 I would note that this refers to sites that are over 500 metres walking distance of a bus stop, or within 1km of a light rail stop or a rail station.

4 More than 800-1000 m of from a principal town or suburban centre and employment location, outside of 1.5 km from high capacity urban public transport stop (such as DART, commuter rail or LUAS) and over 500 m from a high frequency bus route."

84. She went on at section 11.9:

"11.9.1. The proposed development would materially contravene the specific development objectives for the subject lands detailed in Figure 11-13 of the Galway City Development Plan in relation to plot ratio (Section 11.1 above refers). The submitted Material Contravention Statement addresses this issue and this statement is referenced in the public notices. The Board, therefore, has recourse to the provisions of Section 37 (2) (b) of the Planning and Development Act should it consider the proposed ratio to be acceptable. A case is made for the density proposed on the basis of national policy and in particular the density standards detailed in the Section 28 Sustainable Residential Development in Urban Areas Guidelines (2009).

11.9.2. I would note that a number of the third party submissions received argue that it is not open to the Board to grant permission for the proposed development under the SHD process on the basis that the proposed development would materially contravene the operative development plan in relation to the zoning of the land referencing the 'Low Density Residential' zoning. I have addressed this issue in detail in Sections 11.1 and 11.2 above. I consider that the material contravention relates to density only, that it is not concerned with the land use zoning and that it is open to the Board to grant permission.

11.9.3. I consider that a grant of permission, that may be considered to material contravene the Development Plan, would be justified in this instance under sub section (iii) of the Act on the basis of the following reasons and considerations:

(i) It is considered that permission for the proposed development should be granted having regard to Government policy set out in the National Planning Framework and the Regional Spatial and Economic Strategy for the area, including the requirement that cities outside of Dublin significantly increase their population share. Under National Policy Objective 2b half (50%) of future population and employment growth will be focused in the existing five Cities

and their suburbs (including Galway). The site is within the Galway MASP area as defined in the NPF Implementation Road Map and RSES and while a relatively small number of units are proposed (102 in total) it is a notable contributor to the population growth targets for the Galway MASP area detailed in the Regional Spatial and Economic Strategy of 27,500 persons to 2026 and a further 14,500 to 2031. Furthermore, National Policy Objective 35 of the NPF is to increase residential density in settlements.

(ii) It is considered that permission for the proposed development should be granted having regard to Section 28 Guidance set out in the Sustainable Residential Development in Urban Areas Guidelines for Planning Authorities (2009); the Urban Development and Building Height Guidelines for Planning Authorities (2018); and the Sustainable Urban Housing Design Standards for New Apartment Guidelines for Planning Authorities (2020). SPPR4 of the Urban Development and Building Height Guidelines seeks increased densities within urban areas in accordance with the minimum densities set out in the Sustainable Residential Development in Urban Areas Guidelines. The Sustainable Residential Development in Urban Areas Guidelines promote densities of 35-50 units per hectare at outer suburban and greenfield locations such as this, stating that development at net densities of less than 30 dwellings per hectare should generally be discouraged in the interests of land efficiency. The Sustainable Urban Housing Design Standards for New Apartment Guidelines for Planning Authorities state that peripheral and / or less accessible urban locations, such as this, are suitable for residential development of any scale that will include a minority of apartments at low medium densities."

85. While the category of legal errors that can be pleaded is open-ended, in a situation like this, an applicant can typically argue that:

(i) the decision-maker didn't address an issue at all, or did purport to address the issue but misunderstood it;
(ii) she failed to give reasons; or
(iii) the reasons given were not valid.

86. We need to stick to the pleaded case. The applicants did plead point (i), but in effect withdrew that in the written submissions. And they didn't plead point (iii). So all we are left with is whether there are reasons. But there are.

87. Or more precisely, no lack of reasons has been made out. The applicants are entitled to the main reasons on the main issues, not micro sub-reasons (*Balscadden Road v. An Bord Pleanála* [2020] IEHC 586, [2020] 11 JIC 2501 at §39, *per* Farrell J. in *Kimmage Dublin Residents Alliance clg v. An Bord Pleanála* [2024] IEHC 261, [2024] 5 JIC 1301 at para. 70) and they got that in the decision. Insofar as the applicants generate a lot of questions which they say were not answered, those fall into the micro-sub-reasons category. What's required is only the main reasons on the main issues, and the board gave its reasons for contravention on the plot ratio issue, primarily by reference to proximity to Galway City and in the light of government policy. As in *Killegland Estates v. Meath County Council* [2023] IESC 39, [2023] 12 JIC 2109 *per* Hogan J., nobody could be in doubt as to what the reasons were.

88. As the board points out, the Inspector dealt with density expressly, and considered that:

(i) the "proposed development, with a density of 36 units per hectare and a mixture of apartment and housing units, is generally consistent with national policy in relation to density at less accessible urban locations" (§11.2.6);
(ii) "the density proposed is acceptable in this instance given the locational context of the site and is in accordance with national policy" (§11.2.7);
(iii) the identified material contravention of the Development Plan was justified for stated reasons and considerations (§11.9.3); and
(iv) "the principle of residential development density proposed" to be "acceptable on this site. This is a zoned and serviceable site within the development boundary of Galway City" (§11.10).

89. The applicants don't go on in this ground to say that such reasons are invalid so this ground ends here.

Sub-ground 3.1 – failure to have regard to 2009 and 2018 guidelines

90. Core ground 3 is:

"3. The Decision is invalid because the Board failed to have any or any proper regard to relevant guidelines and policy as required by S9(2) (2016 Act) and S28 (2000 Act) before deciding to grant permission for a material contravention of the Development Plan pursuant to S9(6) (2016 Act) and S37(2) (2000 Act)."

91. Sub-ground 3.1 is:

"3.1. The Board failed to have regard to the fact that the 2009 Guidelines and SPPR4 of the Height Guidelines were satisfied in relation to density, in circumstances where the Council had considered and applied the 2009 Guidelines and considered them to be satisfied,

and where paragraphs 5.11 and 5.12 of those Guidelines provide for deviations in small areas where the overall density objective is met. Accordingly, those Guidelines could not lawfully be relied upon to justify a material contravention of the Development Plan."

92. This fails for reasons set out in more detail under core ground 5 below.

93. Sub-ground 3 makes two points, firstly that the council had already considered and applied the 2009 guidelines, and secondly the guidelines don't facilitate developments of the type in question.

94. As regards the first point, the fallacy there is that the council's views at the stage of adoption of the development plan are not binding on the board. A council can't at the level of principle preclude the board from allowing a departure from a plan merely by factoring in guidelines when the plan is made.

95. As regards the second point, the complaint there is that paras. 5.11 and 5.12 of the 2009 guidelines "could not lawfully be relied on" to justify the material contravention here.

96. The introduction to those paragraphs, not quoted by the applicants, provides:

"Appropriate locations for increased densities

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

97. The quoted paragraphs provide:

"(f) Outer Suburban / 'Greenfield' sites

5.11 These may be defined as open lands on the periphery of cities or larger towns whose development will require the provision of new infrastructure, roads, sewers and ancillary social and commercial facilities, schools, shops, employment and community facilities. Studies have indicated that whilst the land take of the ancillary facilities remains relatively constant, the greatest efficiency in land usage on such lands will be achieved by providing net residential densities in the general range of 35-50 dwellings per hectare and such densities (involving a variety of housing types where possible) should be encouraged generally. Development at net densities less than 30 dwellings per hectare should generally be discouraged in the interests of land efficiency, particularly on sites in excess of 0.5 hectares.

Provision for lower densities in limited cases

5.12 To facilitate a choice of housing types within areas, limited provision may be made for lower density schemes provided that, within a neighbourhood or district as a whole, average densities achieve any minimum standards recommended above."

98. While the inspector doesn't cite these paragraphs by number, she does address them in substance:

"11.2.6. The Guidelines on Sustainable Residential Development in Urban Areas (2009) recommend net residential densities in the general range of 35-50 dwellings per hectare on outer suburban/greenfield sites[3] in large towns and cities. The guidelines state that development at net densities less than 30 dwellings per hectare should generally be discouraged in the interests of land efficiency, particularly on sites in excess of 0.5 hectares. The proposed density of 36 dwellings per hectare (net) is at the lower end of this density range. The more recent Urban Development and Building Height Guidelines (2018) state that increased building height and density will have a critical role to play in addressing the delivery of more compact growth in urban areas. The guidelines caution that due regard must be given to the locational context, to the availability of public transport services and to the availability of other associated infrastructure required to underpin sustainable residential communities. SPPR4 requires that in planning the future development of greenfield or edge of city locations planning authorities must secure the minimum densities set out in the Sustainable Residential Development in Urban Areas Guidelines. Section 2.4 of the Sustainable Urban Housing Design Standards for New Apartment Guidelines (2020) provide guidance in relation to the types of locations in cities and towns that may be suitable for increased densities, with a focus on the accessibility of the site by public transport and proximity to city/town/local centres or employment locations. I consider that the site meets the definition of a peripheral / less accessible urban location[4] and this is acknowledged in the CE's Report. Such locations are generally suitable for small-scale higher density development, or residential development of any scale that will include a minority of apartments at low-medium densities. It is noted that this will vary but would be broadly less than 45 dwellings per hectare net. The CE's Report argues that the environmental sensitivities and the un-serviced nature of the site influences the achievement of such quantum's. I consider that the proposed development, with a density of 36 units per hectare and a mixture of apartment and housing units, is generally consistent with national policy in

relation to density at less accessible urban locations. The density provisions of the Galway City Plan Development Plan, equating to 18 units per hectare (approx.) falls substantially short of the density standards envisaged in national planning policy.

11.2.7. The application includes a Material Contravention Statement in respect of (inter alia) density, and this statement is referenced in the public notices. The Board, therefore, has recourse to the provisions of Section 37 (2) (b) of the Planning and Development Act should it consider a material contravention to be justified in this instance. I consider that the density proposed is acceptable in this instance given the locational context of the site and is in accordance with national policy. Based on the foregoing, and without prejudice to the consideration of other matters, I consider that a material contravention in relation to density is justified having regard to the provisions of the NPF, RSES and Section 28 guidance. This is addressed further in Section 11.10 Material Contravention Density."

99. The footnotes are:

"3 I would note that this refers to sites that are over 500 metres walking distance of a bus stop, or within 1km of a light rail stop or a rail station.

4 More than 800-1000 m of from a principal town or suburban centre and employment location, outside of 1.5 km from high capacity urban public transport stop (such as DART, commuter rail or LUAS) and over 500 m from a high frequency bus route."

100. The basic problem with the argument that the 2009 guidelines "could not lawfully be relied on" is that the applicants, by sleight of hand, are elevating them into something mandatory – as in *Cork County Council v. Minister for Housing & Anor.* [2021] IEHC 683, [2021] 11 JIC 0502. But the guidelines aren't mandatory. The only obligation under s. 28 of the 2000 Act is to "have regard" to them, which the board manifestly did. This point is not made out.

Sub-ground 3.2 – failure to have regard to relevant considerations

101. Sub-ground 3.2 is:

"3.2. The Board erroneously failed to acknowledge that part of the Council's reasoning behind the low density of proposed development for the Rosshill peninsula was to protect the sensitive environment of the area, and that this was a key determinant in understanding that zoning. This was a relevant consideration that the Board should have taken into consideration in determining if a material contravention should be permitted."

102. This fails for reasons set out above under core ground 2.

103. The doctrine of failure to take into account relevant considerations is not a Pandora's box to allow applicants to think of things after the event and to then argue that a decision-maker has failed to consider them. Mandatory legal requirements need to be addressed and complied with autonomously, but that doesn't cover anything and everything that could conceivably be relevant to consideration of an issue and certainly doesn't cover things that weren't raised and that a decision-maker only needs to consider if raised by a participant in the process.

104. Insofar as the applicants or anyone else made this point in submissions, the submissions were considered – the board says so and the applicants haven't proved otherwise: *G.K. & Ors v. Minister for Justice, Equality and Law Reform* [2001] IESC 205, [2002] 2 I.R. 418, [2001] 12 JIC 1704 (Hardiman J.).

105. Insofar as the applicants didn't make this point, it isn't something that the board has to address autonomously. There isn't some ectoplasm of "reasoning" for a document that hovers above and outside the document itself and which calls from the spirit world demanding to be taken into account. The board self-evidently considered the development plan and its terms – there is no separate legal obligation to consider the "reasoning" for the plan under some separate heading. That would, as the board says in oral submissions, be an "impossibly high standard" - if indeed it is a standard at all.

106. In any event this point is unfounded on the facts. As the board points out:

"The LDR zoning of the subject lands was properly considered in the Inspector's Report as were the submissions made in relation to the exceedance of the development plan density standard that contended that the low density restrictions at this location are a response to environmental and infrastructural constraints in the area (see e.g., §6.1.4, the third bullet point at page 20 (§8.1), the third bullet point at page 27 (§9.1.1), §11.1.1 and §11.2.6 (at page 41) of the Inspector's Report)."

Sub-ground 3.3 – failure to have regard to DMURS

107. Sub-ground 3.3 is:

"3.3. The Board erroneously failed to have regard to the objective in the Design Manual for Urban Roads and Streets that all new development should be within 800m of a bus stop/route, or explain how a material contravention could be justified having regard to statutory guidelines or government policy. The distance to the nearest bus stop on a bus route was accepted as being 1.2km. The Board failed to consider that the Proposed Development would be non-compliant with relevant guidelines."

108. The parties' positions as recorded in the statement of case are summarised as follows. It can be noted that certain aspects of core ground 3 are addressed under core grounds 2 and 5:

"Ground 3.3, 3.4

41. Ground 3.3 is that the Board failed to have regard to the Design Manual for Urban Roads and Streets which sets an objective that all new development should be within 800m of a bus stop/route: the Proposed Development is 1.2km from a bus route. Ground 3.4 is that the Board failed to have regard to the Regional Spatial and Economic Strategy objective of 'integration of housing with transportation infrastructure fostering sustainable transport patterns.'

42. Board's Position on Grounds 3.3 and 3.4. The Board's Decision is not invalid as alleged. Regarding sub-ground §3.3, there is no basis for the assertion that the Board failed to have regard to the provisions of the Design Manual for Urban Roads and Streets (DMURS) regarding the proximity of the proposed development to the nearest bus stop route. On pages 4 to 5 of the Board Order, it states that in coming to its decision, the Board, inter alia, had regard to the Design Manual for Urban Roads and Streets (DMURS) (at paragraph (g)), to the availability in the area of a range of social, community and transport infrastructure (at paragraph (j)) and to the report of its Inspector (paragraph (o)). The Inspector's Report (with which the Board agreed in granting permission generally in accordance with the Inspectors recommendation) provides detailed consideration of the issue of public transport (see e.g., §11.2.4, §11.6.1 and page 41 of the Inspector's Report). The language in the DMURS at §3.4.3, page 8, where it refers to 'an objective that all houses within urban areas are located within 800m of a bus route/ stop' is referring (in general terms) to something toward which effort is to be directed or that is aimed to be achieved, it is not an inflexible and rigid mandatory requirement. Further, as set out on internal page 10 of the DMURS, 'Chapter 3 outlines the approaches to the design and management of street networks with the aim of creating better-connected places.' It is noted that condition 17 of the grant of permission requires that the internal road and vehicular circulation network serving the proposed development, including turning bays, junctions, parking areas, footpaths and kerbs, shall be in accordance with the detailed construction standards of the planning authority for such works and design standards outlined in DMURS. The approach of the Applicants at sub-ground 3.3. is effectively that unless the Board expressly says something (in this case, in relation to §3.4.3 of DMURS), it must be presumed to have acted unlawfully. However, that is not the law or the correct approach to reading and interpreting the Board's Decision. Lack of narrative discussion does not equate to failure to have regard to something. There is an onus on the Applicants to show that matters were not considered, which has not been discharged. It is also noted that the Notice Party's planning application was, inter alia, accompanied by a DMURS Report prepared by Tobin Consulting Engineers which states (at internal page 2) that 'TOBIN were required to provide a statement of consistency with Ministerial Guidance in relation to the Design Manual for Urban Roads and Streets (DMURS) 2019' and (at internal page 3) that 'This statement of consistency confirms that the roads and streets proposed as part of the Residential development in Rosshill, Galway have been designed in accordance with the principles and guidance as set out in the Design Manual for Urban Roads and Streets (DMURS) 2019.' With respect to sub-ground 3.4, as regards the Northern and Western Regional Assembly Regional Spatial and Economic Strategy 2020-2032 (RSES) and Galway Metropolitan Strategic Area Plan (MASP), there is nothing incorrect or unlawful about what the Board stated in respect of same in the context of s.37(2)(b)(iii) of the 2000 Act, and the Applicants have not identified anything allegedly incorrect or unlawful in this regard. There is no basis for the assertions advanced at sub-ground 3.4. Further, the claims advanced at sub-grounds 3.3 and 3.4 in relation to the alleged failure to have regard to certain matters are in substance impermissible complaints/submissions on the merits.

43. Further, as regards sub-ground 3.4, the Applicant's written submissions expressly state at §61 that 'Ground 3.4, integration of housing with transportation infrastructure under the Regional Spatial and Economic Strategy (RSES) for the North West and the Metropolitan Area Strategic Plan (MASP) for Galway is withdrawn'. It is of course an inappropriate approach to litigation that the Applicants have represented that position in their written legal submissions yet appear to have now changed position on the point per the Statement of Case.

44. The Notice Party argues that the DMURS Report, which was prepared on behalf of the Notice Party by Tobin Engineers and submitted with the application, was adequately considered by the Board in its assessment.

45. The Notice Party agrees with Board to the effect that the Board considered DMURS in reaching its decision, as was reflected in the Board Order and the Inspector's Report, and

further, the Board was subject to a 'have regard to' obligation, as opposed to an obligation to comply expressly with the provisions upon which the Applicants' complaints are based."

109. It is not altogether clear to me that DMURS is particularly relevant, given the "semi-rural" nature of the area as described by the council. But insofar as the complaint is failure to have regard to DMURS, that is not made out evidentially. The board order states that regard was had to DMURS and that has not been displaced evidentially – see *per* Hardiman J in *G.K. & Others v. Minister for Justice & Others* [2001] IESC 205, [2002] 2 I.R. 418, [2001] 12 JIC 1704.

110. We have to confine ourselves to the way in which the applicants have pleaded the issue. Under this heading, it is pleaded as a mere "failure to have regard" to DMURS, which is normally a poor start when the decision says that regard has been had to the thing in question. The applicants haven't evidentially displaced that.

Sub-ground 3.4 – failure to have regard to the RSES

111. Sub-ground 3.4 is:

"3.4. The Board failed to have regard to the objective set out in the Regional Spatial and Economic Strategy for the North West and Metropolitan Area Strategic Plan for Galway of ensuring integration of housing with transportation infrastructure fostering sustainable transport patterns, and providing for a co-ordinated approach with investment and the delivery of essential infrastructure, services and community facilities"

112. Sub-ground 3.4 was already withdrawn and can't be revived at this point but even if it could, it has no substance for similar reasons. No failure to have regard to the RSES has been made out evidentially. As noted above the inspector's report references the RSES as having been considered. This has not been evidentially displaced– see *per* Hardiman J in *G.K. v. Minister for Justice*.

Core ground 4 – failure to have regard to the NPF

113. Core ground 4 is:

"4. The Decision is invalid because the Board failed to have any or any proper regard to the National Planning Framework as required by S9(2) (2016 Act) and S143 (2000 Act) before deciding to grant permission."

114. The parties' positions as recorded in the statement of case are summarised as follows:

"Ground 4

46. Ground 4 is similar to Ground 3, but is that as the Development Plan already complies with the NPF in relation to density, the NPF cannot justify a departure from the Plan.

47. Ground 4.1 relates to NPF Objective 27 which aims to "prioritise" walking and cycling; but the Proposed Development only "contributes" to walking and cycling while prioritising car travel – and the Board makes no finding on this argument.

48. Ground 4.2 is that NPF Objective 33 aims to prioritise development at locations that can prioritise sustainable development, and at an appropriate scale of provision relative to the locality; but the zoning for Roscam has already decided what is an appropriate scale.

49. Ground 4.3 is that NPF Objective 35 aims for increased density in settlements "where appropriate", and the Development Plan determines that it is not appropriate in Roscam: this is in accordance with Objective 35. Ground 4.4 is that, though SPPR4 of the Height Guidelines makes the outer suburban density requirements of the 2009 Guidelines mandatory, as the Board held; the 2009 Guidelines allow a local authority flexibility to set lower limits where it considers them appropriate, and it has done so here. National policy does not warrant or demand a departure from the Plan.

50. Board's Position on Ground 4. The Board's Decision is not invalid as alleged. The Board did not fail to have any or any proper regard for the NPF as alleged. A fundamental flaw that undermines the Applicants' arguments at Ground 4 is that reliance by the Board on government/national policy to justify a material contravention doesn't involve a finding that the development plan itself fails to align with the policies and objectives of national policy. The Applicants' argument does not factor that crucial point in. There was material before the Board that aligns with the views of the Inspector (at §11.2.5, Inspector's Report) as regards the proposed development being consistent with National Policy Objectives (NPOs) 27, 33 and 35 of the NPF (see e.g., Table 7-1 in the Planning Report and Statement of Consistency, and section 6.10.2.2 of same in relation to content of the Traffic and Transport Assessment (TTA) in relation to proposed walking and cycling facilities). Further, sub-grounds 4.1 to 4.4 are framed as allegations of errors of law by the Inspector, but really, they are in substance contending that the Applicants' views on how NPOs 27, 33 and 35 cannot be /are not met by the proposed development are to be preferred to the view of the Inspector on same. That is not a basis for quashing the Board's Decision.

51. The Notice Party argues that the standard of review where there an allegation that a planning authority acted inconsistently with the NPOs in the NPF is that of consistency with

the relevant objectives generally, as distinct from complying in every detailed and minor particular.

52. The Applicants' arguments in this regard are incorrectly premised on the presumption that, simply because the Development Plan was drawn up so as to implement relevant policy, any reliance by the Board on the same or similar relevant policies for the purposes of justifying a material contravention of the CDP in somehow invalid. This contention is advanced on the basis of a misunderstanding of the purpose and effect of the provisions of the NPF."

115. We can view the "have regard to" issue as consisting of a high level objection and specific objections in the sub-grounds. As a high level objection, the NPF is referenced and the applicants haven't evidentially displaced that – see *per* Hardiman J in *G.K. v. Minister for Justice*.

116. It's a red herring to view that as impugning the legality of the development plan. That isn't the issue – the issue is the board's express jurisdiction to materially contravene. The council's view doesn't bind the board. No unlawfulness in that regard has been shown.

117. So that leaves the more specific objections in core grounds 4.1 to 4.4.

Sub-ground 4.1 – erroneous finding of compliance with NPO 27

118. Sub-ground 4.1 is:

"4.1. The Inspector erred in law in finding that National Policy Objective 27 was met simply because the Developer was willing to upgrade footpaths and contribute to the cost of Council proposed cycleways. Whilst this may show that the Proposed Development would contribute to objectives for walking and cycling, it is not evidence that the Proposed Development would prioritise them, and does not displace the evidence of public submissions and the Council's Report which indicated that the Proposed Development would encourage car based travel because it would be located more than 1.2km from the nearest bus stop."

119. The inspector expressly finds that objective 27 of the NPF is complied with:

"11.2.5. Recent planning policy at national and regional levels encourage higher densities in urban areas. The National Planning Framework (NPF) 2018 promotes the principle of 'compact growth'. Objectives 27, 33 and 35 of the NPF prioritises the provision of new homes at locations that can support sustainable development and encourage increased densities in settlements where appropriate. While some of the third party submissions argue that the proposed development would be contrary to these objectives, I do not accept this argument given the sites wider context within the urban area of Galway. Section 28 guidance, in the Sustainable Residential Development in Urban Areas Guidelines (2009), the Urban Development and Building Height Guidelines (2018), and the Sustainable Urban Housing Design Standards for New Apartments Guidelines (2020), assist in determining appropriate densities within urban areas. There is a reference in one third party submission to Circular Letter: NRUP 02/2021 21 April 2021 (Residential Densities in Towns and Villages). However, the guidance contained in that circular relates to towns and villages (not cities) and is not applicable in this instance."

120. The statement that "some of the third party submissions argue that the proposed development would be contrary to these objectives, I do not accept this argument" implies that the development is not contrary to objectives 27, 33 and 35.

121. Section 6.2 of the NPF sets out the context (emphasis added):

"6.2 Healthy Communities

Our health and our environment are inextricably linked. Specific health risks that can be influenced by spatial planning include heart disease, respiratory disease, mental health, obesity and injuries. By taking a wholesystem approach to addressing the many factors that impact on health and wellbeing and which contribute to health inequalities, and by empowering and enabling individuals and communities to make healthier choices, it will be possible to improve health outcomes, particularly for the next generation of citizens. Decisions made regarding land use and the built environment, including transportation, affect these health risks in a variety of ways, for example through influencing air and water quality, traffic safety, opportunities for physical activity and social interactions as well as access to workplace, education, healthcare and other facilities and services such as food and alcohol outlets.

National Policy Objective 26

Support the objectives of public health policy including Healthy Ireland and the National Physical Activity Plan, though integrating such policies, where appropriate and at the applicable scale, with planning policy.

The changing nature of society has resulted in greater car dependence and reduced levels of physical activity being undertaken by people over time. Physical design affects people's behaviour at every scale - buildings, communities, villages, towns, cities and regions. The places in which we live, work, and play can affect both our physical and mental well-being.

> Communities that are designed in a way [that] supports physical activity, e.g. generously sized footpaths, safe cycle lanes, safe attractive stairways and accessible recreation areas, all encourage residents to make healthy choices and live healthier lives. Countries with extensive cycle infrastructure report higher levels of
> cycling and lower rates of obesity. Healthy places in turn create economic value by appealing to a skilled workforce and attracting innovative companies.
> **National Policy Objective 27**
> Ensure the integration of safe and convenient alternatives to the car into the design of our communities, by prioritising walking and cycling accessibility to both existing and proposed developments, and integrating physical activity facilities for all ages."

122. The 2000 Act does not require compliance with every jot and tittle of the NPF. At the plan-making level it requires consistency with the objectives of the NPF, as outlined by Hogan J. for the Supreme Court in *Killegland Estates Ltd. v. Meath County Council* [2023] IESC 39, [2023] 12 JIC 2109:

> "101. In many ways the key question so far as this appeal is concerned is the extent to which the operation of the NPF is intended to be prescriptive … If objective 3c had been made the equivalent of a mandatory statutory obligation so that it required every in-fill site of this kind to be zoned suitable for housing, then the applicant's case would have much to commend it.
> 102. Where I respectfully part company with the arguments advanced by Killegland on this point is that I do not consider that one can read either the relevant statutory provisions – particularly s. 12(18) – or the objectives of the NPF in this way. In the first instance, s. 12(18) simply requires that the development plan is 'consistent' with the 'objectives' of the NPF. Like [the trial judge], I read this language as meaning consistent generally, as distinct from complying in every detailed and minor particular…
> 103. … As [the trial judge] also observed (at paragraph 146), one must also have regard to the fact that by contrast to the language of s. 12(18) the Oireachtas used mandatory and prescriptive language in other parts of closely related sections. Thus, for example, as we have already noted, s. 10(2A(a) provides that a core strategy 'shall' contain sufficient information to show that development plans are 'consistent' with the NPF. The obligation to provide the information is thereby made mandatory ('shall'), but a more accommodating standard ('consistent') is provided in relation to the actual contents of the development plan itself."

123. At the individual planning application level, the interface is set out in s. 143 of the 2000 Act:

> "143.—(1) [The Board shall, in the performance of its functions (other than functions conferred by Chapter III of Part XXI), have regard to]—
> (a) the policies and objectives for the time being of the Government, a State authority, the Minister, planning authorities and any other body which is a public authority whose functions have, or may have, a bearing on the proper planning and sustainable development of cities, towns or other areas, whether urban or rural,
> (b) the national interest and any effect the performance of the Board's functions may have on issues of strategic economic or social importance to the State, and
> (c) the [National Planning Framework] and any [regional spatial and economic strategy] for the time being in force.
> (2) In this section 'public authority' means any body established by or under statute which is for the time being declared, by regulations made by the Minister, to be a public authority for the purposes of this section.]"

124. This is applied specifically to the SHD context by s. 9 of the Planning and Development (Housing) and Residential Tenancies Act 2016:

> "Decisions by Board on applications under section 4
> 9. (1) The Board shall, before making a decision to which subsection (4) relates in respect of the proposed strategic housing development, consider—
> (a) (i) the report of the planning authority or, where the proposed development is in the area of more than one planning authority, the report of each such authority submitted in accordance with section 8(5) ,
> (ii) any submissions or observations duly received by the Board consequent on—
> (I) the publication of a notice pursuant to paragraph (a)(vii) of section 8(1), or
> (II) the sending of a notice pursuant to subparagraph (ii) of paragraph (b), or to paragraph (c), of section 8(1),
> and
> (iii) any other relevant information,
> in so far as they relate to—

(A) the likely consequences for proper planning and sustainable development in the area in which it is proposed to situate the development,
(B) the likely effects on the environment or the likely effects on a European site, as the case may be, of the proposed development, if carried out,
(b) where required, an [environmental impact assessment report or Natura impact statement or both that report and that statement], as the case may be, submitted to the Board pursuant to section 8(2), and
(c) any report or recommendation prepared in relation to the application in accordance with section 146 of the Act of 2000, including the report of the person conducting any oral hearing of the proposed development.
(2) In considering the likely consequences for proper planning and sustainable development in the area in which it is proposed to situate the strategic housing development, the Board shall have regard to—
(a) the provisions of the development plan, including any local area plan if relevant, for the area,
(b) any guidelines issued by the Minister under section 28 of the Act of 2000,
(c) the provisions of any special amenity area order relating to the area,
(d) if the area or part of the area is a European site or an area prescribed for the purposes of section 10(2)(c) of the Act of 2000, that fact,
(e) if the proposed development would have an effect on a European site or an area prescribed for the purposes of section 10(2)(c) of the Act of 2000, that fact,
(f) the matters referred to in section 143 of the Act of 2000, and
(g) the provisions of the Planning and Development Acts 2000 to 2016 and regulations made under those Acts where relevant.
(3) (a) When making its decision in relation to an application under this section, the Board shall apply, where relevant, specific planning policy requirements of guidelines issued by the Minister under section 28 of the Act of 2000.
(b) Where specific planning policy requirements of guidelines referred to in paragraph (a) differ from the provisions of the development plan of a planning authority, then those requirements shall, to the extent that they so differ, apply instead of the provisions of the development plan.
(c) In this subsection 'specific planning policy requirements' means such policy requirements identified in guidelines issued by the Minister to support the consistent application of Government or national policy and principles by planning authorities, including the Board, in securing overall proper planning and sustainable development.
(4) The Board may, in respect of an application under section 4 for permission for the proposed strategic housing development, decide to—
(a) grant permission for the proposed development,
(b) grant permission for the proposed development subject to such modifications to the proposed development as it specifies in its decision,
(c) grant permission, in part only, for the proposed development, with or without any other modifications it may specify in its decision, or
(d) refuse to grant permission for the proposed development,
and may attach to a permission under paragraph (a), (b) or (c) such conditions as it considers appropriate.
(5) Where the Board did not exercise its functions under section 8(3) to refuse to deal with an application, then nothing in that subsection shall be read so as to prevent the Board from refusing to grant permission for a proposed strategic housing development in respect of an application under section 4 where the Board considers that development of the kind proposed would be premature by reference to the inadequacy or incompleteness of the [environmental impact assessment report] or Natura impact statement submitted with the application for permission, if such is required [, or where an environmental impact assessment report is required, the application was not accompanied by such report].
(6) (a) Subject to paragraph (b), the Board may decide to grant a permission for a proposed strategic housing development in respect of an application under section 4 even where the proposed development, or a part of it, contravenes materially the development plan or local area plan relating to the area concerned.
(b) The Board shall not grant permission under paragraph (a) where the proposed development, or a part of it, contravenes materially the development plan or local area plan relating to the area concerned, in relation to the zoning of the land.
(c) Where the proposed strategic housing development would materially contravene the development plan or local area plan, as the case may be, other than in relation to the zoning of the land, then the Board may only grant permission in accordance with paragraph (a)

where it considers that, if section 37(2)(b) of the Act of 2000 were to apply, it would grant permission for the proposed development.
(7) Without prejudice to the generality of the Board's powers to attach conditions under subsection (4), the Board may attach either or both of the following to a permission for the development concerned:
(a) a condition with regard to any of the matters specified in section 34(4) of the Act of 2000;
(b) a condition requiring the payment of a contribution or contributions of the same kind as the planning authority or authorities in whose area or areas the proposed strategic housing development would be situated could, but for this Part, require to be paid under section 48 or 49 (or both) of the Act of 2000 were that authority to grant the permission (and the scheme or schemes referred to in the said section 48 or 49, as appropriate, made by that authority shall apply to the determination of such contribution or contributions).
(8) The conditions attached under this section to a permission may provide that points of detail relating to the grant of the permission may be agreed between the planning authority or authorities in whose functional area or areas the development will be situated and the person carrying out the development. If that authority or those authorities and that person cannot agree on the matter the matter may be referred to the Board for determination.
(9) The Board shall make its decision under this section on an application under section 4—
(a) where no oral hearing is held, within 16 weeks beginning on the day the planning application was lodged with the Board or within such other period as may be prescribed under subsection (10),
(b) where an oral hearing is held, within such period as may be prescribed.
(10) The Minister may by regulations extend the period referred to in subsection (9)(a), where it appears to him or her to be necessary, by virtue of exceptional circumstances, to do so and, for so long as the regulations are in force, this section shall be construed and have effect in accordance therewith.
(11) The Board may, at any time after the expiration of the period specified in section 8(5)(a), make its decision under this section on the application.
(12) The Board shall include in each report made under section 118 of the Act of 2000 a statement of—
(a) the number of matters which the Board has determined within each of the periods referred to in paragraphs (a) and (b) of subsection (9), and
(b) the number and the aggregate amount of all sums paid (if any) by the Board under subsection (13) ,
together with such other information as to the time taken to determine such matters as the Minister may direct.
(13) (a) Where the Board has failed to make a decision under this section in relation to an application within the period specified in subsection (9)(a) or as may be prescribed under subsection (9)(b) or (10) as appropriate and becomes aware, whether through notification by the applicant or otherwise, that it has so failed, the Board shall proceed to make the decision notwithstanding that the period has expired.
(b) Where the Board fails to make a decision within the period referred to in paragraph (a), it shall pay the appropriate sum to the applicant.
(c) Any payment due to be paid under this subsection shall be paid as soon as may be and in any event not later than 4 weeks after it becomes due.
(d) In this subsection 'appropriate sum' means a sum which is equal to the lesser amount of 3 times the fee paid by the applicant to the Board in respect of his or her application for permission or €10,000.
(14) Without prejudice to the generality of section 18(a) of the Interpretation Act 2005, a reference, however expressed, in this section, sections 4 to 8 or in regulations made under section 12 to the area in which the proposed strategic housing development would be situated includes, if the context admits, a reference to the 2 or more areas in which that development would be situated and cognate references shall be construed accordingly.
(15) A person shall not question the validity of a decision of the Board under this section by reason only that the procedures as set out in subsection (9) were not completed within the time provided for by that subsection.
(16) The failure by the planning authority concerned to comply with the requirement to prepare and submit to the Board a report, under subsection (5) of section 8, within the time limits provided for by that subsection shall not prevent the Board from proceeding to make its decision under this section."

125. So the obligation for the board was to have regard to the NPF, which in one sense they did. Insofar as the board went beyond that to a positive finding that relevant objectives in the NPF were actually satisfied, the applicants only challenge that on a limited basis.

126. As stated above, sub-ground 4.1 alleges that:

> "4.1. The Inspector erred in law in finding that National Policy Objective 27 was met simply because the Developer was willing to upgrade footpaths and contribute to the cost of Council proposed cycleways. Whilst this may show that the Proposed Development would contribute to objectives for walking and cycling, it is not evidence that the Proposed Development would prioritise them, and does not displace the evidence of public submissions and the Council's Report which indicated that the Proposed Development would encourage car based travel because it would be located more than 1.2km from the nearest bus stop."

127. The problem with that is that the board did not find that NPO 27 "was met simply because the Developer was willing to upgrade footpaths and contribute to the cost of Council proposed cycleways". The applicants accept that the inspector didn't in fact say exactly that – they say it is their "summary" of what she said. But it isn't an accurate summary. She didn't say that or anything like it. She referred to a range of factors supporting a conclusion that NPO 27 was satisfied. The rest of the ground doesn't arise because it is based on a false premise.

Sub-ground 4.2 – erroneous finding of compliance with NPO 33

128. Sub-ground 4.2 is:

> "4.2. The Inspector erred in law in finding that National Policy Objective 33 was met on the basis of the Sustainable Residential Development in Urban Areas Guidelines (2009) which 'recommend net residential densities in the general range of 35-50 dwellings per hectare.' In fact, those Guidelines recommend such a density on average in outer suburban areas, and allow for exceptions. The Development Plan clearly sets out that the LDR zoning for Rosshill is an exception and that the average density for such areas is still met. It does so for the purposes of Section 28 of the 2000 Act. Accordingly, the 2009 Guidelines do not justify a material contravention in this location. There is no valid basis for prioritising the provision of new homes at this location over more central locations supported by the Council that can support sustainable development and do so at an appropriate scale of provision relative to location in accordance with National Policy Objective 33."

129. Section 6.6 of the NPF addresses housing and locations (emphasis added):

> "6.6 Housing
>
> Homes are both the places where we live and the foundation stone from which wider communities and their quality of lives are created. There is a projected total requirement to accommodate 550,000 additional households to 2040. National Policy Objective 32 To target the delivery of 550,000 additional households to 2040. The long-term vision for Ireland's housing future aims to balance the provision of good quality housing that meets the needs of a diverse population, in a way that makes our cities, towns, villages and rural areas good places to live now and in the future.
>
> **PRIORITIES AND PRINCIPLES**
>
> Nationally, the high level policy priorities in the housing sector to 2040 are as follows:
>
> Location of Homes - Addressing the longterm spatial distribution of housing.
>
> Building Resilience - Re-use, adaptability
>
> and accessibility in our housing stock, ensuring integration to deliver vibrant sustainable communities.
>
> Need and Demand Profile – Charting national housing pressures to 2040.
>
> Reconciling Future Housing Requirements Effectively - Establishment of a comprehensive evidence base to support and inform housing policies and implementation measures.
>
> **NATIONAL CORE PRINCIPLES ARE SET OUT TO GUIDE THE DELIVERY OF FUTURE HOUSING, AT EVERY LEVEL OF GOVERNANCE:**
>
> Ensure a high standard quality of life to future residents as well as environmentally and socially sustainable housing and placemaking through integrated planning and consistently excellent design.
>
> Allow for choice in housing location, type, tenure and accommodation in responding to need.
>
> Prioritise the location of new housing provision in existing settlements as a means to maximising a better quality of life for people through accessing services, ensuring a more efficient use of land and allowing for greater integration with existing infrastructure.
>
> Tailor the scale and nature of future housing provision to the size and type of settlement where it is planned to be located.
>
> Integrate housing strategies where settlements straddle boundaries (county and/ or regional).
>
> Utilise existing housing stock as a means to meeting future demand. The long term vision for Ireland's housing future aims to balance the provision of good quality housing that meets

the needs of a diverse population, in a way that makes our cities, towns, villages and rural areas good places to live now and in the future.

Location of Homes

Future homes are required to be located where people have the best opportunities to access a high standard quality of life. In Ireland, the location of housing has taken on a dispersed and fragmented character which has led to people living further away from their jobs and often being at a sizeable remove from important services such as education and healthcare. Development sprawl at every settlement level in Ireland has manifested as scattered development, 'leapfrogging', continuous suburbs and linear patterns of strip or ribbon development. This type of development has made it costly and often unfeasible for the State to align and invest in infrastructure delivery where it cannot be justified. It has also hampered effective responses to climate change, compounded issues such as congestion and pollution, increased commuting times and has had an overall negative impact on people's health and wellbeing.

National Policy Objective 33

Prioritise the provision of new homes at locations that can support sustainable development and at an appropriate scale of provision relative to location.

Ireland's future homes will:

be located in places that can support sustainable development - places which support growth, innovation and the efficient provision of infrastructure, are accessible to a range of local services, can encourage the use of public transport, walking and cycling, and help tackle climate change;.

be delivered in our cities and larger towns (where large scale housing demand exists), where homes and the appropriate supporting services can be delivered more efficiently and effectively at less cost to the State in the long-run, and

still be located in our smaller towns, villages and rural areas, including the countryside, but at an appropriate scale that does not detract from the capacity of our larger towns and cities to deliver homes more sustainably."

130. Again however we need to confine ourselves to the pleaded case. Sub-ground 4.2 as stated above begins:

> "4.2. The Inspector erred in law in finding that National Policy Objective 33 was met on the basis of the Sustainable Residential Development in Urban Areas Guidelines (2009) which 'recommend net residential densities in the general range of 35-50 dwellings per hectare.' In fact, those Guidelines recommend such a density on average in outer suburban areas, and allow for exceptions. The Development Plan clearly sets out that the LDR zoning for Rosshill is an exception and that the average density for such areas is still met. It does so for the purposes of Section 28 of the 2000 Act. Accordingly, the 2009 Guidelines do not justify a material contravention in this location."

131. However the inspector did not simply make a "finding that National Policy Objective 33 was met on the basis of the Sustainable Residential Development in Urban Areas Guidelines (2009) which "recommend net residential densities in the general range of 35-50 dwellings per hectare."" She referred to a range of matters.

132. The applicants claimed that the inspector made this point at para. 11.2.6. There she said:

> "SPPR4 requires that in planning the future development of greenfield or edge of city locations planning authorities must secure the minimum densities set out in the Sustainable Residential Development in Urban Areas Guidelines."

133. The applicants didn't however actually dispute the correctness of that. Instead they relied on the combination of that with a later statement at 11.9.3:

> "SPPR4 of the Urban Development and Building Height Guidelines seeks increased densities within urban areas in accordance with the minimum densities set out in the Sustainable Residential Development in Urban Areas Guidelines."

134. The part of the sub-ground in inverted commas derives from the opening of para. 11.2.6. The full sentence is:

> "The Guidelines on Sustainable Residential Development in Urban Areas (2009) recommend net residential densities in the general range of 35-50 dwellings per hectare on outer suburban/greenfield sites[3] in large towns and cities."

135. The alleged "exception" which the applicants rely on in the 2009 guidelines arises from the following:

> "(f) Outer Suburban / 'Greenfield' sites
>
> 5.11 These may be defined as open lands on the periphery of cities or larger towns whose development will require the provision of new infrastructure, roads, sewers and ancillary social and commercial facilities, schools, shops, employment and community facilities. Studies have indicated that whilst the land take of the ancillary facilities remains relatively

constant, the greatest efficiency in land usage on such lands will be achieved by providing net residential densities in the general range of 35-50 dwellings per hectare and such densities (involving a variety of housing types where possible) should be encouraged generally. Development at net densities less than 30 dwellings per hectare should generally be discouraged in the interests of land efficiency, particularly on sites in excess of 0.5 hectares.

Provision for lower densities in limited cases

5.12 To facilitate a choice of housing types within areas, limited provision may be made for lower density schemes provided that, within a neighbourhood or district as a whole, average densities achieve any minimum standards recommended above."

136. So what the inspector says isn't inaccurate in any way. The 2009 guidelines do recommend the specified densities, as she says.

137. Even the so-called exception isn't an exception because on its own terms it recognises the recommendation. So the applicants' complaints boil down to the complaint that the possibility of departing from a recommendation wasn't referred to. But that is inherent in the very concept of a recommendation. In any event, even if this was an exception, a decision isn't invalid by reason of failure to operate an exception. Such failure should generally be construed as the exercise of a view by the decision-maker that the exception is not particularly relevant or appropriate. Ultimately this is just a re-iteration of the applicants' overall misconception that the council's view of density is somehow operative legally and binding on the board in some way.

138. Not only is this not a good point, but it doesn't become any better by reason of emanating from applicants who have themselves have "summarised" the inspector's findings across their pleadings in manifestly inaccurate terms. Apparently they can summarise with impunity, but when the inspector does so, the court is obliged to sprint into action with *certiorari* in hand. Chutzpah doesn't even begin to describe this approach. The inspector can't be prohibited from setting out the thrust of the guidelines without tediously referring to every jot and tittle – she specifically uses the precatory terms "seek" and "recommend", which isn't the language of asserting an absolute position that implies nullification of the possibility of departures or exceptions. There isn't any unlawfully rigid position adopted by the inspector here either linguistically or legally, or any other way.

139. The first set of complaints in sub-ground 4.2 therefore don't arise.

140. We then come to the second part of sub-ground 4.2: "There is no valid basis for prioritising the provision of new homes at this location over more central locations supported by the Council that can support sustainable development and do so at an appropriate scale of provision relative to location in accordance with National Policy Objective 33".

141. The problem with that is that, as pleaded, it is a merits-based argument. No specific legal provision or doctrine is called in aid. Rather it is asserted that the finding of the board lacks a "valid basis", whatever that means. No particularisation is provided. Ultimately the correct way for the court to proceed is to limit itself to the issues that are pleaded, and the applicants' issues here are pleaded only a limited and specific way. The pleaded case does not disclose a sufficient basis to grant an order of *certiorari* under this heading.

Sub-ground 4.3 – erroneous finding of compliance with NPO 35

142. Sub-ground 4.3 is:

"4.3. The Inspector erred in law in finding that National Policy Objective 35 was met on the basis that it encourages increased densities in settlements where appropriate. Where the Council has already determined in its Development Plan what parts of Galway city should have increased densities, and has satisfied the need for such increased densities, it is not open to the Board to decide to further increase densities in the City in an unplanned manner. In so doing, the Board applied Section 9(6) of the 2016 Act in a manner inconsistent with proper planning."

143. This ground is fallacious for reasons we have already seen – the council taking a particular view of the requirements for higher densities doesn't preclude the board from taking a view that even higher densities are appropriate.

Sub-ground 4.4 – erroneous finding regarding NPPR4

144. Sub-ground 4.4 is:

"4.4. The Inspector erred in law in finding that SPPR4 of the Height Guidelines makes a minimum density of 35 units per hectare mandatory by reference to the 2009 Guidelines. SPPR4 purports to make 'the minimum densities for such locations set out in' the 2009 Guidelines (incorrectly referred to as the 2007 Guidelines) obligatory; but the 2009 Guidelines allow for limited lower density schemes 'provided that, within a neighbourhood or district as a whole, average densities achieve any minimum standards recommended above.' The Development Plan stated that the 2009 Guidelines were complied with."

145. What the inspector said at para. 11.2.6 was:

"SPPR4 requires that in planning the future development of greenfield or edge of city locations planning authorities must secure the minimum densities set out in the Sustainable Residential Development in Urban Areas Guidelines. … I consider that the proposed development, with a density of 36 units per hectare and a mixture of apartment and housing units, is generally consistent with national policy in relation to density at less accessible urban locations."

146. What SPPR4 requires is:

"SPPR 4

It is a specific planning policy requirement that in planning the future development of greenfield or edge of city/town locations for housing purposes, planning authorities must secure:

1. the minimum densities for such locations set out in the Guidelines issued by the Minister under Section 28 of the Planning and Development Act 2000 (as amended), titled 'Sustainable Residential Development in Urban Areas (2007)' or any amending or replacement Guidelines;

2. a greater mix of building heights and typologies in planning for the future development of suburban locations; and

3. avoid mono-type building typologies (e.g. two storey or own-door houses only), particularly, but not exclusively so in any one development of 100 units or more."

147. So the inspector doesn't in fact say that "SPPR4 of the Height Guidelines makes a minimum density of 35 units per hectare mandatory by reference to the 2009 Guidelines". The point is factually misconceived. This is just another example of an applicant trying to construe a decision in the most tortured, negative and erroneous way possible in order to get *certiorar*i.

Core ground 5 – lack of jurisdiction to contravene a plan that complies with guidelines and policy

148. Core ground 5 is:

"5. The Decision is invalid because it is not open to the Board to grant permission in material contravention of the Development Plan for the purposes of S9(6) (2016 Act) and S37(2)(b)(iii) (2000 Act) where the Development Plan is already compliant with relevant Guidelines and Government Policy."

149. The parties' positions as recorded in the statement of case are summarised as follows:

"Grounds 3.1, 5,

37. Grounds 3.1 and 5, taken together, are that, where the Plan already complies with government guidelines for the area of the local authority as a whole, those guidelines cannot then justify a departure from the Plan. Objective SPPR4 of the Height Guidelines makes the minimum density requirements of the 2009 Guidelines mandatory; but the 2009 Guidelines provide for a density of 35-50 units per hectare in outer suburban areas generally – but the Development Plan gives effect to that requirement generally, but decides to set a lower limit for Roscam. That is not a departure from the Guidelines; it is an application of them: higher densities are provided for elsewhere, but not everywhere. The Guidelines cannot warrant overriding the Plan because the Plan has already correctly integrated the Guidelines, setting higher densities generally. The Board is upsetting a delicate balance worked out by the Council at the plan stage for the purposes of applying the Guidelines, by setting that balance aside when the Guidelines do not warrant it because they have already been applied.

38. Board's Position on Grounds 3.1 and 5. The Board's Decision is not invalid as alleged. As regards sub-ground 3.1, the Board was correct in stating that the policy objective contained in SPPR 4 of the Height Guidelines seeks increased densities within urban areas in accordance with the minimum densities set out in the 2009 Guidelines, and was also correct in stating that the 2009 Guidelines promote densities of 35 to 50 units per hectare at outer suburban and greenfield locations and that they also state that development at net densities of less than 30 dwellings per hectare should generally be discouraged in the interests of land efficiency (see section 5.11 of the 2009 Guidelines). There is clear policy support for the particular type of development proposed here and for the density proposed at locations such as the subject site. The Board can adopt a different view as to what permission should be granted to serve such policies and has lawfully done so here. To rely on government/national policy to justify a material contravention doesn't involve a finding that the development plan itself fails to align with the policies and objectives of national policy. The Applicants' argument is flawed as it does not factor in that crucial point. The 2009 Guidelines could be relied upon, and there is no textual or other legal basis for reading in a limitation into s.37(2)(b)(iii) of the 2000 Act of the kind the Applicants incorrectly contend for. Further, the claims advanced at sub-ground 3.1 in relation to the alleged failure to have regard to certain matters are in substance impermissible complaints/submissions on the merits.

39. As regards Ground 5 (which is denied), that ground is not developed beyond a general assertion at §41 in the Applicants' submissions. Ground 5 is based on an incorrect premise. The fact that a development plan may be (on one view) compliant with certain s.28 guidelines and government policies does not in law serve to constrain or limit the Board's statutory jurisdiction under s.9(6) of the 2016 Act to grant permission for development in material contravention of the development plan. The interpretation and/or application of government policies and/or s.28 guidelines by a planning authority in the context of the making of a development plan does not have the effect in law of confining or limiting the Board in its interpretation and/or application of the same in the exercise of the Board's statutory jurisdiction to make the decision required from it under s.9 of the 2016 Act. The relevant words used in the 2000 Act and the 2016 Act on their plain and ordinary meaning, do not support the interpretation the Applicants contend for. The onus is on the Applicants as they are the party asserting that the relevant statutory provision does not have the effect suggested by the plain meaning of the words chosen by the legislature. The Applicants have not discharged that onus. Further, as noted above in response to sub ground 3.1, the Board relying on government/national (or regional) policy to justify a material contravention doesn't involve a finding that the development plan itself fails to align with the policies and objectives of such policy. The Applicants' argument does not factor that crucial point in. Moreover, insofar as the test for the purposes of s.37(2)(b)(iii) of the 2000 Act implies a degree of imperative support for the development on a basis that could override development plans, arising from policy, that is the case here as regards the policies and section 28 guidance referred to at (i) and (ii) on pages 8 and 9 of the Board Order (see e.g. SPPR 4 of the Height Guidelines, section 5.11 of the 2009 Guidelines, RPO 3.6.2 and RPO 3.6.3 of the RSES, and section 2.1 of the and 2.4(3) of the 2020 Apartment Guidelines).

40. The Notice Party agrees with §29 of the Board's written submissions regarding the policy objectives contained in SPPR 4 of the Height Guidelines, and the Board's Inspector's correct application of the same. It is clear that the alleged failure to acknowledge the 'sensitive environment of the area' is inaccurate as is clear from the references cited at §30 of the Board's submissions, where specific instances of consideration of that issue in the Inspector's report are demonstrated."

150. The fundamental confusion in the applicants' point is that just because the council took a particular view of the guidelines doesn't preclude the board from taking its own view. Yes the 2009 guidelines and other guidelines and policies had already been factored in, but only to the extent that the council thought appropriate, not to the extent that the board thought appropriate.

151. The board says it all at para. 50 of their submissions:

"... the Board can adopt a different view as to what permission should be granted to serve such policies, and this has been lawfully done here."

Core ground 6 – breach of para. 3.7 of height guidelines

152. Core ground 6 is:

"6. Even were the Board to be correct in the above, it would still be in error in finding that the Height Guidelines warrant a grant of permission in circumstances where the predominant part of the Proposed Development would involve a 2-storey, cul-de-sac dominated approach contrary to paragraph 3.7 of those Guidelines."

153. The parties' positions as recorded in the statement of case are summarised as follows:

"Ground 6

53. Ground 6 is that §3.7 of the Height Guidelines recommends a return to traditional urban forms and away from cul-de-sac style development, and that the Proposed Development does not represent a return to those forms: because the Proposed Development does not satisfy this aspect of the Height Guidelines, those guidelines do not warrant a grant of permission in material contravention of the Development Plan.

54. Board's Position on Ground 6. The Board's Decision is not invalid as alleged. The Board was entitled to rely on the Height Guidelines in the manner it did in reaching its Decision. Core Ground 6 is an impermissible complaint/submission on the merits. The Applicants' submissions serve merely to demonstrate the accuracy of that categorisation. The Applicants have manifestly failed to demonstrate that the Board erred in law in its interpretation or consideration of the Height Guidelines. The merits of the design layout of the proposed development are a matter of planning judgment for the Board in the exercise of its expert planning function. The Applicant's allegation as to non-compliance with §3.7 of the Height Guidelines is based on the Applicant's subjective planning judgement and opinion as to what they think the proposed development entails. The Applicants refer selectively to §3.7 of the Height Guidelines divorced from its context, and for example, fail to properly consider §3.6 and in particular §3.8 of same. The Applicants' submissions (§72-§73) are apt to mislead insofar as they suggest that, whereas the Inspector noted (at e.g., §4.1.1) the

refusal of permission under reference ABP-306413-20 was because 'the proposed development results in poorly defined and poorly overlooked streets and open spaces, a high number of cul-de-sacs and a lack of variety and distinctiveness in the design of the dwellings, which would result in a substandard form of development, and would be seriously injurious to the residential amenities of future occupants', any reference is absent thereafter to 'cul-de-sacs' in the Inspector's Report (with the invited implication being that the issue therefore wasn't considered further). Apart from the fact that that is not the correct way to interpret the Inspector's Report (same must be interpreted as a whole and considered in substance, as opposed to being selectively read, and in a way that makes sense and is valid), the Applicants crucially omit to refer to §11.10 of the Inspector's Report where the Inspector expressly stated: 'I am satisfied that the previous reasons for refusal under SHD Ref. ABP 306413-20 in relation to wastewater and the design and layout of the scheme have been addressed within the new application.' (Emphasis added). The obvious (and indeed only valid) interpretation of the foregoing is that the Inspector considered that the proposed development does not 'result in poorly defined and poorly overlooked streets and open spaces, a high number of cul-de-sacs and a lack of variety and distinctiveness in the design of the dwellings, which would result in a substandard form of development, and would be seriously injurious to the residential amenities of future occupants' in the manner that the proposed development under ABP-306413-20 did. Further, at §11.3.3, the Inspector stated that '[t]he Building Heights Guidelines 2018 sets out a specific planning policy requirement (SPPR 4) that the future development of greenfield or edge of city/town location must include a greater mix of building heights and typologies and that mono type building typologies should be avoided. The scheme responds to this specific policy requirement.' (Emphasis added). The Board Order (at page 10) records that the Board considered that, subject to compliance with the conditions attached to the permission, the proposed development 'would constitute an acceptable quantum and density of development' in this urban location, would not seriously injure the residential or visual amenities of the area, 'would be acceptable in terms of urban design, height, and quantum of development', and would be acceptable in terms of pedestrian and traffic safety. The Board considered that the proposed development would, therefore, be in accordance with the proper planning and sustainable development of the area. The Board was entitled to determine this based on the materials before it.

55. The Notice Party argues that agrees with the position of the Board (at §53 to 59 of their submissions) that Core Ground 6 is an impermissible complaint/submission on the merits and that the Applicants have manifestly failed to demonstrate that the Board erred in law in its interpretation or consideration of the Height Guidelines."

154. The relevant part of the heights guidelines provides as follows:

"Building height in suburban/edge locations (City and Town)

3.4 Newer housing developments outside city and town centres and inner suburbs, i.e. the suburban edges of towns and cities, typically now include town-houses (2-3 storeys), duplexes (3-4 storeys) and apartments (4 storeys upwards). Such developments deliver medium densities, in the range of 35-50 dwellings per hectare net. Such developments also address the need for more 1 and 2 bedroom units in line with wider demographic and household formation trends, while at the same time providing for the larger 3, 4 or more bedroom homes across a variety of building typology and tenure options, enabling households to meet changing accommodation requirements over longer periods of time without necessitating relocation. These forms of developments set out above also benefit from using traditional construction methods, which can enhance viability as compared to larger apartment-only type projects.

3.5 The forms of development set out above can, where well designed and integrated, also facilitate the development of an attractive street-based traditional town environment with a good sense of enclosure, legible streets, squares and parks and a strong sense of urban neighbourhood, passive surveillance and community as in the case of the award winning Adamstown Strategic Development Zone in South Dublin County Council.

3.6 Development should include an effective mix of 2, 3 and 4-storey development which integrates well into existing and historical neighbourhoods and 4 storeys or more can be accommodated alongside existing larger buildings, trees and parkland, river/sea frontage or along wider streets.

3.7 Such development patterns are generally appropriate outside city centres and inner suburbs, i.e. the suburban edges of towns and cities, for both infill and greenfield development and should not be subject to specific height restrictions. Linked to the connective street pattern required under the Design Manual for Urban Roads and Streets (DMURS), planning policies and consideration of development proposals must move away

from a 2-storey, cul-de-sac dominated approach, returning to traditional compact urban forms which created our finest town and city environments.

3.8 Where the relevant planning authority or An Bord Pleanála considers that such criteria are appropriately incorporated into development proposals, the relevant authority shall apply the following Strategic Planning Policy Requirement under Section 28 (1C) of the Planning and Development Act 2000 (as amended).

SPPR 4 It is a specific planning policy requirement that in planning the future development of greenfield or edge of city/town locations for housing purposes, planning authorities must secure: 1. the minimum densities for such locations set out in the Guidelines issued by the Minister under Section 28 of the Planning and Development Act 2000 (as amended), titled 'Sustainable Residential Development in Urban Areas 2. 3. (2007)' or any amending or replacement Guidelines; a greater mix of building heights and typologies in planning for the future development of suburban locations; and avoid mono-type building typologies (e.g. two storey or own-door houses only), particularly, but not exclusively so in any one development of 100 units or more."

155. The problem for the applicants is that the specifics of para. 3.7 are in the "have regard to" category. Core ground 6 doesn't in its own terms plead breach of the mandatory SPPR4.

156. Ultimately the applicants' point here is a merits disagreement dressed up in (rather loose) legal language. It was a matter for the board to take the non-SPPR parts of the guidelines into account, and the fact that the applicants disagree with the approach adopted does not give rise to a ground for judicial review.

Core ground 9 – breach of development plan by council

157. Core ground 9 and associated sub-grounds (apart from the withdrawn sub-ground 9.1) provide:

"9. The Application is invalid because the Developer has no interest in a part of the site, the lands comprising the L5037 Old Dublin Road, and the Council in whose charge that road is has no power to authorise the Developer carry out works on it, or to apply for permission to do so. The purported consent issued by Council to the Developer to apply for permission in respect of road construction works on or beneath that road is ultra vires the Council and invalid.

...

9.2. Pursuant to Section 15 of the 2000 Act, the Council is required to do everything in its power to give effect to its Development Plan. It cannot grant consent to a Developer to apply for permission to carry out a development which would materially contravene that Plan. The Council purported to grant such consent. That purported consent is invalid, ultra vires the Council, and contrary to Section 15.

9.3. It would have been premature for the Applicants to challenge the validity of the purported consent granted by the Council while the application for permission was pending before the Board, as they had not suffered any detriment at that stage."

158. The parties' positions as recorded in the statement of case are summarised as follows:

"Ground 9

56. Ground 9 is that the Council infringed S15 PDA by consenting to an application for permission, or consenting to a proposal for development that would contravene the Development Plan: once the Board found that the application would indeed constitute a material contravention, the Council cannot lawfully consent to the carrying out of roadworks to facilitate it. Declaratory relief is sought in this respect.

Council's Position on Ground 9

57. The Applicants' ground of challenge in this regard is misconceived and fails to understand the purpose of the Council's letter, dated 7th July 2021, consenting to the making of the planning application. The said letter, which in this case was issued by the Council qua Roads Authority, provided consent only to the making of a planning application - which is separate and distinct from the question as to whether permission should be granted – a distinction which the Applicants fail to appreciate.

58. There was no contravention of s.15 of the 2000 Act (which relates to the functions of the Council qua Planning Authority) in issuing such a letter. Section 15 of the 2000 Act provides:

'It shall be the duty of a planning authority to take such steps within its powers as may be necessary for securing the objectives of the development plan.

The Applicant's abstract submissions are, unhelpfully, not framed by reference to the role/powers of the Council, as Planning Authority, under the statutory scheme provided for by the 2016 Act – when same are considered in the correct statutory context same are without merit.

59. The Applicant has attempted, in legal submissions, to advance a new un-pleaded case, seeking new un-pleaded relief relating to the Council consenting, at some unspecified future point, to the carrying out of future works. This is beyond the scope of these proceedings. These arguments are not pleaded, and it is not open to the Applicant to seek to pursue same. Without prejudice to the foregoing pleading objection, in any event, these complaints are misconceived and are premised on a misunderstanding of s.15 of the 2000 Act and the statutory scheme provided for under the 2016 Act and the role of the Council, as Planning Authority, under same. Section 15 is not some form of freestanding provision which acts to cut across and undermine other statutory consent powers/functions of the Board – it places a duty on the Planning Authority to seek to achieve the objectives of the Development Plan within the scope of the statutory powers – a point which the Applicants consistently fail to comprehend. It also involves imposing some form of constraint on the Council in its capacity of roads authority, under the Roads Act, to frustrate a development authorised under the Planning Acts, which has no statutory basis.

60. Board's Position on Ground 9. The remaining parts of Ground 9, which are still being pursued by the Applicants, do not go to the validity of the Board's Decision. The Applicants' submissions (§101, §103) on the remaining parts of Core Ground 9 (sub-ground 9.2) appear to accept that their pleaded case on this issue is incorrect. The Board was entitled to take the consent to the making of the application as having been validly given by the Council to determine the application, and the Applicants now appear to expressly accept that such consent was validly given by the Council, which in effect disposes of the pleaded ground of challenge. However, having essentially abandoned what remains of the pleaded ground in their submissions, the Applicants now impermissibly attempt via their submissions (§§100-107) to advance a new and entirely unpleaded case (which is unsupported by any legal authority) to the effect that the letter of consent to making the planning application issued by the Council qua road authority is somehow retrospectively invalidated by the a finding of material contravention of the Development Plan by the Board as part of its decision to grant permission and that such finding 'altered the position of the Council by making clear the Council's consent would conflict with the duty under s.15'. As a matter of law and fact, the Board's Decision did not alter the Council's position, nor did it invalidate the Council's letter of consent to make the application – the assertions to the contrary by the Applicants are entirely misconceived. The Applicants also now appear (e.g., §98, §107) to be mounting a new case (for the first time via their submissions) about a future hypothetical event – namely the Council providing consent to the carrying out of works on Council lands, with the Applicants suggesting a declaration (again nowhere pleaded) might be made against the Council in this regard and inviting the Council to consent to same (which the Council has entirely rejected and opposes in its submissions). It is simply not open to the Applicants to attempt to advance this new unpleaded ground. In any event, the new unpleaded case the Applicants attempt to impermissibly advance for the first time via their submissions is entirely without merit and misconceived in law. The Applicants argument (§99, Applicants' submissions) appears to consist of an erroneous assertion that s.15 of the 2000 Act, which is directed at the planning authority, and does not apply to the Board and its consent functions under the 2016 Act, operates to annul the Board's grant of permission if such a grant concerns a material contravention of the Development Plan and works, of any nature, on land in control of the Council – in this case, a public road. This is circular and flawed in law and logic. The Applicants appear to be contending (for the first time via their submissions) that, notwithstanding that the Oireachtas has clearly provided the Board with express power to grant permission in material contravention of the Development Plan under s.9 of the 2016 Act, such a power is somehow implicitly constrained by s.15 of the 2000 Act if the Council, in any capacity, has consented to the making of a planning application. The Applicants' assertions in this connection are advanced without any supporting legal authority. They are based on an erroneous premise, namely the Applicants' misunderstanding of the meaning and effect of s.15 of the 2000 Act and the applicability of same to the Board's functions.

61. The Notice Party, in its submissions, expressly adopted the submissions of Galway City Council in respect of the matters advanced at Core Ground 9."

159. Insofar as the applicants complain about the council agreeing to allow the developer to "carry out works", that is premature and does not arise unless or until the permission is no longer under challenge. The concept of an anticipatory challenge to the council's *vires* to get involved in the actual works is a misconception and is inappropriate here. As the council points out, this is:

> "an injunctive-type challenge to the Council consenting to 'the carrying out of … works' at some ill-defined point in the future [by way of] some form of 'prospective' challenge to a hypothetical future 'consent'/works"

160. None of this arises for the simple reason that the council hasn't purported to consent to any works, merely to the making of an application, in which context they made clear that relevant permitting requirements would apply at the appropriate time.

161. That just leaves the pleaded argument that the council consented to the making of the application. But as regards the council's letter of consent, the pleaded complaint is effectively withdrawn in the written submissions. As the council points out:

> "10. The extent of the Applicants' departure from their pleaded case is perhaps most stark from their Submissions – wherein, somewhat inconsistent to the actual pleaded case, it is stated (§101):
> 'the Developer was entitled to seek the consent of the Council to apply for permission, and the Council was entitled to grant that consent ….'
> [Emphasis Added]
> 11. In further contradistinction to the pleaded case, the Applicants' Submissions also appear to expressly agree with the Council's pleaded opposition, inter alia:
> 'The Council's opposition (§15) is that, to have refused consent [to the making of the planning application], it would have had to prejudge the assessment of the planning application. The Applicants agree.' (§103)
> The Applicants accept in Submissions that the Council lawfully issued the letter of consent to the making of the application."

162. There isn't anything left by way of relief against the council. It isn't open to the applicants to now reconfigure the case and pursue unpleaded claims.

163. The oral submissions sought to make a different argument that the consent may have been valid at the time but was voidable and became retrospectively void when the board gave its decision finding a material contravention. As this isn't pleaded it would be incorrect to deal with it in any detail, but in any event it is a clearly unworkable and illogical theory.

164. Insofar as concerns alleged invalidity of the application in relation to the lack of an owner's consent (the first sentence of core ground 9), no actual submissions were made in that regard so there is nothing for the opposing parties or the court to deal with. Indeed as the statement of case makes clear, the point is being phrased in terms of the alleged invalidity of the consent, not the alleged invalidity of the application on grounds not related to the consent.

165. Overall the attack on the permission *via* an attack on the council's consent can't succeed in the circumstances.

EU law issues

Core ground 11 – invalid EIA

166. Core ground 11 is:

> "11. The Decision is invalid because the Board failed to carry out an EIA in accordance with the requirements of S171A and 172 (2000 Act) as applied by S20 (2016 Act), and failed to comply with A8a and A1(2)(g), 2(1), 3(1) and 5 (EIA Directive), or with S9(1) and 10(3) (2016 Act), in relation to effects on groundwater, protected sites, bats, birds, significance, alternatives, and monitoring."

167. The parties' positions as recorded in the statement of case are summarised as follows:

> "European Law Grounds
> Ground 11.3
> 66. Ground 11.3 is that the Board failed to make a finding as part of its EIA as to whether the Proposed Development would or would not cause deliberate disturbance to bats or destruction or deterioration of breeding sites or resting places bats as a result of the Proposed Development, leaving it open that, if bats were discovered, a derogation licence could be sought. Case law indicates that a finding is required in order to determine whether disturbance, deterioration or destruction will occur; and a derogation licence should be sought before seeking permission.
> Ground 11.2
> 67. Ground 11.2 relates to potential impact on groundwater, and is that the Board, in its EIA, was required to reach a conclusion as to whether the Proposed Development would or would not comply with A4(1) of the Water Framework Directive (i.e., would / would not cause deterioration of water quality, or prejudice the achievement of water quality standards): application of a different legal test is not sufficient to satisfy this requirement.
> Ground 11.1
> 68. Ground 11.1 is that the Board lacked data on foot of which to make its EIA determination in relation to potential impacts on groundwater and, indirectly, on protected habitats. Recital 32 to Directive 2014/52 requires the data submitted by the Developer to be complete.
> 69. Board's Position on the remaining parts of Ground 11 (sub-grounds 11.1, 11.2 and 11.3) The Board's Decision is not invalid as alleged. Contrary to what the Applicants submit,

the EIA that the Board completed with respect to the proposed development was carried out by the requirements applicable to that assessment. The Board's conclusions for EIA purposes, including those related to potential impacts or groundwater and bats, were open to it based on the materials before it. The Board was fully entitled to rely on the evidence and materials that were before it in the manner it did. The non-expert assertions of the Applicants are not a basis for and do not establish any inadequacy in the EIA carried out by the Board nor any adequacy in the EIAR or any other supporting documentation submitted to the Board by the Notice Party in the SHD planning application process. The adequacy of information submitted for EIA purposes is primarily at the discretion of the Board. In the context of EIA, the Board is entitled to curial deference to its view of the adequacy of the information before it and, as to such adequacy, is reviewable only for irrationality. A high threshold applies in the case of a challenge to a decision by the Board that insufficient information has been provided. The Applicants' case (including the complaint at sub-ground 11.1 alleging an absence of data) does not meet this high threshold concerning the alleged inadequacy of the EIAR. Contrary to the non-expert assertions by the Applicants, as evident from its Decision (at page 6 of the Board Order), the Board was satisfied that the information submitted was sufficient for EIA purposes and in this regard that the EIAR, supported by the documentation submitted by the Notice Party, adequately identified and described the direct, indirect, secondary, and cumulative effects of the proposed development on the environment. The Applicants have not advanced or adverted to anything that impugns the rationality of the Board's conclusions for EIA purposes by reference to the material before the Board and have also not discharged the onus of proving that the Board's findings in relation to EIA were incorrect in law. A point of importance is that the EIAR in this case was prepared with appropriate expertise (see e.g. §1.10, Table 1-2, §1.10.1.1 to §1.10.1.5 and §1.11 of the EIAR). The Applicants pleadings make allegations not supported by any narrative affidavit expert evidence. There is no expert evidence from which the Court could conclude that the EIAR was inadequate regarding potential impacts on groundwater or bats. More particularly as regards sub-ground 11.2, the likely significant effects on groundwater and the potential for spills of fuel oils were adequately assessed and considered for EIA purposes (see e.g. pages 84,85, and 109 of the Inspector's Report and §8.5.1.3 and §8.5.1.4, §8.5.7, and §8.5.8 of the EIAR). More particularly regarding sub-ground 11.3, the likely significant effects of the project on bats were adequately identified and assessed by the Board. There is no evidence to support a contention that the proposed development risks impacting bats in a manner that would breach Article 12 of the Habitats Directive. The impact of the proposed development on bats was expressly and adequately considered in the Inspector's Report and by the Board in granting permission generally in accordance with the Inspector's recommendation, with the conclusions reached being open to the Inspector and the Board based on the materials that were before the Board (see e.g., pages 77 to 80 of the Inspector's Report, Chapter 6 of the EIAR and §4.1.2 of the NIS). This case relates to a scheme where no current requirement for a derogation licence had been identified. The Applicants ground of challenge, insofar as concerns potential impacts on bats, is not based on what the relevant survey work actually demonstrated the conditions on-site to be, but rather it seeks to capitalise on the measures that were included concerning bats on a purely precautionary basis in order to cover a future hypothetical possibility, not an identified factual reality. The Inspector (with whom the Board agreed) expressly concluded that "There is no information before the Board to suggest that the proposed development will impact on roosting bats and on the basis of the available information no indication that a derogation licence is required" (Emphasis added). On the particular facts of this case, it cannot be said that the material before the Board, on which it relied, was incapable of objectively supporting the conclusion it reached, in EIA, on the bats issue or the groundwater issue. The Applicants have not discharged the onus of demonstrating error and ground 11 (including sub-grounds 11.1 to 11.3) should be rejected.

70. The Notice Party argues that, in light of requirement that an EIAR be of sufficient quality that it is capable of being accepted, it is incumbent on the Applicants to adduce any expert evidence in support of their contentions in this regard, which they have not done.

71. In relation to bats, there is no evidence in support of the Applicants' proposition that there was a breach of Article 8a of the EIA Directive or Article 12 of the Habitats Directive. A series of bat surveys were carried out, which with the Board's Inspector expressed full satisfaction, and which indicated no signs of bats. Accordingly, no requirement for a derogation licence was identified. The Applicants' complaints in this regard are premised entirely on the statements in the EIAR which indicated, on the basis of a purely precautionary approach, that it would take steps in the hypothetical scenario that the situation on the

ground were to change in advance of the commencement of development. The material before the Board was entirely sufficient to allow it to reach the decision it did in this regard.

72. The EIAR also deals fully with the issue of groundwater, and extensive proposals for dealing with this issue were set out and taken into account by the Board's Inspector, who expressly concluded that this information was sufficient to allow her to exclude the possibility, of inter alia, the potential for impacts on water quality in the downstream European sites.

73. However, the Applicants' claims in this regard are founded on the lack of an express statement that it would be impossible that any discharge could ever occur. It is clear that such a 'counsel of perfection' is not required by EU law. The Applicants make a purely formalistic argument in this regard, which should be dismissed.

74. In relation to the issue of the purported absence of data, this is based principally on the incorrect premise that the EIAR did not make provision for the appropriate storage in terms of containers and bunding onsite. This is issue is expressly dealt with at §7.5.2.2. of the EIAR.

75. the Inspector was satisfied by the information provided by the Notice Party, which she found was sufficient to allow her to reach the conclusions set out at pages 84 and 85 of her Report. In the circumstances, this sub-ground does not comprise a ground upon which relief could, or should, be granted."

168. The issues are best considered under each individual sub-ground.

Sub-ground 11.1 – groundwater

169. Sub-ground 11.1 is:

"11.1. The Board failed to identify, describe and assess adequately or at all the likely significant effects on groundwater and, through groundwater, on the Galway Bay SAC and SPA, and the Developer failed to submit the information necessary to allow that assessment to take place. While the Developer submitted mitigation measures intended to mitigate impacts, and the Board decided the measures would avoid significant impacts, there was no measurable data relating to the quantity of materials present, the quantity susceptible of being involved in any accident, or the potential impact of such a quantity on water quality or on protected habitats or species. In the circumstances the information necessary to carry out the assessment was not present or considered. There was also no data present relating to the risk of the oil interceptor and soakaways becoming clogged and ceasing to function over time, or the maintenance regime applicable to them.

(See in relation to Ground 11.1 the EIAR main report §4.5.7, §7.5.2.2, §8.3.1.4, §8.5.1.3, §8.5.1.4, §8.5.1.6, §8.5.1.7, §15.1 Mitigation Measure #15 and 19, Table 6-20 Impacts on Water Quality During Construction, and Appendix 4-2 draft Construction and Environmental Management Plan, in particular.)"

170. Groundwater was duly considered by the inspector (p. 84-85):

"The potential for pollutants to enter groundwater and surface water during construction and groundworks is identified in the EIAR (e.g., leakage of sediments, hydrocarbons, and other polluting substances) and by third parties. Third parties also raised concerns about the potential for alterations to ground water flows within the aquifer due to proposed excavations. Given the shallow nature of the excavations proposed over a restricted area I am satisfied that potential for impact on ground water flows within the aquifer would be negligible. In relation to pollution of ground and surface waters the EIAR sets out mitigation measures aimed at avoiding any impacts on water quality. Subject to the implementation of the mitigation measures I am satisfied that any potential loading of pollutants during the construction phase would be negligible and that significant impacts will not arise.

During the operational phase attenuated stormwater will percolate to ground via 6 soakaways. The soakaways will also attenuate storm water during and post storm events. Water will pass through oil / petrol interceptors before entering the soakaways. Given the proposal to discharge clean attenuated water at a greenfield rate I am satisfied that the potential for significant environmental impacts can be excluded. …

With regard to cumulative impacts, no significant cumulative impacts on the water environment are anticipated.

I have considered all of the written submissions made in relation to hydrology and hydrogeology and the relevant contents of the file including the EIAR. I am satisfied that the information submitted is sufficient in terms of its detail of the local hydrological and hydrogeological environment to exclude the potential for significant environmental impacts on the environment and in turn the potential for impacts on water quality in the downstream European sites."

171. The EIAR sets out material before the board, which was accepted, to the effect that there was not going to be impact on groundwater:

"'There are no proposed discharges of any substance from the site during the construction phase of the proposed development. The hydrological regime, which includes percolation of rainfall to ground, will not be altered significantly during the construction phase. Potential emissions from the site are therefore related to potential uncontrolled releases and so a range of procedures, management plans and infrastructural mitigation proposals have been identified and described earlier in this chapter and will be implemented to ensure that such uncontrolled releases do not occur. The potential for residual impacts on water and ground water receptors is considered to be imperceptible and so the potential for cumulative effects associated with these receptors is limited. It is highly unlikely that all nearby proposed developments projects (as listed in Table 8-4) would be constructed at the same time and so the potential for multiple uncontrolled releases to water are also not likely. Should some or all nearby proposed development projects be constructed at the same time, the water quality controls at the Proposed Development site will ensure no likely significant cumulative effects will occur. Furthermore, it should be noted that planning and construction standards require that similar water quality controls will be implemented at other nearby development sites (as listed in Table 8-4), thus further reducing the potential for likely, significant cumulative effects…' (§8.5.7)

'During the operational phase, all surface water arising within the Proposed Development site will drain via soakaways to ground, with no proposed outfall. The water quality controls at the Proposed Development site will ensure no likely significant effects cumulatively will occur during the operational phase. Mandated water quality controls at the other nearby development sites will further reduce the potential for likely, significant cumulative effects.

Wastewater effluent arising from the operational phase of the proposed development will be piped to, and treated at, the municipal wastewater treatment plant via the Merlin Park pumping station. The Mutton Island treatment plan operates under licence from the EPA. The EPA cannot issue a licence in the event that emissions from that facility could lead to unacceptable environmental emissions. In circumstances where Irish Water has confirmed that the waste water arising from the proposed development will be treated at the Mutton Island wastewater treatment plant, the potential for cumulative effects associated with the wastewater discharges does not arise.'" (§8.5.7).

172. Mitigation measures were then set out in any event at §8.5.1.4. On the basis of the material before the board, the Inspector found that the information submitted was sufficient to allow her to exclude the potential for impacts on water quality in European sites.

173. By definition nobody can give an absolute guarantee in such a situation. One can only exclude reasonable doubt, and failure to arrive at 100% certainty doesn't invalidate a decision. Even the court only operates on a 50%+1 basis when applying the civil standard of proof. Here the applicants haven't shown that the material was such as to create reasonable doubt as to effects on European sites.

174. The applicants' complaints about alleged lack of data have to be viewed in that context. The applicants complain on affidavit about the adequacy of bunding. That is another term not leaping out of legal dictionaries, but, according to public domain material and specifically the New South Wales Environment Protection Agency, "Bunding is a form of secondary containment consisting of a raised, impermeable barrier used to retain liquids" (https://www.epa.nsw.gov.au/your-environment/waste/industrial-waste/hazardous-and-liquid-wastes/bunding-requirements-at-liquid-waste-treatment-facilities).

175. The applicants' evidence that bunding capacity is unspecified is in fact incorrect – see §7.5.2.2. of the EIAR. The applicants now accept that they were in error in that regard. Overall the EIAR was accepted and the applicants haven't dislodged that evidentially as having been a flawed approach.

176. This ground fails ultimately because judicial review is not a mechanism for a merits-based scrutiny of the EIA process: *per* Holland J. in *Coyne & Anor v. An Bord Pleanála & Others* [2023] IEHC 412, [2023] 7 JIC 2104 at §414, *per* Holland J. in *Fernleigh Residents Association & Anor v. An Bord Pleanála & Others* [2023] IEHC 525 at §303, *per* Farrell J. in *Grafton Group Plc v. An Bord Pleanála* [2023] IEHC 725, [2023] 12 JIC 2201 at §166. Non-expert evidence from the applicants is unlikely to establish flaws on the face of EIA material, and does not do so here, and in any event no cross-examination was sought (see also *Environmental Trust v. An Bord Pleanála* [2022] IEHC 540, [2022] 10 JIC 0305 *per* Holland J. at para. 91 onwards regarding expert evidence). The complaints about EIA have not been made out evidentially. That equally applies to the specific complaint that there was inadequate data.

177. The fact that a similar approach was taken in *Carrownagowan Concern Group & Others v. An Bord Pleanála & Others (No. 2)* [2024] IEHC 300 at para. 160 or that that case is sufficiently recent as to be potentially capable of being appealed doesn't mean that this issue can't be decided similarly here, or that the applicants are going to get anywhere by saying, as they do, that

Carrownagowan (No. 2) was wrong and should be departed from. What I said in that case at para. 160 was:

> "… To show that … acceptance [of an EIAR] constituted a failure of analysis by the board there would need to be evidence, normally scientific evidence, demonstrating a flaw in the assessment on its face or showing that a reasonable and well informed expert would have seen the analysis as flawed. Then any such disagreement has to be brought home, by cross-examination if necessary. An applicant can't simply engage in a merits-based disagreement with the result in the context of judicial review in the High Court. The applicants fall foul of that principle. That's the problem that occurred in *Hellfire Massey Residents Association v. An Bord Pleanála & Ors* [2021] IEHC 424, [2021] 7 JIC 0201 at 56-57, and *Reid v. An Bord Pleanála (No. 2)* [2021] IEHC 362, [2021] 5 JIC 2705. History repeats itself here."

178. The applicants say that it is enough to show a failure to apply the correct legal test in which case evidence isn't required. They rely on *Talbot & Anor v. An Bord Pleanála & Others* [2008] IESC 46, [2009] 1 I.R. 375, [2009] 1 I.L.R.M. 356, [2008] 7 JIC 2302 (Fennelly and Kearns JJ.) although that is about something different, namely in effect whether one could be sure, if one reason was invalid, if the decision could stand independently on another reason.

179. The applicants seem very trigger-happy about *Worldpor*t – anything they don't like the sound of is just condemned as wrongly decided. Happily the common law provides a more nuanced and generally more useful procedure known as distinguishing. *Carrownagowan* was dealing with a different context which was "a failure of analysis", not a failure to ask the right question.

180. Sure, if hypothetically a planning decision-maker was to lose her bearings and set out an incorrect test for AA such as balance of probabilities or something like that, expert evidence wouldn't be required. So there is always the possibility of a legal error that is evident on the face of the material. But the applicants' criticisms here don't come within a country mile of that. This is a case where an evidential contest by reference to the science would have been necessary to displace the board's assessment. That wasn't even attempted.

181. The applicants' denial of the relevance of the facts ultimately amounts to an attempt to convert the white heat of head-to-head forensic combat into the bloodless conjectural metaphysics of an academic symposium. If complaints don't have a proper factual foundation they simply don't arise as legal issues in contested litigation – even if they are otherwise interesting points in the abstract. The very wording of core ground 11 overall has a kitchen-sink energy and reads like an all-out disagreement with the decision on the merits. If it waddles like a duck and quacks like a duck it just might be a duck.

Sub-ground 11.2 – fuel oils

182. Sub-ground 11.2 is:

> "11.2. The EIAR and the Board failed to identify that the potential for spills of fuel oils involves a risk of discharge of hazardous substances to groundwater contrary to Article 6 of the Groundwater Directive (2006/118) as implemented by Article 4 of the European Communities Environmental Objectives (Groundwater) Regulations 2010. (SI No. 9 of 2010.) Such oils are designated as hazardous by the Environmental Protection Agency in its Classification of Hazardous and Non-Hazardous Substances in Groundwater, 2010, adopted pursuant to Article 9 of those Regulations. They are also classified as hazardous by the European Union in amendments to Annex X of the Water Framework Directive (2000/60.) In the circumstances, the Board failed to identify that it was precluded from granting a licence in the absence of measures that would prevent all discharge of oils to groundwater. The mitigation measures proposed in the EIAR are not preventive in this sense."

183. The points in relation to sub-ground 11.2 also apply here – this challenge has not been made out evidentially.

Sub-ground 11.3 – bats

184. Sub-ground 11.3 is:

> "11.3. The Board failed to identify, describe and assess, adequately or at all, or to reach reasoned conclusions in relation to, the likely significant effects of the project on the environment, in particular on bats. The information submitted by the Developer made it clear that there would be a loss of foraging habitat and a loss of suitable roosting sites (though it did not detect bats roosting in those sites.) The information confirmed that there would be an impact at the level of individual bats. The Board made findings on this basis as to the likely significant effects, but made no findings as to the measures necessary to prevent that effect, for the purposes of Article 8a of the EIA Directive and Article 12 of the Habitats Directive.
>
> • (1) As to the first sentence of §11.3, the Board failed to reach lawful reasoned conclusions in relation to the significance of effects as to impacts on bats. Proof that there will be no remaining significant effects at population level is not a sufficient compliance with A12 of the Habitats Directive which operates at the level of the individual, rather than the

species. Accordingly, the Board failed to apply the correct legal test for the lawful conclusion of an EIA.

- (2) As to the second sentence of §11.3, the information submitted by the Developer said there would be a loss of foraging habitat, but this would be minimised, and lost habitat would be replaced.
- (3) As to the third sentence of §11.3, the Developer's assertion that there would be no significant effect at the population level constitutes an admission that such effects will occur at the level of the individual. The Board erred in failing to recognise that this was the wrong legal test to apply, or in failing to explain how it considered that application of this test could amount to a sufficient finding for the purposes of A12 of the Habitats Directive.
- (4) As to the fourth sentence of §11.3, The assertion of lack of significant effect in this context was made at a population level, not at the level of the individual. The fact that the assertion is made at the population level constitutes an admission that impact at the level of the individual either has not been excluded or has not been considered. In either case, the Board erred because it failed to identify that the expression of the wider proposition either constituted an admission of the narrower or a failure to consider same.
- (6) See in relation to Ground 11.3, §6.4.2.2 of the EIAR main report, §6.4.3.3, §6.4.4.4, §6.5.1.3, §6.5.1.4, §6.5.1.7, §6.5.1.10, §6.5.2.4, §6.5.2.5.1 (p6-38 to 6-48), §6.5.2.7, §6.6.2.2.1, §6.6.3.2, §6.6.3.3, §15.1 Schedule of Mitigation #25 and #27; Inspector's Report §12.3.2 p77-80; submission of Martin Fahy, §6.10 to 6.12; submission by Buck Planning on behalf of Save Roscam, §6.3.4.2; report of the Chief Executive of Galway City Council, p8. The Applicant relies on those documents and the other exhibits for their full meaning and effect.
- (7) Factual Ground E3 §31 is relied on respect of Ground 11.3."

185. The bat complaint is factually misconceived. Firstly, the bat surveys identified no signs of bats. Those were accepted by the inspector as methodologically valid. Demonstrating flaws in such surveys has to be established evidentially, which was not done.

186. The inspector expressly found that there was no impact on roosting bats and no action requiring a derogation licence in the context of construction (pp. 79-80):

> "Given the suitability of some trees for roosting it is proposed to undertake pre-construction surveys on all trees with suitable potential prior to felling to ensure that there are no bat roosts in those trees at that time. The EIAR states that if bat roosts are found in any of the structures during pre-commencement surveys a bat derogation licence will be obtained and further mitigation prescribed. A number of third party submissions express concern in relation to the potential impacts on bat species and in relation to a grant of permission on the basis that a derogation licence may be required from the NPWS / Minister. However, up to date survey work undertaken in support of the subject application has not identified any bat roosts within the site. Taking a precautionary approach, it is proposed to conduct further pre-construction surveys on the basis that circumstances could change in the future. This is standard industry practice. There is no information before the Board to suggest that the proposed development will impact on roosting bats and on the basis of the available information no indication that a derogation licence is required. In relation to fragmentation and loss of habitat the landscape management plan minimises loss of planting and includes supplementary planting, with no / minimal net loss of linear landscape connectivity. Disturbance mitigation includes confining the majority of works to daylight hours and use of low intensity lighting and motion sensors where lighting is required. During the operational phase lighting will be designed to minimise bat disturbance."

187. The way in which the inspector approached the matter makes clear that she was considering the impact on individual bats as well as on the overall population.

188. As regards the operation phase, some potential impact on bats was accepted and mitigation measures regarding lighting were imposed (§6.6.3.3).

189. The previous points also apply. This point has not been made out evidentially. The EU law caselaw relied on does not arise in the absence, taking into account the mitigation measures, of potential problems such as habitat loss, removal of likely roosting places, or reasonable prospect of impact on let alone disturbance of bats, deliberate or otherwise.

Possible reference to the CJEU

190. The parties' positions as recorded in the statement of case are summarised as follows:

> "(h) Referral
>
> 'h. in the event of any request for a reference to the CJEU, a statement of any proposed question(s).'
>
> 76. Proposed Questions from the Applicants:
>
> (i). Where the Court said, at §39 of Case C-122/22 Hellfire Massey, that the outcome of an EIA must make it possible to determine whether, at the time of that assessment, the

project concerned was likely to have effects prohibited by Article 12 of Directive 92/43, is such an effect considered likely unless there remains no reasonable scientific doubt as to the absence of such effects (as per §67 of Case C-127/02), or is such an effect to be considered likely only if there is evidence that it will occur?

(ii). Does A6(1) of the Groundwater Directive, 2006/118, impose an obligation on the State to prevent inputs into groundwater of any hazardous substances, such as hydrocarbons?

(iii). Does the finding of the Court, at §39 of Case C-122/22 Hellfire Massey, that the outcome of an EIA must make it possible to determine whether, at the time of that assessment, the project concerned was likely to have effects prohibited by Article 12 of Directive 92/43, apply equally to Article 6(1) of Directive 2006/118, so that the EIA must make it possible to determine whether, at the time of the assessment, inputs into groundwater of any hazardous substances, such as hydrocarbons, will be prevented; and is the test for prevention of inputs that the competent authority (An Bord Pleanála) has made certain that discharge will not occur and / or there remains no reasonable scientific doubt as to the absence of such inputs (as per §67 of Case C-127/02)?

77. Board's position on proposed CJEU reference. There is no basis for the CJEU reference sought by the Applicants. A reference to the CJEU is unnecessary. The questions are based on a false premise, namely the Applicants' mischaracterisation and/or misinterpretation of the circumstances of this case and the applicable legislation and relevant case law. No doubt warranting a reference to the CJEU has been demonstrated. The three questions are abstract and do not arise on the facts, and therefore, a reference is not appropriate (Carrownagowan Concern Group v. An Bord Pleanála (No.2) [2024] IEHC 300 at §188, §189). The purported need for the three questions is based on mere assertion and conjecture. As regards Questions (i) and (iii), the queries set out do not arise on the facts, and both appear to be premised on a misunderstanding by the Applicants of the CJEU's respective judgments in Case C-463/20 Namur-Est (which, inter alia, as noted by Holland J. in Jennings v. An Bord Pleanála [2023] IEHC 14 at §668, in essence requires that the environmental effects of carrying a derogation licence (for example, in respect of bats which are entitled to strict protection pursuant to Article 12 the Habitats Directive) into effect be considered in EIA) and §67 of Case C-127/02 Waddenzee (which relates to appropriate assessment under Article 6(3) of the Habitats Directive). Questions (i) and (iii) also appear to conflate the respective assessments under the EIA Directive and the Habitats Directive. While an appropriate assessment under Article 6(3) of the Habitats Directive can operate to direct the outcome of a development consent process, EIA is not determinative as to the outcome and is limited to requiring that a project be subject to an assessment which informs rather than determines the development consent decision which should or may be made. Further as regards questions (i) and (iii), the CJEU's judgment in Case C-166/22 Hellfire Massy speaks for itself (see Hellfire Massy (No.5) v. An Bord Pleanála [2023] IEHC 591 at §41(vi) and §43). In addition, seeking a reference on the meaning of §39 of the CJEU's judgment in Case C-166/22 based on hypothetical facts and/or the Applicant's misunderstanding/misinterpretation of the facts of the present case and/or of the law isn't a basis for a reference. In any event, there is nothing unclear about §39 of Case C-166/22 that would warrant a clarificatory reference being made by this Honourable Court. Rather, the present case is analogous to the circumstances referred to at §37 in Case C-166/22. As regards Question (ii), it doesn't arise on the facts and is nothing to do with the Board's Decision or its functions. In respect of all three questions proposed by the Applicants, the interpretation of EU law that is sought bears no meaningful relationship to the facts of the main action before the High Court and a reference to the CJEU is therefore not necessary or appropriate. The three questions posed are irrelevant and are not necessary for the effective resolution of the dispute. The justification for the reference for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered, but rather that it is necessary for the effective resolution of a dispute (Case C-558/18 and C-563/18 Miasto Łowicz and Prokurator Generalnyat at §44; Case C-254/19 Friends of the Irish Environment Ltd at §62). The reference procedure isn't for any and every possible imaginative question – only for questions on which there can be a genuine dispute (Reid v. An Bord Pleanála (No.7) [2024] IEHC 27 at §89; Toole v. Minister for Housing (No. 3) [2023] IEHC 378 at §§86-87). It is not appropriate to make a reference where (as here) the alleged problem/issues are hypothetical (Case C-112/16 Persidera at §24; and Case C-222/05 Van der Weerd at §22).

78. The Notice Party agrees with the position set out by the Board in relation to the proposed reference."

191. The first question is

"(i). Where the Court said, at §39 of Case C-122/22 Hellfire Massey, that the outcome of an EIA must make it possible to determine whether, at the time of that assessment, the project concerned was likely to have effects prohibited by Article 12 of Directive 92/43, is such an effect considered likely unless there remains no reasonable scientific doubt as to the absence of such effects (as per §67 of Case C-127/02), or is such an effect to be considered likely only if there is evidence that it will occur?"

192. This doesn't arise on the facts. On either postulated basis there is no lawful reason to anticipate effects prohibited by art. 12 of directive 92/43, still less that such effects are likely.

193. The second question is:

"(ii). Does A6(1) of the Groundwater Directive, 2006/118, impose an obligation on the State to prevent inputs into groundwater of any hazardous substances, such as hydrocarbons?"

194. This is hypothetical and academic because it doesn't arise on the facts either. The board lawfully determined a lack of likely groundwater effects. It lawfully considered that this "will not arise".

195. The third question is:

"(iii). Does the finding of the Court, at §39 of Case C-122/22 Hellfire Massey, that the outcome of an EIA must make it possible to determine whether, at the time of that assessment, the project concerned was likely to have effects prohibited by Article 12 of Directive 92/43, apply equally to Article 6(1) of Directive 2006/118, so that the EIA must make it possible to determine whether, at the time of the assessment, inputs into groundwater of any hazardous substances, such as hydrocarbons, will be prevented; and is the test for prevention of inputs that the competent authority (An Bord Pleanála) has made certain that discharge will not occur and / or there remains no reasonable scientific doubt as to the absence of such inputs (as per §67 of Case C-127/02)?"

196. This doesn't arise on the facts either. On either basis there is no lawful reason to anticipate effects prohibited by directive, 2006/118, still less that such effects are likely.

197. In short there is no basis for a reference to the CJEU and indeed such a hypothetical and non-fact-based reference would be impermissible as a matter of EU law.

Summary

198. One final point before concluding is that while the departure from the development plan here in terms of plot ratio is significant, there could still have been a sizeable development on the site even complying with the plan. If there had been no material contravention in that respect, the plan could have allowed 50 units on this site based on the material contravention statement which calculated the plot ratio by reference to the developable part of the site. An expansive definition of plot ratio by reference to the entire landholding would have resulted in 84 dwellings, and maybe a more buccaneering developer might have tried to push the envelope by suggesting that figure as the baseline in a counter-factual non-contravention scenario, but the notice party didn't push that conceit here. The board allowed 102 units, but a 50-unit development would still have been significant, which perhaps contextualises the extent of the practical impact of the legal disagreement. In other words, the difference between the plan and the material contravention could be seen as one of degree rather than of seismic discontinuity.

199. In outline summary, without taking from the more specific terms of this judgment:

(i) provisions of a development plan regarding density and plot ratio are not zoning provisions;

(ii) the board did not misunderstand the concept of zoning;

(iii) the board was not obliged to consider some form of abstract "reasoning" for the plan separate and apart from the content and terms of the plan;

(iv) insofar as it is claimed that the board failed to have regard to a range of things, the board stated that it has had regard to such matters and the applicants haven't proved otherwise;

(v) insofar as non-compliance with non-mandatory guidelines is explicitly or implicitly alleged, such compliance isn't required;

(vi) the council's view of the requirements of national policy as embodied in the development plan is not binding on the board, and nor does departure from that in an individual case by the board constitute an implicit attack on the validity of the development plan;

(vii) the council did not authorise works or commit any other legal error in issuing a letter of consent to the application for permission; and

(viii) the remaining submissions of the applicants including as to EIA involve erroneous factual premises or are in substance merits-based disagreements with the board, or alternatively attempt to make points that are not pleaded.

Order

200. For the foregoing reasons, it is ordered that:

(i) the proceedings be dismissed other than in respect of core grounds 14 and 16 to 18;

(ii) the matter be listed on Monday 10th June 2024, for mention to arrange the processing of Module II, with the applicants being required to notify the CSSO immediately of the listing date;

(iii) the issue of costs be adjourned pending the outcome of Module II;

(iv) the council and any other parties not concerned with the issue against the State may be released from participation in Module II, with liberty to apply and liberty to appear in relation to costs or any other consequential matter should that become an issue; and

(v) the perfection of the order be postponed pending the outcome of the final module.