[2024] IEHC 66

THE HIGH COURT
PLANNING & ENVIRONMENT

[H.JR.2022.0000304]

IN THE MATTER OF SECTION 50, 50A AND 50B OF THE PLANNING AND DEVELOPMENT ACT 2000 AND IN THE MATTER OF THE PLANNING AND DEVELOPMENT (HOUSING) AND RESIDENTIAL TENANCIES ACT 2016

BETWEEN

BALLYBODEN TIDY TOWNS GROUP

APPLICANT

AND

AN BORD PLEANÁLA, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

MACCABE DURNEY BARNES LIMITED

NOTICE PARTY

(BALLYBODEN V)

JUDGMENT of Humphreys J. delivered on Tuesday the 13th day of February, 2024

Judgment history

1. While the present parties have not all litigated *inter se* before, this is the fifth set of proceedings instituted by the applicant that has given rise to a written judgment, and the ninth written decision overall, so I will refer to the case as *Ballyboden V*. I will identify the other cases for ease of present and future reference.

2. *Ballyboden I* was 2020 No. 816 J.R., a challenge to a Strategic Housing Development (SHD) on a site at Taylor's Lane and Edmondstown Road, Ballyboden, Dublin 16. *Certiorari* was granted by Holland J. in *Ballyboden Tidy Towns Group v. An Bord Pleanála & Ors* [2022] IEHC 7, [2022] 1 JIC 1001.

3. *Ballyboden II* was 2021 No. 89 JR, a challenge to flood relief works in South Dublin. That was dismissed in *Ballyboden Tidy Towns Group v. An Bord Pleanála & Ors* [2021] IEHC 648, [2021] 10 JIC 2003. Leave to appeal was refused in a No. 2 judgment: *Ballyboden Tidy Towns Group v. An Bord Pleanála & Ors* [2022] IEHC 1, [2022] 1 JIC 0701. The Supreme Court granted leapfrog leave to appeal ([2022] IESCDET 42) and then dismissed the appeal in a judgment by Woulfe J.: *Ballyboden Tidy Towns Group v. An Bord Pleanála & Ors* [2022] IESC 47, [2022] 11 JIC 1502.

4. *Ballyboden III* was 2021 No. 810 JR, a challenge to a development on a site at Stocking Avenue, Woodstown, Dublin 16. The board decided to concede the challenge, but the developer asked for liberty to defend it. I decided that that should be granted: *Ballyboden Tidy Towns Group v. An Bord Pleanála & Ors* [2023] IEHC 114, [2023] 3 JIC 1007. The applicant obtained leapfrog leave to appeal to the Supreme Court: [2023] IESCDET 90. The matter is currently pending before that court.

5. *Ballyboden IV* was 2021 No. 933 JR, a challenge to a Strategic Housing Development of 114 Build-to-Rent apartments in six apartment and duplex blocks of up to six storeys on a 2.2 hectare site south of Stocking Avenue, Rathfarnham, Dublin 16. That was dismissed by Holland J.: *Ballyboden Tidy Towns Group v. An Bord Pleanála & Ors* [2023] IEHC 722, [2023] 12 JIC 2107. A second module against the State is now awaited.

Facts

6. The applicant challenges the validity of an SHD decision permitting the construction of 131 residential units and associated works on lands off Stocking Lane, Ballyboden, County Dublin (ABP-311616-21).

7. The applicant is an unincorporated association dedicated to the sustainable planning and development and strong protection for the natural and built environment in the Ballyboden area, taking into account its long-established character and environmental characteristics.

8. In advance of the application, Irish Water (since 31st December, 2022, Uisce Éireann (UÉ) by virtue of the Water Services (Amendment) Act 2022) issued a pre-connection letter dated 30th May 2019 as follows:

> "Re: Connection Reference No CDS19003311 pre-connection enquiry - Subject to contract | Contract denied
>
> Connection for Mixed Use Development of 122 units at Coolamber, Stocking Lane, Ballyboden, Co. Dublin.
>
> Irish Water has reviewed your pre-connection enquiry in relation to a water connection at Coolamber, Stocking Lane, Ballyboden, Co. Dublin. Based upon the details that you have provided with your pre-connection enquiry and on the capacity currently available in the network(s), as assessed by Irish Water, we wish to advise you that, subject to a valid connection agreement being put in place, your proposed connection to the Irish Water

network(s) can be facilitated. Water: The connection should be made from 6'' ID cast-iron main in Stocking Lane. Approximately 20 m network extension will be required for the connection. Should you wish to progress with the connection, the extension works fee will be calculated and be a part of Irish Water connection offer for the Development. This Confirmation of Feasibility to connect to the Irish Water infrastructure also does not extend to your fire flow requirements. Please note that Irish Water can not guarantee a flow rate to meet fire flow requirements and in order to guarantee a flow to meet the Fire Authority requirements, you should provide adequate fire storage capacity within your development. Wastewater: New connection to the existing network is feasible without upgrade. Strategic Housing Development Irish Water notes that the scale of this development dictates that it is subject to the Strategic Housing Development planning process. Therefore: A. In advance of submitting your full application to An Bord Pleanála for assessment, you must have reviewed this development with Irish Water and received a Statement of Design Acceptance in relation to the layout of water and wastewater services. B. You are advised that this correspondence does not constitute an offer in whole or in part to provide a connection to any Irish Water infrastructure and is provided subject to a connection agreement being signed and appropriate connection fee paid at a later date.

All infrastructure should be designed and installed in accordance with the Irish Water Codes of Practice and Standard Details. A connection agreement can be applied for by completing the connection application form available at www.water.ie/connections. Irish Water's current charges for water and wastewater connections are set out in the Water Charges Plan as approved by the Commission for Regulation of Utilities."

9. On 12th August 2020, UÉ under its previous name issued a statement of design acceptance, as follows:

"Re: Design Submission for Lands at Stocking Lane, Ballyboden, Co. Dublin (the 'Development') (the 'Design Submission') / Connection Reference No: CDS20003688

... Many thanks for your recent Design Submission. We have reviewed your proposal for the connection(s) at the Development. Based on the information provided, which included the documents outlined in Appendix A to this letter, Irish Water has no objection to your proposals. This letter does not constitute an offer, in whole or in part, to provide a connection to any Irish Water infrastructure. Before you can connect to our network you must sign a connection agreement with Irish Water. This can be applied for by completing the connection application form at www.water.ie/connections. Irish Water's current charges for water and wastewater connections are set out in the Water Charges Plan as approved by the Commission for Regulation of Utilities (CRU)(https://www.cru.ie/document_group/irish-waters-water-chargesplan-2018/). You the Customer (including any designers/contractors or other related parties appointed by you) is (*sic*) entirely responsible for the design and construction of all water and/or wastewater infrastructure within the Development which is necessary to facilitate connection(s) from the boundary of the Development to Irish Water's network(s) (the 'Self-Lay Works'), as reflected in your Design Submission. Acceptance of the Design Submission by Irish Water does not, in any way, render Irish Water liable for any elements of the design and/or construction of the Self-Lay Works."

10. The developer consulted with the planning authority (South Dublin County Council) on 16th April, 2021. On 20th April, 2021 the council issued the following letter:

"20th April, 2021 ... Maccabe Durney Barnes Ltd 20 Fitzwilliam Place Dublin 2

Comhairle Contae Atha Cliath Theas South Dublin County Council

WITHOUT PREJUDICE SUBJECT TO CONTRACT/CONTRACT DENIED

... Re: Proposed Grant of Consent to include lands in the charge/control of the Council in a planning application to An Bord Pleanala to facilitate pedestrian, cycle and vehicular access to proposed Strategic Housing Development in Stocking Lane, Dublin 16

I refer to your request to include lands in the charge/control of the Council in a proposed planning application. I now wish to confirm that South Dublin County Council hereby grants its consent to include lands coloured blue on attached Indicative Drawing No. PR402491-ACM-01-00-DR-CE-00-0002 in a planning application for the purposes outlined above. Please note that this consent does not convey to Maccabe Durney Barnes Ltd. any interest whatsoever in the subject lands and is for the sole purpose of allowing a planning application to be made. This consent is valid for a period of twelve months from date of this letter. Yours sincerely PP Tony O'Grady Senior Engineer Road Maintenance Section"

11. Attached to that was a map which purported to include in the blue coloured land some of the land within the folio attached to 9a Prospect Heath.

12. The developer lodged a request for pre-application consultation on 30th April, 2021 (ref 310111). The developer, board and planning authority participated in the SHD pre-application meeting on 23rd June, 2021.

13. The board issued its opinion on 25th June, 2021 that the documents constituted a reasonable basis for an application under section 4 of the Planning and Development (Housing) and Residential Tenancies Act 2016.

14. The application for planning permission (ref 311616) was submitted on 11th October, 2021. It was accompanied by a number of documents, most notably for present purposes:

(i) maps;
(ii) a statement of material contravention; and
(iii) purported consents of owners.

15. As regards the site location map, a map (Drw No : 2183-10-A) indicates the red lined area as including part of the roadway (which is in the registered ownership of the owner of No. 9a) and also a small rectangular piece of land that is not currently part of the public road (but that is also owned by the owner of No. 9a).

16. As discussed at the hearing, public domain material (specifically google maps: https://www.google.com/maps/@53.2767222,-6.302233,3a,46.7y,88.84h,84.53t/data=!3m7!1e1!3m5!1sqjf9dVkEIC1duchLCK-3CA!2e0!6shttps:%2F%2Fstreetviewpixels-pa.googleapis.com%2Fv1%2Fthumbnail%3Fpanoid%3Dqjf9dVkEIC1duchLCK-3CA%26cb_client%3Dmaps_sv.tactile.gps%26w%3D203%26h%3D100%26yaw%3D36.23205%26pitch%3D0%26thumbfov%3D100!7i16384!8i8192?entry=ttu) indicates that this rectangular area would appear to be a small slice of the grass verge beside the road at a staggered-gated pedestrian pathway exit with traffic lights.

17. As regards the Statement of Material Contravention submitted by the developer, this identified that the proposed development materially contravened Housing Policy 9 – Objective 3 read in conjunction with §11.2.7 of the of the South Dublin Development Plan 2016-2022 in relation to height (§17.1.1). The developer relied on the National Planning Framework and the Urban Development and Building Height Guidelines 2018, and in particular purported to demonstrate compliance with the criteria in SPPR3 (§18.1.3):

> "There are available public bus services available near the site. A bus stop served by the Dublin Bus line 15b is located close to the site, which connects Stocking Lane to the city centre and other public transport routes and offers a 15 minute peak hour service. Other bus services are located on Edmonstown Road"

18. As regards consents, the only owners identified in the application form are from the owner of 4 Stocking Lane and from the council. The council's letter purports to consent to inclusion of lands identified on an attached map. The legend for the map indicates the land is "SDCC controlled, as per taken in charge drawing". The Council correctly did not suggest that they were the owners of the land, merely that it was "controlled" by them.

19. The applicant made a submission to the board prepared by Marston Planning Consultancy and Martin Peters Associates on 10th November, 2021.

20. The occupier of No. 9 Prospect Heath made a submission received online on 13th November, 2021, stating that the consent of the owner of No. 9a had not been sought and the owner had not been notified of the application. The submission includes the following:

> "H. Consent requested by the applicant regarding the pedestrian crossing to the South on Stocking Lane: Reference is made to the SDCC Grant of Consent document submitted by the applicant. It is to be noted that the section in the South-West corner (reproduced hereunder as diagram 1) is part of the property shown on plan and Folio Number DN173689F (reproduced hereunder as diagram 2). Permission and consent should be sought from the rightful owner. The owner of this property was not informed of the proposed inclusion of the land in the planning application"

21. A submission by Patrick Joyce Consulting Engineers on behalf of Prospect Manor Residents Association on 15th November, 2021 stated that a section of land between the site of the proposed development and the footpath in Prospect Heath was owned by the owner of No. 9a Prospect Heath, who had not given consent for an application to be made for development on their land. A comparison between the map appended to that objection and the Site Map confirms that part of the proposed development required for the provision of a new footpath is to be carried out over land registered as owned by the landowner of No. 9a Prospect Heath.

22. The chief executive of the planning authority issued his opinion to the board on 6th December, 2021 which noted that there remained issues with the application which either had been raised previously or had arisen in the present application. Notwithstanding this, the planning authority recommended a grant of permission subject to proposed conditions.

23. The board's inspector Mr Paul O'Brien issued his report on 28th January, 2022 and recommended a grant of permission. Of note for present purposes is the discussion of public transport as follows:

"11.3.3. Section 3.2 of the Urban Development and Building Heights guidelines refers to the need for a proposed development to be 'well served by public transport with high capacity, frequent service and good links to other modes of public transport'. The seated capacity of a double decker bus, the only type of bus that is operated on the 15B, varies from between 65 and 75 seats and the total capacity to include standees, mobility impaired and children in buggy's, also varies but may add between 15 and 20 people to the overall loading that a bus may legally carry. The hourly off-peak capacity is therefore about 340 passengers each way and the peak capacity would be circa 510 passengers. There is a higher frequency service (operating every ten minutes in the off-peak) provided in the form of Dublin Bus route 15 from Stocking Avenue/ Ballycullen Road (located 2 km from the site) and it may be assumed that this is the more popular bus route for existing residents of the Ballycullen Road/ Stocking Avenue area.

11.3.4. I note that a number of the third-party submissions referred to the lack of public transport in the area and the Planning Authority also referred to the limited public transport provision in the area. I would disagree with these comments as the bus service, existing and proposed, passes along the front of the site along Stocking Lane and the frequency is good/ suitable for the immediate area. The existing bus stops would all be within easy walking distance from all points within the proposed development. I have already commented on the average capacity per hour per direction and consider this suitable to serve the proposed development, in particular noting the scale of the development in the context of the existing population. The extension of the bus service to Tallaght under Bus Connects, improves accessibility to a wider area/ greater range of services than is the case at present.

11.3.5. The reports submitted by Marston Planning/ Martin Peters Associates Consulting Engineers and Patrick Joyce Associates -Consulting Engineers refer to the poor quality of existing public transport in the area, but they do not provide any detailed technical information on the frequency/ capacity of the existing bus services, and they do not demonstrate why this service cannot cater for the proposed development."

24. This was largely repeated at section 11.9:

"11.9.19. Specific Comment on Public Transport: I note the concerns expressed in the third-party submissions about the existing and proposed public transport provision in the area. I would disagree with the comments that it is not of a high quality. The present 158 service provides for an off-peak service of every 15 to 20 minutes, with frequency (and therefore capacity at peak times) being every c.10 minutes, and as Stocking Lane is near the terminus of this route, which is at Stocking Avenue, access to this service should not be an issue. The proximity of the subject site to the terminus provides a sense of reliability for users of the service, though modern Real Time apps allow for a greater level of certainty than was the case in the past. 11.9.20. I have already reported on the capacity of the 158 route and consider this to be acceptable, I repeat these details in the following table. I am estimating the capacity of the standard 'Dublin Bus' bus at 85 passengers, the capacity varies due to the type of bus, number of doors etc. Route 158 is only operated with double decker buses. The table provides AM peak citybound and PM Peak from the city figures, however it should be stated that both peak hours vary in length, so it is not expected that everyone commutes only during these times. For example, pupils/ students using the bus to attend schools/ colleges may use the bus in the core AM peak but travel home outside of the PM Peak. Such travel patterns are replicated throughout the day, and this is more pronounced with the move away from 9 to 5 working patterns."

25. There then followed a table, after which the inspector continued:

"11.9.21. The revisions to the local network under Bus Connects, sees the 158 being replaced with the 85, not the 16 as indicated in the submitted 'Traffic and Transport Assessment'-prepared by AECOM, and the route will be extended to Tallaght. The increase in the range of services/ destinations that this will provide may be off-set by less reliability through the extension of the route. Overall, the service provision is not significantly changed under Bus Connects. It should be noted that the final frequency of Route 85 will probably only be published nearer the time of implementation.

11.9.22. A benefit of Bus Connects, will be the development of the Core Bus Corridors and which will benefit the journey times of all buses that use these corridors. The 158 will benefit, particularly on the section from Rathfarnham into the city centre. Improvements to bus journey times will encourage a greater modal shift from use of the private car for those who commute into the city centre. 11.9.23. The bus stops along Stocking Lane are accessible for all residents of the proposed development and the proposed connection into Springvale may enable/ encourage residents to use the bus, thereby reducing demand for car-based commuting. This link will allow for a significant number of the residents of Springvale to be

within 500 m walking distance of the bus stops on Stocking Lane. As is reported in the Patrick Joyce Associates report, bus service provision on Edmonstown Road is not of a high quality."

26. As regards the ownership issue, the inspector said as follows in para. 11.9.36:

"The Patrick Joyce Associates report refers to a landownership issue in the vicinity of the southern crossing point. The Property Registration Authority map indicates that part of the exiting crossing is in the ownership of no. 9 Prospect Heath. This is a legal issue and as Section 5.13 of the Development Management Guidelines, 2007, states 'The planning system is not designed as a mechanism for resolving disputes about title to land or premises or rights over land; these are ultimately matters for resolution in the Courts. In this regard, it should be noted that, as section 34(13) of the Planning Act states, a person is not be (*sic*) entitled solely by reason of a permission to carry out any development'. This is a matter for the applicant to ensure that they have the right to develop the indicated lands. In the event this matter cannot be resolved, the provision of an alternative pedestrian crossing, albeit serving the same desire can be provided, and this matter could reasonably be dealt with by condition."

27. The board now seems to accept that the inspector's report is incorrect in referring to No. 9 as opposed to No. 9a. The applicant didn't plead any issue arising out of this error.

28. As regards capacity of the network regarding water and wastewater, the inspector said as follows:

"11.10.1. Water Supply and Foul Drainage: Irish Water and the South Dublin County Council Water Services Department have reported no objection to this development in relation to the connection to public foul drainage and water supply systems. The applicant has engaged with Irish Water and has submitted design proposals. Irish Water has issued a Statement of Design Acceptance and conditions are recommended in the event that permission is granted. No capacity constraints have been identified by either body. I do note the comments of Inland Fisheries Ireland (IFI) in relation to the capacity constraints at the Ringsend Wastewater Treatment Plant. The Ringsend WWTP is licenced by the EPA and measures are underway to upgrade and improve the capacity of this facility."

29. The inspector concluded:

"11.10.9. Conclusion on Infrastructure and Flood Risk: The site is served by a public water supply and the public foul drainage network. Wastewater will be treated at the Ringsend WWTP and having regard to the submitted information, there is no concern in relation to this facility been able to treat the foul water from this relatively modest development. There is no concern regarding the potential for flooding of this site or the cause of flooding on adjacent lands."

30. Under the heading of AA, the inspector continued this discussion:

"12.4.8. Full regard/ consideration is had to the report by Inland Fisheries Ireland (IFI). I note in particular their comments regarding the Ringsend Wastewater Treatment Plant; however, I am not aware of there being any capacity or licencing issues that would prevent the connection of the subject development to public foul drainage network and in turn treatment of foul water at Ringsend. Improvement works are underway and will allow for the treatment of additional wastewater generated in the Greater Dublin Area. The scale and nature of the proposed development is unlikely to put any significant increased demand on wastewater treatment provision.

12.4.9. Consideration of Impacts on South Dublin Bay SAC, North Dublin Bay SAC, South Dublin Bay and River Tolka Estuary SPA and North Bull Island SPA: There is nothing unique or particularly challenging about the proposed urban development, either at construction phase or operational phase.

• There are no surface water features within the site. During the construction phase standard pollution control measures are to be used to prevent sediment or pollutants from leaving the construction site and entering the water system.

• During the operational phase of development, foul water will drain to the public system. The discharge from the proposed development would drain, via the public network, to the Ringsend Wastewater Treatment Plant for treatment and ultimately discharge to Dublin Bay. There is potential for an interrupted and distant hydrological connection between the site and sites in Dublin Bay due to the wastewater pathway. However, the discharge from the site is negligible in the context of the overall licenced discharge at Ringsend Wastewater Treatment Plant, and thus its impact on the overall discharge would be negligible.

In-Combination or Cumulative Effects

12.5.1. This project is taking place within the context of greater levels of built development and associated increases in residential density in the Dublin area. This can act in a cumulative manner through increased volumes to the Ringsend Wastewater Treatment Plant

(WWTP). I note the submission from Inland Fisheries Ireland (IFI) in relation to current and future capacity of the Ringsend WWTP.

12.5.2. The expansion of the city is catered for through land use planning by the various planning authorities in the Dublin area, and specifically in the Ballyboden/Stocking Lane area in accordance with the requirements of the South Dublin County Development Plan 2016 - 2022. This has been subject to AA by the Planning Authority, which concluded that its implementation would not result in significant adverse effects to the integrity of any Natura 2000 sites. I note also the development is for a relatively small mixed use development including provision for 131 residential units and modest commercial development on serviced lands, with an appropriate RES zoning (for residential uses), in an established urban area. As such the proposal will not generate significant demands on the existing public drainage network for foul water and surface water.

12.5.3. Furthermore, I note that upgrade works have commenced on the Ringsend Wastewater Treatment works extension, permitted under ABP – PL.29N.YA0010, and the facility is subject to EPA licencing and associated
Appropriate Assessment Screening.

12.5.4. While there are capacity issues associated with the Ringsend WWTP, the permitted major upgrade to the WWTP now underway will allow the Ringsend WWTP to treat the increasing volumes of wastewater arriving at the plant to the required standard, enabling future housing and commercial development in the Dublin area. The project will deliver, on a phased basis, the capacity to treat the wastewater for a population equivalent of 2.4 million while achieving the standards of the Urban Wastewater Treatment Directive. In February 2018, work commenced on the first element, the construction of a new 400,000 population equivalent extension at the plant and these were completed and commissioned in November 2021. Works on the upgrade of secondary treatment tanks at the plant with Aerobic Granular Sludge (AGS) Technology were completed in December 2021. The addition of AGS technology will allow more wastewater to be treated to a higher standard within the existing tanks. The second contract commenced in November 2021, following the completion of the capacity upgrade contract, and is expected to take two years to be complete. Construction works on foot of a third contract are due to commence in early 2022. These contracts are phased to ensure that Ringsend WWTP can continue to treat wastewater from the homes, businesses, schools and hospitals of the Greater Dublin Area at current treatment levels throughout the upgrade works. The details of these upgrade works are available at www.water.ie/projectsplans/ringsend

12.5.5. Having regard to the scale of development proposed, and likely time for occupation if permitted and constructed, it is considered that the development would result in an insignificant increase in the loading at the Ringsend Wastewater Treatment Plant, which would in any event be subject to Irish Water consent and would only be given where compliance with EPA licencing in respect of the operation of the plant was not breached.

12.5.6. Taking into consideration the average effluent discharge from the proposed development, the impacts arising from the cumulative effect of discharges to the Ringsend WWTP generally, and the considerations discussed above, I am satisfied that there are no projects or plans which can act in combination with this development that could give rise to any significant effect to Natura 2000 Sites within the zone of influence of the proposed development."

31. The board held a meeting on 11th February, 2022 and decided to grant permission generally in accordance with the Inspector's recommendations. The Board Direction was signed on 11th February, 2022 by Mr Paul Hyde.

32. The Board Order was signed on 16th February, 2022, again by Mr Hyde. The order includes the "defensive and circular" formula (similar to although perhaps not quite as bad as the one referenced by O'Donnell J. in *Balz and Heubach v. An Bord Pleanála* [2019] IESC 90, [2020] 1 I.L.R.M. 367, [2019] 12 JIC 1202 para. 46) that:

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

33. On the issue of material contravention, the order stated as follows:

> "The Board considered that the proposed development is, apart from the building height parameters, broadly compliant with the current South Dublin County Council Development Plan 2016-2022 and would therefore be in accordance with the proper planning and sustainable development of the area. The Board considers that, while a grant of permission for the proposed Strategic Housing Development would not materially contravene a zoning objective of the Development Plan, it would materially contravene the plan with respect to building height limits. The Board considers that, having regard to the provisions of section

37(2) of the Planning and Development Act 2000, as amended, the grant of permission in material contravention of the South Dublin County Council Development Plan 2016-2022 would be justified for the following reasons and considerations:

- With regard to section 37(2)(b)(i) of the Planning and Development Act 2000, as amended, the proposed development is in accordance with the definition of Strategic Housing Development, as set out in section 3 of the Planning and Development (Housing) and Residential Tenancies Act 2016, as amended, and delivers on the Government's policy to increase delivery of housing from its current under supply as set out in Rebuilding Ireland Action Plan for Housing and Homelessness issued in July 2016.
- With regard to section 37(2)(b)(iii) of the Planning and Development Act 2000, as amended, the proposed development in terms of height is in accordance with national policy as set out in Project Ireland 2040 National Planning Framework, specifically National Policy Objective 13 and National Policy Objective 35, and is in compliance with the Urban Development and Building Heights Guidelines for Planning Authorities, issued by the Department of Housing, Planning and Local Government in December 2018, in particular Specific Planning Policy Requirement 3."

Procedural history

34. The proceedings were issued on 11th April, 2022.

35. The application for leave to apply for judicial review was opened before Hyland J. during the Easter vacation and was adjourned to the Commercial Planning and Strategic Infrastructure list on 9th May, 2022.

36. Leave was granted on 9th May, 2022.

37. The originating notice of motion was issued on 13th May, 2022.

38. The case against the Second and Third Named Respondents [Relief 4, Core Ground 12] was adjourned generally with liberty to re-enter on 30th May, 2022.

39. The board filed its opposition on 13th February, 2023. The Notice Party has not filed opposition papers. On 19th June, 2023 the matter was adjourned to 3rd July, 2023 for certification of readiness. The matter was eventually certified as ready on 19th October, 2023, by the applicant, and sent to the following list to fix dates, when it was given a hearing date.

40. The matter was heard on 6th and 7th February, 2024. On the latter date, the applicant sought and was, without objection, granted liberty to file a further affidavit exhibiting the submission to the board by the occupier of No. 9 Prospect Heath and the folios for 9 and 9a showing that the owner is Standard Bank Offshore Trust Jersey Ltd. At the conclusion of the hearing on the same date, judgment was reserved.

Relief sought

41. The reliefs sought in the statement of grounds are as follows:

"1. An order of *Certiorar*i by way of application for judicial review quashing the decision of the Respondent to grant planning permission to the Notice Party for the construction of 131 residential units and associated works on lands off Stocking Lane, Ballyboden, County Dublin (ABP-311616-21).

2. 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 respondent as the court considers appropriate.

3. A Declaration, if necessary, that the Board had a duty to disapply section 9(6)(c) of the Planning and Development (Housing) and Residential Tenancies Act 2016 in order to avoid granting planning permission in material contravention of a plan or programme that was subject to SEA assessment at the time it was adopted.

4. A Declaration that Article 9(6) of the 2016 Act actively contravenes Articles 1 and 3 of the SEA Directive as it allows the Board to grant planning permission in Material Contravention of a plan or programme that was subject to SEA Assessment at the time that it was adopted.

5. A Declaration 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 and /or Order 99 of the Rules of the Superior Courts and Section 165 of the Legal Services Regulation Act 2015 interpreted pursuant to the interpretive obligations set out in Case C-470/16 *North East Pylon Pressure Campaign Limited v. An Bord Pleanála* and *McCoy and others v Shillelagh Quarries* [2015] IECA 28 whereby in proceedings where the application of national environmental law is at issue, it is for the court to give an interpretation of national procedural law which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) and (4) of the Aarhus Convention apply to these proceedings.

6. A stay, if necessary, on works being carried out pursuant to the impugned grant of planning permission pending the resolution of these proceedings.
7. Costs."

Grounds of challenge

42. The core grounds of challenge are as follows:

Domestic law grounds

"1. The impugned decision of 16th February 2022 (the "Impugned Decision") is invalid as the application did not comply with Article 297(2)(a) of the Planning and Development Regulations 2001 (the "2001 Regulations") and /or the Board erred in law and/or took into account irrelevant factors and/or had no jurisdiction to grant permission for an invalid application in respect of which no consent had been given for part of the land concerned, further particulars of which are set out in Part 2 below.

2. The Impugned Decision is invalid because it was made pursuant to an invalid application which did not comply with the mandatory requirements of Regulations 297(1) and/or 297(2)(d) of the Planning and Development Regulations 2001, further particulars of which are set out in Part 2 below.

3. The Impugned Decision is invalid as the Board erred in its interpretation and application of section 3 of the Urban Development and Building Height Guidelines 2018 in respect of public transport capacity and/or failed to give adequate reasons in respect of submissions made identifying an absence of public transport capacity and/or impermissibly switched the burden of proof to the public, further particulars of which are set out in Part 2 below.

4. The Impugned Decision is invalid as the Board erred in its interpretation of Section 3 of the Urban Development and Building Height Guidelines 2018 and/or failed to take into account a relevant consideration, further particulars of which are set out in Part 2 below.

5. The Impugned Decision is invalid because the Board misinterpreted Sections 37(2)(b)(i) of the 2000 Act and took into account an irrelevant factor and therefore granted planning permission for development which would materially contravene the South Dublin County Development Plan 2016 to 2022 contrary to Section 9(6)(c) of the 2016 Act, further particulars of which are set out in Part 2 below.

6. The Impugned Decision is invalid as the Board breached the Applicant's rights to fair procedures and failed to give any or any adequate reasons in its assessment of traffic impacts from the proposed development on the greater Rathfarnham area, further particulars of which are set out in Part 2 below.

European Law Grounds

7. The Impugned Decision is invalid because it relied on an EIA Screening determination which was unlawful due to the Developer's failure to comply with Article 4(4) of the EIA Directive (as transposed inter alia by Regulation 299B(1)(b)(ii)(II) of the 2001 Regulations) and the Board's failure to comply with Article 4(5)(b) of the EIA Directive (as transposed by Regulation 299C(1)(b) of the 2001 Regulations), further particulars of which are set out in Part 2 below.

8. The Impugned Decision is invalid because the Board failed to comply with Article 299B(1)(b) of the 2001 Regulations, in particular as the Board failed to conduct the required preliminary EIA screening exercise as required or at all. further particulars of which are set out in Part 2 below.

9. The Impugned Decision is invalid as the Appropriate Assessment Screening decision carried out by the Board was contrary to Article 6(3) of the Habitats Directive because it contained a material scientific error i.e. that there was no direct or indirect linkage between the Wicklow Mountains SAC and the site of the proposed development and/or because it failed to correctly take into account in combination effects, further particulars of which are set out in Part 2 below.

10. The Impugned Decision is invalid as the Board made an unlawful EIA Screening determination by failing to take into account adequately or at all the cumulative impact of the proposed development together with the impact of other existing and/or approved projects in breach of Article 4(3) of the EIA Directive and Regulation 299C(1)(a)(i) of the 2001 Regulations., further particulars of which are set out in Part 2 below.

11. The Impugned Decision is invalid in that it contravenes Articles 1 and 3 of Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment ('the SEA Directive') by granting planning permission in Material Contravention of the CDP, further particulars of which are set out in Part 2 below.

Validity Ground

12. The Impugned Decision is invalid as Article 9(6) of the 2016 Act, upon which the Board relied, actively contravenes Articles 1 and 3 of the SEA Directive by allowing the Board to grant planning permission in Material Contravention of the CDP, further particulars of which are set out in Part 2 below."

43. The statement of case confirms that Core Grounds 4 and 8 are not being pursued. Also while not formally withdrawn, no substantive submissions whatsoever were made in relation to core ground 11. The applicant's submission states in that regard at para. 5:

"The Applicant is formally maintaining Core Ground 11. A very similar point was rejected by Holland J. in *BTTG v. An Bord Pleanála* [*Ballyboden IV*]. The Applicant maintains this ground in the event that this point is successful at appellate level. However, it is not addressed in detail herein."

44. Noting that ground 12 has been modularised, the grounds that potentially arise now are 1 to 3, 5 to 7, 9 and 10. In the course of submissions the applicant stated that it was not pursuing the issues at sub-grounds 13, 14 and 40.

Domestic law issues

45. We begin with the domestic grounds of challenge, of which core grounds 1 to 3, 5 and 6 remain live.

Core ground 1 – lack of consent by owner

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

"Applicant – The application is invalid because it breached Regulation 297(2)(a) of the 2001 Regulations by including lands within the red line that are not in the ownership of the applicant for permission without the written consent of the owner. Because the application was invalid, the impugned decision is, as a consequence, also invalid.

Board – It is denied that the Board breached Regulation 297(2)(a) of the 2001 Regulations. The Applicant does not have *locus standi* to challenge the decision of the Board by reference to this Core Ground. The application for planning permission was accompanied by the required letters of consent and thus the planning permission complied with the requirements of Article 297 of the 2001 Regulations."

Whether this issue needs to be decided

47. The issue of whether, and in what circumstances, an applicant can challenge the validity of a permission based on a breach of a requirement to obtain the consent of another party as owner has given rise to a spectrum of judicial views. There is no obvious point in my getting involved in that because, while on the one hand, diverging views leave me freer than usual to opt for the strand of jurisprudence that seems to commend itself more to me, on the other hand, nothing I can do will change the fact that a divergence of view exists. The only meaningful purpose in deciding such a point in a given case, where (as here, for reasons that will become apparent) it isn't crucial to the order, is if the parties are determined to use the case as a vehicle to take the point to an appellate court. That said, the law is being reviewed anyway in a manner that could have the potential (depending on your point of view) to clarify this issue without the need for forensic vehicularity (see s. 258(1) (definition of sufficient interest) of the Planning and Development Bill 2023 as initiated). So it's probably sufficient simply to express relief that I don't think I need to decide this.

Core ground 2 – lack of adequate confirmation of capacity and feasibility by Uisce Éireann

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

"Applicant – A feature of the SHD procedure is that per Regulation 297(2)(d), the application must be accompanied by evidence that Irish Water has confirmed that it is feasible to provide the appropriate services and that the relevant water and waste water networks have the capacity to serve he development. The Applicant argues that evidence concerning capacity in the wastewater network did not accompany the application and in any event, the Ringsend plant is over-capacity so this evidence could not be provided.

Board – It is denied that there was a breach of Regulation 297(1) and/or 297(2)(d). The application for planning permission was accompanied by a letter from Irish Water of 30 May 2019 and a Statement of Design Acceptance from Irish Water dated 12 August 2020. The contents of these letters meet the requirements of Article 291(1) and 297(2)(d). As regards the capacity of Ringsend plant, this was addressed by the Board Inspector at 11.10.1 and 11.10.9 of his report. It was also addressed at §12 in the context of appropriate assessment."

Law in relation to confirmation of capacity and feasibility by Uisce Éireann

49. There are a number of distinct aspects of the UÉ confirmation of capacity and feasibility procedure that warrant mention, specifically:

(i) the extent of the obligation;
(ii) the need for separate confirmation at the pre- and post-application stages;
(iii) the merits of the confirmation; and
(iv) the wording of the confirmation.

The extent of the obligation

50. Article 285 of the 2001 regulations deals with pre-application procedures. In the context of such applications, it provides:

> "(1) A request to the Board by a prospective applicant under section 5 of the Act of 2016 to enter into consultations with the Board in relation to a proposed strategic housing development shall be in the form set out at Form No. 11 of Schedule 3.
> (2) A request referred to in sub-article (1) shall be accompanied by the following, including maps and drawings, where appropriate:
> (a) where the prospective applicant is not the owner of the land concerned, the written consent of the owner to make an application under section 4 of the Act of 2016 in respect of that land;
> (b) a brief description of the proposed numbers and types of houses or numbers of student accommodation units and bedspaces, or both, as appropriate, and their design, including proposed gross floor spaces, housing density, plot ratio, site coverage, building heights, proposed layout and aspect;
> (c) a brief description of proposed public and private open space provision, landscaping, play facilities, pedestrian permeability, vehicular access and parking provision, where relevant;
> (d) a brief description of the proposed provision of ancillary services, where required, including child care facilities;
> (e) where relevant, any other proposed use in the development, the zoning of which facilitates such use, including the proposed gross floor space for each such use;
> (f) a brief description of any proposals to address or, where relevant, integrate the proposed development with surrounding land uses;
> (g) a brief description of any proposals to provide for water services infrastructure, including, in the case where it is proposed to connect the development to a public water or wastewater network or both, evidence that [Uisce Éireann] has confirmed that it is feasible to provide the appropriate service or services and that the relevant network or networks have the capacity to service the development, …"

51. Article 297(2)(d) of the 2001 regulations provides that an application shall be accompanied by the following:

> "(d) where it is proposed to connect the development to a public water or wastewater network, or both, evidence that [Uisce Éireann] has confirmed that it is feasible to provide the appropriate service or services and that the relevant water network or networks have the capacity to service the development,"

52. The applicant submits in effect that "capacity" is a black-and-white, objective situation and that capacity in the Ringsend Waste Water Treatment facility has now been exceeded as illustrated by EPA reports and submissions made to the board in the present case. But that is a misunderstanding. Depending on the context, capacity is not all or nothing – it inherently involves trade-offs. The primary meaning of "capacity" in *The Shorter Oxford English Dictionary* (1973, Oxford, Clarendon Press) vol. I p. 280 is "Ability to take in or hold", giving a date of 1702 for that sense of the term. In some situations that is absolute. The Apollo 11 lunar module had capacity for two astronauts and only two. In other situations it is relative. A cattery could have capacity for 40 cats but with possible extra room for a couple more depending on doubling up of any docile individuals.

53. In the more relative situations, such as the capacity of a water or wastewater network, it is up to the relevant statutory decision-maker – UÉ in this case as the body required to submit confirmation of capacity – to determine how these trade-offs should be managed, and for example to determine how many overflow incidents are acceptable before we hit a red line whereby no more additional connections can be allowed without expansion works.

The need for separate UÉ confirmation at the pre-application and post-application stage

54. The existence or otherwise of capacity is an evolving situation, so the view of UÉ at any one point in time does not necessarily reflect its view at a later point. That is reflected in the distinction between arts. 285 and 297, which respectively require confirmations from UÉ both before and after the making of the application. The express terms and inherent logic of the statutory scheme, especially read in the light of the inherent background factual matrix of an evolving process over time, require separate and distinct statements on behalf of UÉ for the purpose of the pre-application and post-application procedures.

The merits of an UÉ confirmation

55. While the regulation doesn't require that the applicant for permission has to demonstrate feasibility and capacity, but merely provide "evidence" that "Uisce Éireann has confirmed" feasibility and capacity, and therefore what they expressly mandate is a statement of Uisce Éireann's views, not proof that such views are correct, it does not follow that the merits of UÉ's asserted position are irrelevant. If the board accepted a manifestly unreasonable assertion of capacity by UÉ, or one

tainted by error of fact, then that would be a separate administrative law ground for judicial review, even if art. 297 on its own was to be taken as satisfied in its literal terms by the use of the appropriate formula or an equivalent by UÉ itself.

56. While it didn't arise here, I should specify how that point would be pleaded, lest I be taken as setting applicants up for a fall by saying what they have done wrong as opposed to how to do it right. The position is that the UÉ confirmation is a statutory act but not in itself a decision with self-executing legal consequences, and nor is it separate to the planning process. It is a step in the planning process, albeit not one taken by a planning decision-maker. If a party wants to argue that that step was unlawful, it can challenge the letter by *certiorari*, but UÉ would have to be a respondent, and a specific relief should be sought against the letter. That challenge would not be out of time if brought within 8 weeks of the board's decision, because challenges to interim steps can be saved for the final decision. There is no analogy with, for example, a challenge to a derogation licence, which has a stand-alone legal effect separate from a planning consent.

The phrasing of an UÉ confirmation

57. As to the way in which UÉ's confirmation is to be phrased, the wording of the 2001 regulations articulates two separate concepts, feasibility of provision and capacity of the network.

58. As noted elsewhere, it is highly desirable for actual statutory language to be used. Other public bodies do that as a matter of course – but for reasons best known to itself, the board has created endless problems across many cases by failing to take that point on board, and UÉ has done something similar here. From some of the jurisprudence one gets a sense that patience could be wearing slightly thin on this issue. But leaving aside such rumblings, whether empty or otherwise, it must be acknowledged that as the law stands today there is no general legal rule that the exact language of a statute must be used provided that the meaning of what is said is clearly the same. Where a decision-maker departs from the statutory wording and it is not clear that the meaning is the same then relief would presumptively follow. Speaking of such departures by decision-makers, in *V.K. v. Minister for Justice and Equality* [2019] IECA 232, [2021] 1 I.R. 724, [2019] 7 JIC 3011 (Unreported, Court of Appeal, 31st July, 2019) Baker J. said at para. 109 that "words do matter, and if the language of the Minister departed in its emphasis, tone, and possible import from that in the case law, it seems to me that [the trial judge] was correct to grant *certiorari"* (see also *E.L. (Albania) v. International Panel Appeals Tribunal* [2019] IEHC 699, [2019] 10 JIC 2106).

59. Whether informally worded documents should be construed as complying with the statute depends on the context. If there is nothing external to show that there is any issue as to capacity, then one should be slow to find a problem or lacuna in loose wording by UÉ. But if there is significant evidence before the decision-maker of problems in capacity or feasibility, then non-statutory language needs to be looked at more sceptically if it is ambiguous enough to be reasonably open to interpretations that fail to include the precise confirmations mandated by the regulations. But such ambiguity must not be artificially read in.

Application of the law to the facts here

60. Applying the above to the facts here, the position is as follows:

(i) The text of the two letters from UÉ are set out above. As appears therefrom, these do not contain the exact language of art. 297(2)(d). The effect of this will be considered below.

(ii) The failure to obtain the separate post-application confirmation from UÉ as required by the 2001 regulations no longer arises as an issue in the case due to the applicant's withdrawal of sub-grounds 13 and 14.

(iii) The applicant does plead at sub-ground 15 that "In fact, there is no spare capacity in the waste water network as pointed out by IFI and a group of observers and as evidenced by the most recent Ringsend WWTP AER which indicates that the capacity of the WWTP is 1.6 million PE whereas it was then processing 2.3 million PE". That is a misunderstanding of the judicial review process. Postulating a different position to a finding of the decision-maker is not automatically a valid ground of challenge. Rather one would normally look at the issue through the prism of unreasonableness, error of fact or law, or the like – but no such plea is formulated here. No valid challenge to the merits of UÉ's statements have been made out. Nor indeed was UÉ joined as a respondent, but the problem is deeper than that.

(iv) The board says that the letters are in "standard language" used by UÉ. One might ask why does UÉ use a standard language that differs from the statutory test? That seems an undesirable procedure to start with. But while that is an inauspicious start, one can't automatically find for the applicant just on that basis. The 2019 letter says that the connection can be facilitated "[b]ased upon … the capacity currently available in the network(s), as assessed by Irish Water". That logically implies that such capacity exists. The applicant has an unacceptably negative interpretation of the proposed new 20m connection, because what UÉ is saying in relation to that is

that it can carry that out. Insofar as the letter goes on to say that "New connection to the existing network is feasible without upgrade", that must be read as a confirmation of feasibility of provision of the service as envisaged in art. 297. While I agree that there is much evidence that the UÉ Dublin networks, reliant as they are on Ringsend Waste Water treatment plant, are at or beyond capacity depending on one's point of view, UÉ's first letter must be construed as meaning it takes a different view (or at least did as of the date of the letter). The fact that this is contested doesn't help the applicant in the absence of a plea that acceptance of UÉ's position was irrational and unreasonable. Rather the applicant hangs its hat on alleged breach of art. 297(2)(d) – but there is no such breach. The fact that the letter was out of date doesn't help the applicant because the relevant sub-grounds arguing for a more up-to-date letter were abruptly withdrawn. All that said, in fairness to the applicant, it's hard to absolutely dislodge a slight lurking suspicion that it is not impossible that UÉ may have worded the letters otherwise than in accordance with the statutory language due to some form of legal concern over whether they could stand over the exact statutory wording. That is no more than fleeting unease, possibly totally misplaced, because the wording that was used does have the logical consequence that the statute must have been thought to have been complied with. If a party in a future case wants to explore that issue further, they would have to plead appropriately, name UÉ, and possibly even seek cross-examination to clarify the reasons for the language used if UÉ hypothetically did not put its cards on the table in that regard. Ultimately if the letters were marginally more ambiguous I would have considered them inadequate; but even bearing in mind the issues connected to Ringsend, I don't think they can reasonably be construed other than as a confirmation by UÉ of capacity and feasibility. Insofar as the board tried to make the court's flesh creep by submitting that if this point was accepted, there could be no further development carried out in Dublin, I think that issue is really one of executive and administrative judgement. It's up to UÉ to decide when capacity is reached. If it makes that decision, certain legal consequences may follow, but so be it. Presumably the Minister will get to hear about that fairly quickly (or in advance, in a properly functioning system), and, if satisfied with those consequences, will leave the 2001 regulations as is. If unsatisfied, well, there could be potential alternatives available to the executive.

61. Consequently, core ground 2 fails.

Core ground 3 – material contravention regarding public transport capacity

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

"Applicant – The permission was granted under Section 3.2 of SPPR3 of the Building Height Guidelines which requires the developer to *inter alia* demonstrate that the site is well served by public transport with high capacity, frequent services with good links to other modes of transport. The applicant argues that the developer only addressed frequency and did not demonstrate capacity. The Board therefore erred in its interpretation and application of Section 3.2 of SPPR3.

Board – It is denied that that the Board erred in its interpretation and application of section 3 of the Urban Development and Building Height Guidelines 2008 ('Building Height Guidelines'). The Board concluded that the proposed development was a material contravention of the County Development Plan with regards to height and concluded that the development was in compliance with SPPR3 of the Building Height Guidelines. Capacity and frequency of public transport proximate to the proposed developed was addressed in the Inspector's Report. The analysis of the Inspector complies with the requirements of the development management criteria contained in the Building Height Guidelines"

Law in relation to material contravention due to s. 28 guidelines and in particular SPPR 3 of Building Heights Guidelines

63. Section 37(2) of the Planning and Development Act 2000 provides:

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

(b) Where a planning authority has decided to refuse permission on the grounds that a proposed development materially contravenes the development plan, the Board may only grant permission in accordance with paragraph (a) where it considers that— …

(iii) permission for the proposed development should be granted having regard to regional spatial and economic strategy for the area, guidelines under section 28, policy directives

under section 29, the statutory obligations of any local authority in the area, and any relevant policy of the Government, the Minister or any Minister of the Government, …"

64. SPPR3 in the Building Heights Guidelines 2018 states:

"It is a specific planning policy requirement that where; (A) 1. an applicant for planning permission sets out how a development proposal complies with the criteria above; and 2. the assessment of the planning authority concurs, taking account of the wider strategic and national policy parameters set out in the National Planning Framework and these guidelines; then the planning authority may approve such development, even where specific objectives of the relevant development plan or local area plan may indicate otherwise. (B) In the case of an adopted planning scheme the Development Agency in conjunction with the relevant planning authority (where different) shall, upon the coming into force of these guidelines, undertake a review of the planning scheme, utilising the relevant mechanisms as set out in the Planning and Development Act 2000 (as amended) to ensure that the criteria above are fully reflected in the planning scheme. In particular the Government policy that building heights be generally increased in appropriate urban locations shall be articulated in any amendment(s) to the planning scheme (C) In respect of planning schemes approved after the coming into force of these guidelines these are not required to be reviewed."

65. This refers back to the Development Management Criteria in the guidelines which are as follows:

"Development Management Criteria

3.2 In the event of making a planning application, the applicant shall demonstrate to the satisfaction of the Planning Authority/ An Bord Pleanála, that the proposed development satisfies the following criteria:

At the scale of the relevant city/town

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

• Development proposals incorporating increased building height, including proposals within architecturally sensitive areas, should successfully integrate into/ enhance the character and public realm of the area, having regard to topography, its cultural context, setting of key landmarks, protection of key views. Such development proposals shall undertake a landscape and visual assessment, by a suitably qualified practitioner such as a chartered landscape architect.

• On larger urban redevelopment sites, proposed developments should make a positive contribution to place-making, incorporating new streets and public spaces, using massing and height to achieve the required densities but with sufficient variety in scale and form to respond to the scale of adjoining developments and create visual interest in the streetscape.

At the scale of district/ neighbourhood/ street

• The proposal responds to its overall natural and built environment and makes a positive contribution to the urban neighbourhood and streetscape

• The proposal is not monolithic and avoids long, uninterrupted walls of building in the form of slab blocks with materials / building fabric well considered.

• The proposal enhances the urban design context for public spaces and key thoroughfares and inland waterway/ marine frontage, thereby enabling additional height in development form to be favourably considered in terms of enhancing a sense of scale and enclosure while being in line with the requirements of 'The Planning System and Flood Risk Management – Guidelines for Planning Authorities' (2009).

• The proposal makes a positive contribution to the improvement of legibility through the site or wider urban area within which the development is situated and integrates in a cohesive manner.

• The proposal positively contributes to the mix of uses and/ or building/ dwelling typologies available in the neighbourhood. At the scale of the site/building

• The form, massing and height of proposed developments should be carefully modulated so as to maximise access to natural daylight, ventilation and views and minimise overshadowing and loss of light.

• Appropriate and reasonable regard should be taken of quantitative performance approaches to daylight provision outlined in guides like the Building Research Establishment's 'Site Layout Planning for Daylight and Sunlight' (2nd edition) or BS 8206-2: 2008 – 'Lighting for Buildings – Part 2: Code of Practice for Daylighting'.

• Where a proposal may not be able to fully meet all the requirements of the daylight provisions above, this must be clearly identified and a rationale for any alternative, compensatory design solutions must be set out, in respect of which the planning authority or An Bord Pleanála should apply their discretion, having regard to local factors including specific site constraints and the balancing of that assessment against the desirability of

achieving wider planning objectives. Such objectives might include securing comprehensive urban regeneration and or an effective urban design and streetscape solution.
Specific Assessments To support proposals at some or all of these scales, specific assessments may be required and these may include:
• Specific impact assessment of the micro-climatic effects such as downdraft. Such assessments shall include measures to avoid/ mitigate such micro-climatic effects and, where appropriate, shall include an assessment of the cumulative micro-climatic effects where taller buildings are clustered.
• In development locations in proximity to sensitive bird and / or bat areas, proposed developments need to consider the potential interaction of the building location, building materials and artificial lighting to impact flight lines and / or collision.
• An assessment that the proposal allows for the retention of important telecommunication channels, such as microwave links.
• An assessment that the proposal maintains safe air navigation.
• An urban design statement including, as appropriate, impact on the historic built environment.
• Relevant environmental assessment requirements, including SEA, EIA, AA and Ecological Impact Assessment, as appropriate. 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)."

66. In *Ballyboden I*, Holland J. stated at para. 93:
"But obviously, as to a particular planning application, public transport capacity is an intensely practical – as opposed to a theoretical - issue. Accordingly it is entirely to be expected that §3.2 of the Height Guidelines sets as it very first criterion that 'The site is well served by public transport with high capacity, frequent service and good links to other modes of transport.' Though the comma after 'capacity' is helpful in supporting what would in any event have been my view, I would not wish it thought that my decision on this issue hinges on a comma in a guideline as interpreted by the intelligent layperson. But this sentence, to my mind clearly identifies 'capacity' and 'frequency' as distinct concepts. Even without the comma and as a matter of ordinary meaning, they are distinct concepts. Shannon Homes point out that no guidelines define 'capacity' as it relates to public transport and suggest that the closest to such a definition is found in §5.8 of the 2009 Urban Residential Guidelines as to Public Transport Corridors: 'The capacity of public transport (e.g. the number of train services during peak hours) should also be taken into consideration in considering appropriate densities'. As I pointed out at trial 'e.g.' is not 'i.e.' and I accept the Inspector's view that capacity is 'related' to frequency and the implication that they are not the same thing. That apart, and as a matter of both simple English and practical planning, they are clearly related but equally clearly not the same thing. Why that should be so also hardly requires explanation. That busses are frequent is no consolation to the commuter standing at peak hour on the way to or from work at a bus stop at which busses pass every 15 minutes or more frequently if all are already full, or even if the first two are full. As I observed at trial, to assess public transport capacity at a bus stop serving the site requires information not merely as to the frequency of busses but as to how full or empty the bus will probably be arriving at the bus stop and how many people must be presumed to be standing at that bus stop already before you build the proposed development? No doubt one will not have perfect information in those regards and planning judgment will be called for but that is not a basis for ignoring these issues. The point was made in *O'Neill* [*v*. *An Bord Pleanála* [2020] IEHC 356, [2020] 7 JIC 2201 *per* McDonald J.], in which an objector, one of many to similar effect, 'stated that she has to be on the bus by 7.30 a.m. to get into work for 9 a.m. because, if she leaves it any later, the buses travelling into the city centre are already full by the time they pass ….'. Though I do not have similarly eloquent material in this case it is clear from the papers that multiple expressions of similar concern were made in the present case. Such unreliability of actually getting onto a bus is a recipe for car dependency – a considerable concern of the planning authority in recommending refusal of the planning application. Also, the criterion is that the site itself be 'well served' – by which I understand well served actually as opposed to theoretically - and not just that the public transport corridor generally is well served."

67. At para. 101 he addressed the question of onus of demonstration:
"Shannon Homes assert that the Applicants have not pointed to the availability of information which would provide the capacity information in question. I do not think that avails them. Objectors clearly raised the issue before the Board, as did SDCC. And §3.2 of the Height

Guidelines required the Shannon Homes to 'demonstrate' public transport capacity. It is for Shannon Homes to obtain that information. If the suggestion is implicit in their submission that surveys similar to traffic surveys and the like and other available information cannot address the capacity question, that is an inference which, for want of evidence, I do not draw."

Application of law to facts here

68. The problem for the board is that the developer addressed frequency but not capacity, contrary to what is envisaged by the 2018 guidelines. Here the board admitted that the information from the developer was "not great".

69. The critical point is that there was no compliance with the requirement that "the applicant shall demonstrate to the satisfaction of the Planning Authority/ An Bord Pleanála, that the proposed development satisfies the following criteria: At the scale of the relevant city/town … The site is well served by public transport with high capacity …".

70. In the absence of such compliance the board could not have lawfully gone on to apply SPPR3 or to rely on s. 37(2)(b)(iii) on the basis of compliance with SPPR3.

71. The inspector supplied figures of his own, perhaps understandably so at a human level given that the legislation didn't allow him to seek further information from the developer. But that doesn't constitute compliance with SPPR3, and nor is it really the role of the board to swoop in to save applications for development where the developer fails to meet statutory requirements. Doing so pushes at the boundaries of the vaunted quasi-judicial role of the board.

72. Even if SPPR3 envisaged that the board could provide the necessary information where the developer failed, which it doesn't, the inspector's report implies an assumption for the purpose of his figures that virtually all buses will be virtually empty on arrival at the relevant bus stop. The basis for that is inferentially the location of the terminus, but that in itself doesn't guarantee virtual emptiness. Compounding all of this, the inspector erroneously put the onus on those participating in the process to demonstrate lack of capacity, rather than addressing his mind to the prior and more fundamental obligation of the developer to demonstrate the existence of capacity, as set out expressly in the 2018 guidelines themselves which the board was purporting to apply – a point already made to the board by Holland J in *Ballyboden I*, albeit without noticeable effect on its litigation strategy here.

73. The correct position wasn't all that complicated – if the developer did not demonstrate the matters required by the 2018 guidelines then the board should simply have proceeded without asserting reliance on sub-para. (b)(iii) on the basis that the guidelines had been complied with.

74. Consequently, core ground 3 must be upheld. That outcome is ultimately an application of Holland J.'s judgment in *Ballyboden I*.

Core ground 5 – erroneous reasons under s. 37(2)(b)

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

"Applicant – The Board erred in relying on Section 37(2)(b)(i) of the 2000 Act to grant planning permission in material contravention of the development plan in relation to building height. The Board erred in concluding that the proposed development was of strategic and/or national importance simply because it was an SHD development and was consistent with government policy. In addition, the Board took into account an irrelevant consideration, namely Rebuilding Ireland 2016 which was replaced on 2 September 2021.

Board – It is denied that the decision of the Board is invalid or that the Board misinterpreted Section 37(2)(b)(i) of the 2000 Act. In granting permission the Board relied upon Section 37(2)(b)(i) and Section 37(2)(b)(iii). The Board concluded that the criteria in Section 37(2)(b)(i) were met as the proposed development is in accordance with the definition of strategic housing development in section 3 of the 2016 Act. It is denied that Rebuilding Ireland 2016 was an irrelevant factor."

Law in relation to severance of erroneous reasons

76. As we have seen in part, section 37(2) of the Planning and Development Act 2000 provides:

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

(b) Where a planning authority has decided to refuse permission on the grounds that a proposed development materially contravenes the development plan, the Board may only grant permission in accordance with paragraph (a) where it considers that—

(i) the proposed development is of strategic or national importance,

(ii) there are conflicting objectives in the development plan or the objectives are not clearly stated, insofar as the proposed development is concerned, or

(iii) permission for the proposed development should be granted having regard to regional spatial and economic strategy for the area, guidelines under section 28, policy directives

under section 29, the statutory obligations of any local authority in the area, and any relevant policy of the Government, the Minister or any Minister of the Government, or
(iv) permission for the proposed development should be granted having regard to the pattern of development, and permissions granted, in the area since the making of the development plan."

77. It is clear that if two or more independent reasons are given, and at least one reason is legally robust, not entwined with the bad reasons, and is sufficient to justify the outcome, then the bad reasons can be severed and the decision can be upheld. As stated by Holland J. in *Fernleigh Residents Association & Anor v. An Bord Pleanála* [2023] IEHC 525 at para. 30, the requirements are that the valid reasons are discernibly discrete and not intermingled, and that the decision can be read as regarding the valid reasons as sufficient.

78. There is no law that this only applies if the decision-maker herself expressly "identifies them as stand-alone", as submitted by the applicant.

Application of law to facts

79. Here, the board didn't stand over the finding under s. 37(2)(b)(i). But the separate ground of (iii) is independent, is not intermingled, and is a sufficient basis for the decision. Indeed the board impliedly thought that too. Hence the bad reason can be severed.

80. Insofar as the applicant made the separate point in sub-ground 40 that the board took into account an irrelevant factor, namely the *Rebuilding Ireland 2016* policy, which was replaced by *Housing for All* on 2nd September, 2021 some months prior to the board's decision, that is not in itself a point that is entirely lacking in substance. The fact that the earlier strategy is referenced in legislation isn't automatically a complete answer to that. The out-dated 2016 policy was referenced twice in the board's order, once under s. 37(2)(b)(i) and separately as a general consideration affecting the whole order, under the heading of "Reasons and Considerations". But the alleged infirmity was pleaded solely under the overall heading of sub-para. (i). As sub-para (i) is not being relied on by the board now, the point, in the terms pleaded in sub-ground 40, would have failed anyway even if it hadn't been withdrawn. It might not automatically have failed if it had been pleaded as a general ground of challenge, but it wasn't.

81. Consequently, core ground 5 fails.

Core ground 6 – traffic reasons

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

"Applicant – The Board breached fair procedures and did not give any or adequate reasons as to why it rejected and/or disagreed with the issues raised by the applicant's traffic engineer.

Board – It is denied that the Board breached the Applicant's rights to fair procedures and failed to give any or any adequate reasons in its assessment of traffic impacts . The Applicant made a submission through its Traffic Engineer and this submission was considered in detail by the Board Inspector."

Law in relation to reasons

83. As set out in quite a body of caselaw, the standard is to give the main reasons on the main issues. A decision-maker is not automatically under an enhanced duty in this regard merely because a participant in the process comes forward with an expert report. An alleged lack of reasons is best addressed jurisprudentially under that heading – calling it a breach of fair procedures doesn't add anything.

Application of law to facts

84. Here it is clear that the board gave the main reasons on the main issues. While one can always be critical of any decision, or demand further reasons, the main reasons are discernible. The inevitable applicant's demand for more reasons doesn't give rise to a fair procedures issue above and beyond the duty to give reasons in itself.

85. Consequently, core ground 6 fails.

EU law issues

86. As the applicant succeeds under the domestic law heading I do not need to go on to address the EU law issues.

Order

87. Overall, the board has dodged a couple of bullets here. Eleven of the twelve core grounds are either being dismissed, withdrawn, or treated as being unnecessary to decide. Aspects of points raised in core grounds 2 and 5 might have had more traction had they been better pleaded or pursued to a conclusion. Banking the dismissed and withdrawn points, and the grounds that don't need to be addressed, the board is going down only on one point where it has itself accepted that the documentation submitted was not great. The responsibility for that to a large extent must lie with the SHD legislation which did not permit the usual exchange of further information that could rectify such problems in a normal planning process. That exact problem is not going to happen again following the repeal of the SHD procedure. And for good measure, the outcome here, as noted

above, essentially follows Holland J.'s judgment in *Ballyboden I*. It doesn't break massive new ground adverse to the board.

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

(i) there be an order of *certiorari* removing for the purpose of being quashed the decision of the first named respondent to grant planning permission to the notice party for the construction of 131 residential units and associated works on lands off Stocking Lane, Ballyboden, County Dublin (ABP-311616-21);

(ii) unless any party applies otherwise by written legal submission within 14 days from the date of this judgment, there be no order on the other reliefs claimed, and the foregoing order be perfected forthwith thereafter on the basis of an order for costs (including the costs of written submissions and certifying for two counsel in respect of any applications) being awarded to the applicant against the first named respondent, and no order as to costs in favour of or against any other party;

(iii) insofar as issues pleaded have not been decided, in the hypothetical event that a judgment of an appellate court in the proceedings in respect of the points that have been decided renders it logically appropriate to decide those other issues, there be liberty to re-enter the matter for that purpose; and

(iv) the matter be listed on Monday 4th March, 2024, to confirm the foregoing or to fix a date for any application made in submissions lodged within the period of 14 days referred to.