THE HIGH COURT
JUDICIAL REVIEW

[2020 No. 293 J.R.]

IN THE MATTER OF SECTIONS 50, 50A AND 50B OF THE PLANNING AND DEVELOPMENT ACT, 2000 (AS AMENDED)

BETWEEN

CHRISTIAN MORRIS

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

CREKAV TRADING GP LIMITED

NOTICE PARTY

JUDGMENT of Ms. Justice Denis McDonald delivered on 8th June, 2020

1. This is an application for leave to bring judicial review proceedings in respect of a decision of the respondent (*"the Board")* dated 2nd March, 2020 granting planning permission for a strategic housing development at the former Baily Court Hotel, Main Street, Howth, County Dublin and on the adjoining lands located south of the Martello Tower on Balscadden Road, Howth, County Dublin. The decision was made pursuant to s. 9 of the Planning and Development (Housing) and Residential Tenancies Act, 2016 (*"the 2016 Act")* on foot of an application made to the Board under s. 4. The 2016 Act introduced a new procedure under which applications for permission for a strategic housing development are required to be made directly to the Board under s. 4 and not to a planning authority. For this purpose, s. 3 defines a

"strategic housing development" as meaning a development of 100 or more houses on land zoned for residential use or for a mixture of residential and other uses.

2. Mr. Morris, the applicant, is a resident of Howth and he made written observations to the Board in opposition to the proposed development. The applicant pursues these proceedings in that capacity and as a lay litigant. The notice party *("Crekav")* is the developer of the proposed housing development. The development, if it proceeds, will involve the demolition of existing structures on site including a disused sports building on the Balscadden Road and the former Bailey Court Hotel buildings on Main Street and the construction of 177 residential units in three separate apartment blocks and one mews building ranging in height from two to five stories. The decision of the Board will permit the construction of 171 apartments and six duplexes comprising 44 one bedroom units, 103 two bedroom units and 30 three bedroom units.

3. In order to satisfy the applicable time limit for the making of the application for leave, the applicant, previously, on 22nd April, 2020 appeared before Twomey J. On that occasion, Twomey J. deemed the application to have been opened to the court on that day even though the application for leave was not pursued at that time. The applicant made both the Board and Crekav aware of the order made by Twomey J. Thereafter, on 6th May, 2020, Arthur Cox solicitors acting on behalf of Crekav wrote to the applicant to apprise him of High Court Practice Direction 74 which provides that applications for leave to apply for judicial review of decisions in respect of strategic infrastructure developments (which include strategic housing developments) should be made to me as the judge in charge of the Strategic Infrastructure Development List. As the judge in charge of that list, I subsequently fixed 28th May, 2020 as the date for the hearing of the application for leave to seek judicial review. In

advance of that hearing, the applicant swore an affidavit on 25th May, 2020 in which he exhibited the following documents:

(a) The report dated 19th February, 2020 of Stephen J. O'Sullivan, planning inspector, appointed by the Board;

(b) The order of the Board dated 2nd March, 2020 granting permission for the proposed development;

(c) The written observations submitted by the applicant to the Board on 19th November, 2019 in relation to the proposed development;

(d) The written observations of the Howth/Sutton Community Council clg (*the Community Council")* submitted to the Board on the 6th December, 2019 in relation to the proposed development; and

(e) The written observations of Graínne Mallon architect and planning consultant submitted to the Board on 9th December, 2019 on behalf of Balscadden Road SAA Residents Association Ltd. (*"the Residents Association").*

4. The applicant attended before me in person for the purposes of moving his application on 28th May, 2020. I reserved judgment on his application in order to more fully consider the papers and in particular the nature of the relief and the grounds on which it is sought.

The relevant test for the grant of leave

5. The present application is governed by the provisions of ss. 50 and 50A of the Planning and Development Act, 2000 (*"the 2000 Act").* Under s. 50 (2) the validity of a decision of the Board cannot be challenged otherwise than by way of an application for judicial review under O.84 of the Rules of the Superior Courts.

However, as explained more fully below, there are a number of statutory requirements imposed by the 2000 Act which differ from the requirements of O. 84.

6. Under s. 50 (6), there is a time limit for the making of the application but, on the basis of the material before the court and, having regard to the application made to Twomey J. in April 2020, I do not believe that any issue arises in relation to time. For completeness, it should be noted that, in any event, the time limits specified in the 2000 Act has been the subject of a significant extension as a consequence of s. 9 of the Emergency Measures in the Public Interest (Covid-19) Act, 2020 ("*the 2020 Act*") which inserted a new s. 251A into the 2000 Act. Under s. 251A, certain periods are to be disregarded for the purposes of calculating the time limit for (*inter alia*) bringing judicial review proceedings under s. 50 of the 2000 Act. In particular, s. 251A (2) provides that the period to be disregarded is the period beginning on the date s. 9 of the 2020 Act came into operation and ending on a date to be specified by ministerial order. Section 9 of the 2020 Act (in common with the other provisions of Part 3 of the 2020 Act) was commenced on 29th March, 2020. As a consequence of orders made on 16th April, 2020 and subsequently on 8th May, 2020, the period to be disregarded extends from 29th March, 2020 up to and including 23rd May, 2020.

7. Under s. 50A (3) of the 2000 Act, the court is not permitted to grant leave in a case of this kind unless it is satisfied that:-

(a) There are substantial grounds for contending that the decision of the Board is invalid; and

(b) That the applicant has a sufficient interest in the matter.

In circumstances where the second of those grounds can be dealt with quite briefly, I will address that issue first and then consider whether the applicant has demonstrated that he has substantial grounds for contending that the decision of the Board is invalid.

Sufficient interest

8. I do not believe that it is necessary to address this issue in any significant level of detail. It is clear from the statement of grounds and from the applicant's grounding affidavit that the applicant is a local resident in Howth. Moreover, he participated in the process before the Board and submitted observations. According to Part C of the statement of grounds, the applicant is also a member of a number of groups in the local area including the Community Council. Given these facts, and without prejudice to any arguments which the Board or Crekav may seek to make, it seems to me that these facts demonstrate that the applicant has a sufficient interest in the matter for the purposes of s. 50A of the 2000 Act. In this context, I bear in mind the decision of the Supreme Court in *Grace v. An Bord Pleanála* [2017] IESC 10 where, in a joint judgment, Clarke J. (as he then was) and O'Malley J. examined the issue of *"sufficient interest".* It is clear from that judgment that prior participation in a process before a planning authority is generally regarded as enough to give an applicant for judicial review a sufficient interest for the purposes of s. 50A. Furthermore, while *Grace* was primarily concerned with the issue of standing in the context of EU law, it is clear from the judgment that, even where domestic standing rules are applied, close proximity to a proposed development will usually be enough, of itself, to constitute sufficient interest. This is clear from paras. 8.7 to 8.8 of the judgment:

> *"8.7. It is, … clear that a person who has a sufficient proximity, having regard to the nature of the development and any amenity in the location of the development (which might potentially be impaired), will have standing even without participation. Those who do not have such proximity may reasonably be required to show that they have some interest which is potentially affected*

and one very clear way of doing that is by demonstrating that interest by participation in the permission process. That is not, however, the only way in which such an interest can be demonstrated.

8.8. The more general and more important the amenity which may be at stake then the wider range of persons who may well be able to show that they have an interest in the amenity of the area which is the subject of the proposed development. The nature of the legal challenge intended to be mounted will be relevant also. For example, a person who cannot show proximity to a proposed wind farm and did not participate in the process is unlikely to have standing to make an argument more properly raised by a person more directly affected. In our view a challenger who has not previously participated and cannot show any direct personal prejudice must satisfy the leave judge that the point being made is one directed solely to the purpose of the special protection of the site".

9. In the present case, the applicant is a local resident. He has shown his concern for the locality by his membership of the Community Council. He has also participated in the process before the Board and submitted written observations. For the purposes of the present application, I therefore hold that the applicant has a sufficient interest for the purposes of s. 50A (3) (b) of the 2000 Act.

Substantial grounds

10. It is well settled that, in determining whether an applicant has substantial grounds for the purposes of s. 50A, the court should adopt the approach taken by Carroll J. in *McNamara v. An Bord Pleanála No. 1* [1995] 2 ILRM 125 at p. 130. That approach has been approved by the Supreme Court in *Re: Illegal Immigrants (Trafficking) Bill, 1999,* [2000] 2 I.R. 360. It was also applied by the Supreme Court

more recently in *I.G. v. Refugee Applications Commissioner* [2018] IESC 25. In *McNamara,* Carroll J. explained what is meant by *"substantial grounds"* in the following way:

> "*What I have to consider is whether any of the grounds advanced by the appellant are substantial grounds for contending that the board's decision was invalid. In order for a ground to be substantial it must be reasonable, it must be arguable, it must be weighty. It must not be trivial or tenuous. However, I am not concerned with trying to ascertain what the eventual result would be. I believe I should go no further than satisfy myself that the grounds are 'substantial'. A ground that does not stand any chance of being sustained (for example, where the point has already been decided in another case) could not be said to be substantial. I draw a distinction between the grounds and the various arguments put forward in support of those grounds. I do not think I should evaluate each argument and say whether I consider it sound or not. If I consider a ground, as such, to be substantial, I do not also have to say that the applicant is confined in his arguments at the next stage to those which I believe may have some merit."*

11. Although the *"substantial grounds"* requirement is a different test to that prescribed by O.84 for conventional judicial review, I believe it is also useful to bear in mind the approach taken by the Supreme Court in relation to the meaning of *"arguable grounds"* for the purposes of O.84. The *"arguable grounds"* test under O. 84 is generally regarded as a lower threshold than the *"substantial grounds"* test prescribed by the 2000 Act. In context of O. 84, Charleton J. explained the approach to be taken as follows in *AAA v. Minister for Justice* [2017] IESC 80 at paras. 4-5 as follows:

"4. The test for leave to commence judicial review was set out in G v Director of Public Prosecutions [1994] 1 IR 374 by Finlay CJ at pages 377-378:
An applicant must satisfy the court in prima facie manner by the facts set out in his affidavit and submissions made in support of his application of the following matters:-

> *(a) That he has a sufficient interest in the matter …*
> *(b) That the facts averred in the affidavit would be sufficient, if proved, to support a stateable ground for the form of relief sought by way of judicial review.*
> *(c) That on these facts an arguable case in law can be made that the applicant is entitled to the relief which he seeks.*

…
5. In discussing the above test, in Esmé v Minister for Justice [2015] IESC 26, Charleton J stated the following at paragraph 15:

> *'Any issue in law can be argued: but that is not the test. A point of law is only arguable within the meaning of the relevant decisions if it could, by the standards of a rational preliminary analysis, ultimately have a prospect of success. It is required for an applicant for leave to commence judicial review proceedings to demonstrate that an argument can be made which indicates that the argument is not empty. There would be no filtering process were mere arguability to be the test without, at the same time, taking into account that trivial or unstatable cases are to be excluded: the standard of the legal point must be such that, in the absence of argument to the contrary, the*

thrust of the argument indicates that reasonable prospects of success have been demonstrated. It is still required to be shown that a prima facie legal argument has been established."

12. In light of the principles which emerge from *McNamara*, it is now necessary to consider the relief sought by the applicant in the statement grounding his application for judicial review and to consider whether the grounds advanced in support of that relief constitute *"substantial grounds"* for the purposes of s. 50A of the 2000 Act. In applying that test, it is clear that an applicant bears the burden of identifying arguable grounds which must have some weight. Furthermore, it seems to me that a ground which fails the arguability test under O. 84 (as explained in *AAA*) cannot qualify as a substantial ground for the purposes of section 50A.

The relief sought

13. In Part D of his statement of grounds, the applicant seeks the following relief:

(a) In para. 1 of Part D, the applicant seeks an order of *certiorari* quashing the decision of the Board to grant permission;

(b) In para. 2 of Part D, the applicant seeks a declaration that the Board erred in law in failing to give due or any consideration to the existence of plenary proceedings bearing record no. 2020 1628P *Comerford v. Minister for Housing Planning and Local Government* in which a declaration is sought that the Planning and Development (Housing) and Residential Tenancies Act, 2016 (*"the 2016 Act")* and the Planning and Development (Strategic Housing Development) Regulations 2017 (S.I. No. 271 of 2017) (*the 2017 Regulations")* are invalid having regard to the provisions of the Constitution;

(c) In para. 3 of Part D, the applicant seeks a declaration that the Board erred in law in failing to show *"due or any consideration of general matters of safety pertaining to the Site, same worries being expressed both exhaustively and repeatedly throughout the objections process and considerable substantial evidence of such being available through an adequate assessment of the history of the overall area";*

(d) A declaration is sought in para. 4 of Part D that the Board erred in law in granting permission without considering adequately or at all the general ethos, general priorities and specific requirements of Fingal County Council's Objective DMS 174 (pertaining to coastal erosion).

(e) A declaration is sought in para. 5 of Part D that the Board erred in law in granting permission for the proposed development on a site known to be subject to flooding.

(f) A declaration is sought in para. 6 of Part D that the Board erred in law in granting permission for the proposed development on a site known to be subject to subsidence;

(g) In para. 7 of Part D, the applicant seeks a declaration that the Board erred in law in *"attempting to strike a balance of hierarchy between recent Statute and both older Statute and jurisprudence the nature of which could be held in contradiction of each other;*

(h) In para. 8 of Part D, the applicant seeks a declaration that the Board erred in law in acting as set out at (d) above in failing to adequately show *"by way of explicit treatment thereof or otherwise, that the Respondent honoured its obligations to have regard to all the Statutory (either primary*

or secondary) and/or jurisprudential factors that should be given proper consideration in order to leave such decision unassailable";

(i) A declaration is sought at para. 9 of Part D that the Board erred in law by *"as admitted by the Respondent, taking factors of political motives into consideration whereas the Respondent should be seen to be objective and non-political";*

(j) In para. 10 of Part D, the applicant seeks a declaration that the proposed development is not consistent with the zoning of the site pursuant to the Fingal County Council Development Plan of 2017 to 2023;

(k) In para. 11 of Part D, the applicant seeks a declaration that the proposed development *"is not, and should have been foreseen as not, in keeping with the current economic climate";*

(l) A declaration is sought at para. 12 of Part D that Condition 2 set out in the order made by the Board does not make sense;

(m) In para. 13 of Part D, the applicant seeks an order that s. 50B of the 2000 Act and/or ss. 3 and 4 of the Environment (Miscellaneous Provision) Act, 2011 *("the 2011 Act")* and/or Article 9 of the Aarhus Convention applies to the proceedings;

(n) Finally, in para. 14 of Part D, the applicant says that he does not seek eligibility for recovery of costs other than those which would ordinarily be available to a litigant in person but that he seeks indemnity under s. 50B of the 2000 Act or otherwise in respect of any liability that he might otherwise have with regard to costs.

The grounds on which relief is sought

14. It is next necessary to consider the grounds upon which the applicant relies for the purposes of the relief sought by him (as summarised in para. 13 above). As noted, the principal relief sought by the applicant is an order of *certiorari.* Understandably, the applicant relies on all of the grounds set out in his statement in support of that relief. However, certain of the grounds set out in Part E of his statement are referable solely to the specific declaratory relief sought by the applicant. It therefore seems to me that the appropriate approach to adopt is to first consider the individual grounds relied upon by the applicant in support of the specific declaratory relief sought by him. If I come to the conclusion that the applicant has advanced substantial grounds in support of any of the proposed declaratory relief, it is likely that those grounds will also support his claim for an order of certiorari. In the circumstances, I propose to consider the grounds advanced in respect of each of the declarations sought in the first instance and to defer to a later point in this judgment, my consideration as to whether the applicant has established substantial grounds in support of his claim to an order of *certiorari.*

The complaint that the Board failed to give consideration to the constitutional challenge to the 2016 Act and the 2017 Regulations.

15. This is a matter of significant concern to the applicant. It features strongly in the observations made by him to the Board in which he highlighted his intention to bring a constitutional challenge himself.

16. In para. 7 of Part E of his statement of grounds the applicant claims that the Board acted erroneously in omitting to even mention his concern about the constitutionality of the *"Fast Track Planning Laws".* In addition, in his grounding affidavit he drew attention to the proceedings already instituted in *Comerford v.*

Minister for Housing Planning and Local Government (in which a challenge to the constitutionality of the 2016 Act has been mounted) and he exhibited a letter sent by him on 5th March, 2020 to the solicitors acting for the plaintiff in those proceedings in which he suggested that he should be joined as a party to those proceedings.

17. In my view, the applicant has not identified any arguable ground (let alone a substantial ground) in support of this element of the relief sought by him. At the hearing of his application on 28th May, 2020 I asked him whether he had any authority to support this element of his case. The applicant was unable to identify any such authority but suggested that if leave was granted, he might, thereafter, be able to identify case law in support of his case. The applicant is not entitled to proceed in that way. In short, he cannot put the cart before the horse. If leave is to be granted in respect of this element of the relief claimed by him, he must establish, at this stage, that there are substantial grounds for the relief sought. That is an express statutory requirement which is binding on him and on the court. It is a pre-condition to the grant of leave.

18. Moreover, commencement of proceedings challenging the constitutionality of statutory provisions does not, of itself, stay the operation of those provisions. On the contrary, in the case of any statutory provision enacted after the adoption by the people of the 1937 Constitution, the provision in question enjoys the presumption of constitutional validity unless and until declared otherwise by the court. A statutory body such as the Board is therefore required to comply with its obligations under the 2016 Act pending any determination to the contrary by the court. In this context, it is important to recall that under s. 9 (9) of the 2016 Act, the Board is under very strict time constraints to deal with an application made under s. 4 of the 2016 Act for permission for a strategic housing development. The Board has no statutory power to

halt that process pending the determination of any proceedings challenging the constitutionality of the 2016 Act. If any party wished to stay the proceedings before the Board, it would have been necessary to apply to the court for an order to that effect. I express no view as to whether any such order could properly be granted. What is clear, however, is that, in the absence of an order by a court of competent jurisdiction staying the proceedings before the Board or a determination by a court that any relevant statutory provision is invalid having regard to the Constitution, the Board had no alternative but to proceed with the determination of the application made to it by Crekav under s. 4 of the 2016 Act.

19. As noted in para. 11 above, the Supreme Court has made it clear, in the context of the *"arguable grounds"* criterion in O. 84, a point of law is only arguable if it could, by the standards of a rational preliminary analysis, ultimately have a prospect of success. In applying that test, for all of the reasons outlined in para. 18 above, I cannot see any basis on which the grounds advanced by the applicant, in respect of this element of the relief sought by him, could be said to have any prospect of success. In those circumstances, the applicant does not even meet the *"arguable grounds"* requirement under O. 84 in respect of this element of the proposed relief. It follows, in my view, that he has not met the *"substantial grounds"* test imposed by section 50A.

The grounds relied upon in support of the declaration that the Board failed to give sufficient consideration to matters of safety pertaining to the site

20. This element of the relief sought by the applicant is addressed, in particular, in para. 8 of the statement of grounds and in paras. 4 and 25 of his affidavit sworn on 25th May, 2020. In addition, the applicant relies broadly on the averments made by him in paras. 5-24 of his affidavit.

21. In para. 8 of Part E of the statement of grounds, the applicant refers to the observations made to the Board by a number of parties in opposition to the proposed development namely the Community Council and the observations made by Ms. Grainne Mallon acting on behalf of the Residents Association. It is also alleged in para. 8 that these parties *"went into very considerable detail, with much expertise, about why the Notice Party's proposal I should fail".* The paragraph concludes in the following terms:

> *"It was incumbent upon the Board to address, exhaustively and unassailably, why, in its opinion, the averments of these three parties should be set aside in order to properly and sustainably reach its final decision – this has not happened. In short, there is a legitimate expectation that the Board would furnish the Objectors, including this Applicant, with better detail in arriving at its position than has happened".*

22. The combined effect of paras. 4 and 25 of the applicant's affidavit of 25th May, 2020 is that the applicant adopts not only his own objection to the Board but also the observations made by the Community Council and by Ms. Mallon on behalf of the Residents Association. These observations are exhibited to his affidavit. Thus, for the purposes of considering the grounds set out in para. 8 of Part E of the statement of grounds, it appears that the applicant also seeks to rely upon these observations. Essentially, his case is that the Board failed to have any regard or sufficient regard to these observations and that, to the extent that the Board rejected these observations, the Board failed to provide sufficient reasons for doing so. That seems to me to follow from what is stated in the final two sentences of para. 8 (which I have quoted in para. 21 above).

23. Insofar as his own observations are concerned, the principal issue raised by him relates to the Constitutional challenge to the 2016 Act. For the reasons already set out above, I do not believe that this gives rise to any arguable ground let alone a substantial ground in support of the case made by the applicant. Under the heading *"other remarks"* the applicant makes a number of general complaints in relation to the process operated by the Board and in relation to the quality of the application made by Crekav. They do not, however, appear to me to address in any sufficient level of detail either the planning or legal basis for the objections made or the views expressed by the applicant. In addition, under the heading "*grounds for concern*", the applicant made a number of observations in relation to what he characterised as the *"corrupt"* nature of planning in Ireland generally. He also made submissions that the development was unsuitable for Howth. Again, those observations are made in very general terms and appear to be based on the personal view of the applicant rather than on any specific planning or legal grounds. In his affidavit sworn on 25th May, 2020, the applicant also highlights that there is no reference in the inspector's report to the observations made by him and he says in paras. 22-23 of his affidavit:

> *"(22) … I aver that … said omission of citation by the Board of my Objection … renders the entire decision making process as set out in the Order to be precarious. In plain terms – if my Objection has been left out, then what else has been left out? Is this omission deliberate or accidental? Assuming 'accidental', then what amount of diligence did the Board apply in reaching its position as in the Order?*
>
> *(23) I do not believe that I need to seek leave of the Court to amend or supplement the Statement of Grounds in these proceedings".*

24. In the case of the observations from the Community Council, there are very specific issues raised in relation to the risk of subsidence and landslides. In particular, a case is made that there is already land slippage in the Howth area such that the ground is shifting. The case is also made that the proposal entails the removal of some 78,000 cubic metres of sand and gravel which it is suggested may lead to more extensive and severe slippage instance in the future. Concern is also expressed about the impact of construction traffic on the foundations of existing properties and concern is also voiced in relation to air pollution and carbon emissions. In particular, it is alleged that no consideration has been given to the effect that transporting the excavated 78,000 cubic metres of sand and gravel (involving 11,000 lorry loads) will have on the local population and the wider environment. The case is therefore made that it is essential that an environmental impact assessment should be undertaken which should not be confined to potential impacts on the conservation of natural habitats but should also address the impact on the health and safety of human inhabitants.

25. The risk of subsidence and landslides is also addressed in the submission made by Ms. Mallon on behalf of the Residents Association which, at pp. 7-11 addresses issues in relation to the health and environmental impact of the excavations and transport. The concerns expressed on behalf of the Residents Association are also supported by a report from MTW Consultants Ltd, consulting civil and structural engineers. The observations made both by the Community Council and by the Residents Association are quite detailed and go well beyond any expression of personal opinion. In my view, they provide sufficient detail to support the case which the applicant seeks to make in para. 8 of his statement of grounds. While the applicant should more properly have set out the case made by those parties in para. 8 of his

statement of grounds, I believe that when one reads para. 8 in conjunction with the observations made by the Community Council and the Residents Association, the basis for the applicant's case in support of the relief sought by him at para. 3 of Part D of his statement of grounds is reasonably clear. However, in order to come to that conclusion, one has to read the observations made by the Community Council and the Residents Association in conjunction with para. 8 of the statement of grounds.

26. The issues raised by the Community Council and the Residents Association (as summarised in paras. 24 to 25 above) were addressed (at least to some extent) in the report of the planning inspector of 19th February, 2020 at paras. 13.1 to 13.2. It would be entirely wrong for me to express any view, at this point, as to whether the inspector has addressed the concerns adequately. All I can say is that, on the basis of the submissions made by the observers, serious issues were raised and it seems to me that the question of whether those issues were sufficiently addressed by the Board and its inspector is, in legal terms, a weighty issue which satisfies the *McNamara* test.

27. That said, I am concerned about the rather broad-brush way in which the issue is pleaded in the statement of grounds. As noted above, one has to read para. 8 with the affidavit and the exhibits in order to understand the case made. Order 84 r.20 (3) makes clear that it is not sufficient for an applicant, in his or her statement of grounds, to make an assertion in general terms. An applicant seeking judicial review must state precisely each ground, giving particulars where appropriate and identifying the facts or matters relied upon as supporting the ground in issue. On the face of it, para. 8 of Part E of the applicant's statement of grounds does not comply with those requirements. As noted above, one has to read the relevant parts of the observations made by the Community Council and the Residents Association in order to

understand the nature of the case which the applicant intends to make in para. 8 of his statement of grounds.

28. Strictly speaking, I should, accordingly, direct the applicant to reformulate his statement of grounds in order to comply with the requirements of O.84 r.20 (3). However, I am concerned about the delay that any such process would inevitably entail and, in those circumstances, it seems to me that the more efficient way to address the matter will be to specify in the order to be made in this case that the grounds on which leave is granted to seek this declaratory relief are those set out in para. 8 of the statement of grounds when read with the submissions made by the Community Council outlined in s. 1 of its observations dated 5th December, 2019 and the observations made at pp. 7-11 under the headings *"Risk of subsidence and landslides"* and *"Health & Environmental Impact of the Excavations and Transport"* in the submission dated 6th December, 2019 made by Ms. Mallon on behalf of the Residents Association together with the associated report by MTW Consultants Ltd submitted to the Board on 9th December, 2019. When para. 8 is read in that way, it seems to me to be sufficiently clear that the applicant makes the case that the Board failed to properly address and make appropriate findings in relation to the submissions made by the Community Council and Residents Association and/or to provide sufficient reasons for rejecting those submissions.

29. If the order is framed in that way, it will, in my view, satisfy, in substance, the requirements of O.84 r.20 (3). It will also allow all parties and the court to be aware of the basis on which leave has been granted to the applicant to pursue this element of his judicial review application. It is important in this context to bear in mind that, as MacGrath J. observed in *Harrington v. Minister for Communications, Energy and Natural Resources* [2018] IEHC 821 at para. 126:

"...it is clear from the authorities that this Court when considering the grounds of challenge, submissions or arguments is concerned, and concerned only, with the grounds upon which leave to apply for judicial review was granted and the matters contained in statement of grounds and supporting affidavits. Adopting dicta of Haughton J in Alen-Buckley v. An Bord Pleanála (No.2), matters that fall outside the grounds upon which such leave was granted do not come within the remit of this Court on this review and therefore ... unless they are grounds or a basis upon which leave was granted, cannot come within the Court's consideration in deciding whether the Minister acted lawfully when granting the consent."

30. If, however, I frame the order in the terms suggested in para. 28 above, I believe it will be very clear to all parties and the court the basis upon which leave is granted to the applicant in respect of the declaration claimed in para. 3 of Part D of the statement of grounds.

The additional claim made in respect of the omission of the Board to cite the applicant as an observer.

31. As noted in para. 23 above, the applicant in paras. 22-23 of his affidavit also raises an issue which is not currently pleaded in the statement of grounds – namely the lack of any reference to the applicant in the list of observers noted by the inspector in his report. While I fully appreciate that the Board may well have a complete answer to this issue, I nonetheless believe that the omission to make specific reference to the applicant as a person who submitted observations in opposition to the proposed development qualifies as a substantial ground for the purposes of a judicial review challenge to the decision made by the Board to grant permission for the development. By reference to the language used by him in para. 22 of his grounding affidavit, I

therefore propose to grant leave to the applicant to seek a declaration that the omission by the Board and/or its inspector of any reference to the observations made by the applicant invalidates the decision of the Board to grant permission for the development. I will grant leave to the applicant to seek such a declaration on the grounds that the omission to refer to the applicant or to his observations constitutes an error sufficient to invalidate the decision. I stress that, in giving such leave, I do so only on the basis that I believe the applicant can make a weighty argument in support of such relief. I do not in any way prejudge the outcome of that argument and I reiterate that the Board may well have a complete answer to the concern expressed by the applicant. If either the Board or Crekav so require, I will direct that the applicant should file an amended statement of grounds in which the declaration described above is sought in Part D on the grounds described in para. 22 of the applicant's grounding affidavit. I would, however, suggest that it should not be necessary to delay these proceedings by the delivery of amended statement of grounds. In circumstances where the order proposed by me will make clear the precise scope of the additional relief which can be sought by the applicant and the grounds on which such relief can be sought, it seems to me that this would be sufficient to make the scope of this aspect of the applicant's case clear for the purposes of the ultimate hearing of these proceedings.

The grounds relied upon by the applicant in support of his claim that the Board did not adequately consider the requirements of Fingal County Council's objective DMS 174 (pertaining to coastal erosion).

32. In support of this element of the relief claimed by him, the applicant relies again on para. 8 of Part E of the statement of grounds and on paras. 4 and 25 of his affidavit sworn on 25th May, 2020. For the reasons outlined above, I do not believe

that para. 8 of the statement of grounds is sufficient in itself to give any proper indication of the basis upon which this element of the application for judicial review is concerned. However, as noted above, the applicant has expressly adopted the submissions made by the Community Council and the Residents Association.

33. The only reference I can find to Objective DMS 174 in the materials before the court is on p. 6 of the submission made by Ms. Mallon on behalf of the Residents Association. The objective in question prohibits new development outside urban areas within the areas indicated on Green Infrastructure Maps which are within 100 metres of coastline at risk from coastal erosion unless it can be objectively established based on the best scientific information available at the time of the application, that the likelihood of erosion at a specific location is minimal taking into account, inter alia, any impacts of the proposed development on erosion or deposition and the predicted impacts of climate change on the coastline. According to Ms. Mallon, the site is 28 metres from the cliff face above Balscadden Bay such that permission to develop the site would be in contravention of this objective.

34. This objective is cited by the inspector on p. 16 of his report. I believe it would be inappropriate, at this point in these proceedings, to comment any further on the inspector's report in relation to this issue. It is sufficient to note that, in my view, the issue raised by Ms. Mallon on behalf of the Residents Association in relation to this objective was potentially an important issue and it follows, in my view, that the issue as to whether the Board adequately considered this objective qualifies as a substantial ground. However, for similar reason to those set out in para. 28 above, I am of the view that the statement of grounds does not adequately comply with O.84 r.20 (3) in relation to this ground. Paragraph 8 of Part E of the statement of grounds is pleaded too generally. That said, it seems to me that the most efficient way to deal

with this deficiency is to make clear, in the order granting leave in respect of the relief claimed in para. 4 of Part D of the statement of grounds, that such leave is granted on the ground that the Board failed to properly consider and reach a determination on the issue described on p. 6 of the observations dated 6th December, 2019 submitted by Ms. Mallon on behalf of the Residents Association (which drew the attention of the Board to objective DMS 174 and contended that, as the subject site is 28 metres from the cliff face above Balscadden bay, permission to develop the site would be in contravention of objective DMS 174 of the Fingal Development Plan 2017-2023).

The grounds relied upon in support of the claim to a declaration that the Board erred in granting permission for the proposed development on a site known to be subject to flooding.

35. Again, the applicant relies in support of this element of his claim to relief on what is pleaded in para. 8 of Part E of the statement of grounds and on paras. 4 and 25 of his grounding affidavit. For the reasons previously discussed, those paras. do not provide any detail in relation to this ground. However, the issue is addressed very briefly in the observations made by the Community Council where it is stated that the site is within a highly sensitive area with a unique topography where the *"hilly terrain and soil structure has historically led to flooding and subsidence related to rainfall and changes in the ground moisture content".*

36. The question of flooding is addressed in para. 11.7.2 of the inspector's report where the inspector states that the site *"does not have a recorded history of flooding and the sandy soils upon it would not provide significant flood storage in its current condition. The submitted surface water drainage proposals have due regard to the circumstances of the site. They are there for considered acceptable and sufficient to demonstrate that the proposed development would not be at undue risk of flooding*

and would not give risk to an undue risk of flooding on other land and that it would be in keeping with the 2009 guidelines on flood risk management".

37. I do not believe that there is sufficient information before the court in relation to the flooding issue. The flooding issue is raised in such general terms in the observations made by the Community Council that, even having regard to those submissions, it is impossible to properly identify a ground in support of this element of the applicant's claim. In those circumstance, it follows that there is an insufficient basis on which to grant leave in relation to this element of the applicant's claim. Accordingly, I must refuse to grant leave in respect of the declaration claimed at para. 6 of Part D of the statement of grounds.

The grounds relied upon in support of the claim to a declaration that the Board erred in granting permission for the proposed development on a site known to be subject to subsidence.

38. The applicant relies on the same material in respect of this aspect of his claim as he does in relation to the relief claimed at para. 3 of Part D of his statement of grounds (namely, the declaration that the Board failed to give sufficient consideration to matters of safety pertaining to the site). He, therefore, relies on para. 8 of Part E of his statement of grounds and on paras. 4 and 25 of his grounding affidavit. A similar issue, therefore, arises to that described in para. 27 above. However, when para. 8 of the statement of grounds is read in conjunction with the observations submitted by the Community Council and by Ms. Mallon on behalf of the Residents Association, it seems to me that the grounds on which this declaratory relief is sought is clear. There is a substantial overlap between the grounds relied on in support of this relief and the grounds relied upon in support of the declaration that there was a failure to give adequate consideration to matters of safety. As noted in para. 24 above, the

observations of the Community Council address the risk of subsidence and landslides at pp. 3-4 of its observations while the risk of subsidence is also addressed at pp. 7-10 of the observations submitted by Ms. Mallon on behalf of the Residents Association and supported by the report prepared by MTW Consultants Limited. I, therefore, propose to take a similar approach here as I did in relation to the declaration sought in relation to safety. It seems to me that I should specify in the order granting leave that the grounds for granting leave in respect of the relief claimed in para. 6 of Part D of the statement of grounds are those set out in para. 8 of Part E when read with pp. 4-4 of the Community Council observations and pp. 7-10 of the Residents Association's observations together with the MTW Consultants report.

The declarations sought in paras. 7, 8, 9 and 11 of the statement of grounds.

39. At the hearing of the applicant's application on 28th May I invited him to indicate whether he had any legal authorities to cite in support of these elements of his claim to relief. The applicant was unable to cite any authority in support of these elements of his claims.

40. In his statement of grounds, the only support which he provides in relation to these elements of his claim are set out in paras. 9, 10 and 11 of Part E of the statement of grounds. In para. 9, it is alleged in very general terms that the applicant's case is that "*upon exhaustive examination of the overall Statutory and Jurisprudential circumstance, the Board has found itself to be ultra-vires".* With due respect to the applicant, I can see no basis upon which this could be said to constitute a substantial ground. No basis whatever has been identified for suggesting that the Board found itself to have acted in an *ultra vires* manner. Nor is there anything in the grounding affidavit of the applicant that explains the basis for this element of the relief claimed by him. In fact, it is clear from para. 26 of his affidavit that the applicant is not in a

position to identify a basis for this relief. He states in para. 26 that, in the event that leave is granted, he will "*endeavour to submit a detailed treatment of such contention of mine".* For the reasons already explained in para. 17 above, the applicant cannot take this approach. If leave is to be granted to the applicant, he must, as a pre-condition to the grant of leave, establish, at this point in the proceedings, substantial grounds for the relief sought. The court is not mandated by the 2000 Act to grant leave unless such substantial grounds are demonstrated to exist.

41. In para. 27 of his affidavit, the applicant refers to the observation made by the inspector at para. 6.1.1 of his report where he referred to the housing policy of the government as set out in "*rebuilding Ireland – Action Plan for Housing and Homelessness issued in July 2016"* and where the inspector states:

> *"The overarching aim of this Action Plan is to ramp up delivery of housing from its current under-supply across all tenures to help individuals and families meet their housing need".*

42. At para. 28 of his affidavit the applicant complains that the Board has acted in an *ultra vires* manner by implementing government policies which are, more properly, for the Department of Housing, Planning and Local Government.

43. In para. 29 of his affidavit the applicant complains about the use of language in the passage quoted above which he suggests is vague, jargonistic and florid. However, none of paras. 27-29 provides any legal basis to support the relief claimed in paras. 7, 8, 9 and 11 of Part D of the statement of grounds. Accordingly, I can see no substantial grounds in this case to support any of the relief claimed in those paragraphs. I, therefore, refuse to grant leave to the applicant in respect of these elements of his claim.

The declaration that the proposed development is not consistent with the zoning of the site under the Fingal County Council Development Plan 2017 to 2023

44. In support of this ground, the applicant, again, relies on para. 8 of his statement of grounds. In addition, he relies on paras. 4 and 25 of his grounding affidavit. In other words, he relies principally upon the submissions and observations made to the Board by himself, the Community Council and the Residents Association. Insofar as I can see, zoning is not mentioned at all in the observations made by the applicant to the Board. It is mentioned briefly by the Community Council but not in a sufficiently detailed way to identify a specific ground. However, the issue is addressed in more detail in the submission made by Ms. Mallon on behalf of the Residents Association. In particular, it is addressed on pp. 2-4. Among the points made is that only a small portion of the site of the proposed development is zoned *"RS-Residential".* According to the Residents Association, the greater portion of the site is zoned "*TC-Town & District Centre".* In addition, an issue is raised in this section of the submission made on behalf of the Residents Association as to whether the proposed development constitutes a strategic housing development. As noted in para. 1 above, a strategic housing development is defined by s. 3 of the 2016 Act as meaning a development of 100 or more houses *"on land zoned for residential use or for a mixture of residential and other uses".*

45. On the basis of the submissions made by the Residents Association, it appears to me that there are two potential grounds on which this element of the relief claimed by the applicant could be said to arise:

(a) The proposed development does not fall within the definition of a *"strategic housing development"* within the meaning of s. 3 of the 2016

Act such that the Board had no jurisdiction to accept the application made under s. 4 of the 2016 Act; and

(b) The proposed development is inconsistent with the zoning of the site under the Fingal County Council Development Plan, 2017-2023 and that, accordingly, such inconsistency invalidates the decision of the Board to grant permission for the proposed development.

46. In my view, it would be difficult to suggest, at this point in the proceedings and without having heard the case which the Board or Crekav might make, that these grounds are not weighty grounds such as to constitute substantial grounds for the purposes of the *McNamara* test. I, therefore, believe that I should grant the applicant leave to seek the declaration sought in para. 10 of Part D of the statement of grounds (i.e. the declaration summarised in para. 13 (j) above) on the grounds set out in para. 8 of Part E of the applicant's statement of grounds when read in conjunction with the issue raised by the Residents Association at pp. 2-4 of the observations submitted on their behalf.

A declaration that Condition 2 as proposed in the Board's order does not make sense.

47. This is addressed in para. 11 of the statement of grounds where the applicant says that the Board did not exercise due care and diligence in arriving at its decision and in expressing its decision. In para. 30 of his grounding affidavit, the applicant confirms that he has nothing further to add in relation to this issue beyond the statement of grounds.

48. In my view, this element of the relief claimed by the applicant must be read in conjunction with the terms of Condition 2 attached to the decision of the Board to grant permission for the development. That condition is in the following terms:

"2. The proposed widening of the footpath along the Balscadden Road shall be omitted from the proposed development.

Reason:

To protect pedestrians and to safeguard the structural integrity of the road".

49. When one considers the terms of Condition No. 2, it is readily apparent why the applicant seeks the relief which he does. On the face of it, it is difficult to understand how the omission of the proposed widening of the footpath along the Balscadden Road can be said to *"protect pedestrians"* as stated in the reason given by the Board for the imposition of this condition. The widening of the footpath would appear to be in the interests of the protection of pedestrians. It is, therefore, difficult to see how the omission of that aspect of the proposed development could be said to protect pedestrians. That is not to suggest that the Board will not be able to justify this condition (and the reason given for it) but, on the face of it, it seems to me that the applicant has a substantial ground on which to suggest that the reason given for this condition does not make sense. In those circumstances, I propose to give the applicant leave to seek the relief claimed in para. 12 of Part D of his statement of grounds on the basis that Condition 2 to the order made by the Board does not make sense.

The relief claimed in relation to costs

50. As noted in para. 13 (m) and (n) above, the applicant seeks a number of orders in relation to costs. These are orders which are regularly sought in judicial review proceedings of this type and I believe, without prejudging any issues that any of the other parties may wish to raise in relation to these elements of the relief sought, that the applicant has substantial grounds to seek such relief. I therefore do not believe that this is an issue which requires further consideration by me in this judgment. I

will therefore give the applicant leave to seek the relief claimed by him in paras. 13 and 14 of Part D of the statement of grounds. While Part E of his statement of grounds does not address these elements of the relief claimed by him, it seems to me that leave can be granted to the applicant to seek this relief on the basis of the case made in support of the remaining elements of the relief for which leave is granted by this judgment.

The order of *certiorari* sought

51. For the reasons discussed in paras. 24 – 26, 31, 33 – 34, 38, 44 – 46 and 47 – 49 above, it seems to me that there is a basis on which the applicant should be given leave to pursue his claim for an order of *certiorari*. In my view the grounds on which such relief can be sought are those discussed in paras. 28, 31, 34, 38, 46 and 49 above.

The order to be made

52. For the reasons outlined above, I refuse to grant leave to seek any of the relief set out in paras. 2, 5, 7, 8, 9 and 11 of Part D of the statement of grounds. However, I will make an order granting the applicant leave to bring judicial review proceedings in respect of the decision of the Board dated 2nd March, 2020 insofar as he seeks the relief set out in paras. 1, 3, 4, 6, 10, 12, 13 and 14 of Part D of the statement of grounds. Such leave is given on the grounds more particularly set out in paras. 53 – 60 below.

53. Insofar as the relief claimed in para. 3 of Part D of the statement of grounds, leave is granted on the grounds set out in para. 8 of the statement of grounds when read with the submissions made by the Community Council outlined in s. 1 of its observations dated 5th December, 2019 and the observations made at pp. 7-11 under the headings *"Risk of subsidence and landslides"* and *"Health & Environmental Impact of the Excavations and Transport"* in the submission dated 6th December,

2019 made by Ms. Mallon on behalf of the Residents Association together with the associated report by MTW Consultants Ltd submitted to the Board on 9th December, 2019.

54. I will also grant leave to the applicant to seek a declaration that the omission by the Board and/or its inspector to make reference to the observations made by the applicant invalidates the Board's decision to grant permission for the development. Such leave is granted on the ground that the applicant contends that the omission to refer to the applicant or to his observations constitutes an error sufficient to invalidate the decision. In the event that either the Board or Crekav require that an amended statement of grounds be delivered by the applicant for that purpose, I will give liberty to the applicant to amend the statement of grounds but only to the extent necessary to give effect to the leave hereby granted.

55. Insofar as the relief claimed in para. 4 of Part D of the statement of grounds is concerned, leave is granted on the grounds that the Board failed to properly consider and reach a reasoned determination on the issue described on p. 6 of the observations dated 6th December, 2019 submitted by Ms. Mallon on behalf of the Residents Association.

56. Insofar as the relief claimed in para. 6 of Part D is concerned, leave is granted on the grounds set out in para. 8 of Part E of the applicant's statement of grounds when read with pp. 3-4 of the Community Council's observations and pp. 7-10 of the Residents Association's observations together with the MTW Consultants report.

57. Insofar as the relief claimed in para. 10 of Part D is concerned, leave is granted on the grounds as set out in para. 8 of Part E of the applicant's statement of grounds when read in conjunction with the issue raised by the Residents Association at pp. 2-4 of the observations submitted on their behalf .

58. Insofar as the relief claimed in para. 12 of Part D of the statement of grounds is concerned, leave is granted on the grounds that Condition 2 proposed by the Board does not make sense.

59. Insofar as the relief claimed at paras. 13 and 14 of Part D of the statement of grounds is concerned, leave is granted on the basis of the case made by the applicant in respect of the remaining elements of the relief claimed by him in respect of which leave is granted by this judgment as set out in paras. 53 – 58 above and para. 60 below.

60. Insofar as the primary relief is concerned, namely, the claim to an order of *certiorari* claimed in para. 1 of Part D of the statement of grounds is concerned, leave is granted on each of the grounds described in paras. 53 – 58 above.

61. I will direct that the application should proceed by way of an originating notice of motion. I will direct the applicant to serve the originating notice of motion together with a copy of the order made on foot of this judgment, the statement of grounds and his affidavit sworn on 25th May, 2020 on both the Board and on Crekav by sending copies thereof by email to their respective solicitors, namely, Philip Lee Solicitors on behalf of the Board and Arthur Cox Solicitors on behalf of Crekav. I will direct that service should be effected within 7 days from the date of perfection of the order proposed herein, failing which the order granting leave shall lapse.

62. I will also direct that the originating notice of motion should be made returnable in the Strategic Infrastructure list for Thursday, 25th June, 2020 at 10.30 a.m. at which stage I will give directions for the further prosecution of these proceedings. In light of the fact that the respondent and notice party have previously been served with the papers by the applicant, I expect that the statements of opposition and accompanying affidavits should be capable of being delivered within a

relatively short period of time after 25th June. I direct the parties to confer with each other by email or telephone in advance of the further consideration of the matter on 25th June with a view to agreeing the further directions to be made in relation to the timescale for delivery of the statements of opposition and accompanying affidavits, any replying affidavit, the written submissions and suitable dates for the hearing of the proceedings. The Court Registrar should be informed of the outcome of that interaction between the parties by email not later than 3:00pm on 24th June, 2020.

63. In the course of the interaction between the parties directed at para. 62 above, the Board and Crekav should indicate to the applicant whether either of them requires that an amended statement of grounds should be furnished to address the additional relief set out in para. 54 above. In the event that either of them requires delivery of an amended statement of grounds, the time for delivery of the amended statement of grounds will require to be addressed in the further directions discussed in para. 62 above.

64. I will reserve the costs of the application.