

THE HIGH COURT
JUDICIAL REVIEW

[2022] IEHC 318
Record No :2020/737JR

Between:

MONKSTOWN ROAD RESIDENTS' ASSOCIATION,
JAMES BARRY, BAIRBRE STEWART AND CHRISTOPHER CRAIG

Applicants

-and-

AN BORD PLEANÁLA
THE MINISTER FOR HOUSING, HERITAGE AND LOCAL GOVERNMENT,
IRELAND AND ATTORNEY GENERAL
AND
IRISH WATER

Respondents

-and-

LULANI DALGUISE LIMITED
AND
DÚN LAOGHAIRE RATHDOWN COUNTY COUNCIL

Notice Parties

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JUDGMENT of Mr Justice Holland delivered 31 May 2022

INTRODUCTION

1. The Applicants, a local residents association (“MRRA”) and local residents, seek, primarily, to quash the decision of the First Respondent, [“the Board”] made by order ABP-306949-20 dated 25th August 2020, under section 4 of the Planning and Development (Housing) and Residential Tenancies Act 2016 [“the 2016 Act”] to grant the First Notice Party [“Lulani”] planning permission for a strategic housing development [“SHD”] on a site [“the Site”] of approximately 3.66 hectares at Dalguise House, Monkstown Road, Monkstown, Blackrock, County Dublin – [the “Impugned Permission”/“Impugned Decision”]. The site is in the functional area of the 2nd Notice Party [“DLRCC”] as planning authority.

2. Dalguise House, a large 19th Century two-storey over basement residence, is a protected structure¹. Lulani’s Architectural Design Statement² (“ADS”) describes it as shown on the 1837 Ordnance Map and traces its development via later maps. Its walled garden, stable blocks and paddock lie to its rear (south) with, to the front (north), lawns, a curved main avenue, a service road along the western boundary, a tennis court and a lower garden area beyond the main avenue. The Stradbroom stream forms the northern boundary of the Site. The existing general layout is shown on Figure 1 below.

3. In the DLRCC Development Plan 2016-2022 [the “Development Plan”], the Site is zoned “A - *To protect and/or improve residential amenity*”³. Development “Permitted in Principle” is listed in that zoning objective as including “Residential”.

¹ Pursuant to Part IV Chapter 1 of the Planning and Development Act 2000

² Exhibit PD1 Tab2

³ DLRCC Development Plan 2016; Table 8.3.2



Figure 1 – the Existing Site⁴

- Monkstown Road is to the North, running east/west.
- The existing avenue from Monkstown Road enters at the north-western corner of the site.
- The words “Clifton Ln” are misleading. The feature indicated is the avenue to Dalguise House.
- Stradbroke stream runs west to east at the northern Site boundary.
- South and southeast of Dalguise House is a walled garden
- Only a small part of the Site - the northern “half” of each of the two links to Monkstown road⁵ - is in the Monkstown Architectural Conservation Area [“ACA”] of the Development Plan.

4. While Lulani sought permission in March 2020 for 300 residential units, the following are the main elements (the “Proposed Development”) of the Impugned Permission:

- 290 residential units, of which,
 - 24 are houses, of which 2 will occupy Dalguise House itself and 2 will occupy existing buildings,
 - 266 are apartments – in 8 blocks of which the highest, Block E, will be 9 storeys and the others from 5 to 8 storeys⁶,
 - the resultant residential density is approximately 82 units per hectare.
- A creche in the basement of Dalguise House.
- The relocation and refurbishment within the Site of an existing glasshouse/vinery. By Condition 26, the possibility of relocation and refurbishment within the Site of a second existing glasshouse is to be proposed by Lulani.

⁴ Extracted from Architectural Design Statement - Not to Scale – Ignore Text.

⁵ Statement of Consistency Figure 6 & § 6.58

⁶ Including Podiums



Figure 2 – Site layout plan as proposed in planning application⁷

Notes

- The proposed new, eastern, egress to the Monkstown Road is via Purbeck Lodge, where a new bridge will cross the Stradbroke stream.⁸
- The apartment blocks are depicted as, roughly, dark green rectangles. Houses are depicted as, roughly, grey rectangles.
- Three future pedestrian accesses are indicated at boundaries with Arundel, Richmond Park, and the former Cheshire Home site, “subject to agreement”.

⁷ Extract from EIA Screening Report Figure 4

⁸ Nothing turns on it here. The EIA Screening report describes the access and egress arrangements as follows: Access to the site will be by two entrances. The existing entrance to Dalguise House will provide for an ingress access only. Egress will be taken through the residential development at Purbeck Lodge. Purbeck Lodge will remain two-way but only residents of Blocks A, B and C can use this access for entrance. A one-way connection will link to the main Dalguise Avenue. This will enable a point of entry to the site from Monkstown Road to the north, with a bridge proposed across the Stradbroke Stream, which divides the main body of the site from the development at Purbeck Lodge. A minor reconfiguration of the car parking layout at Purbeck Lodge is included within proposals in order to provide access to the site.

4.4 Master-plan - Massing

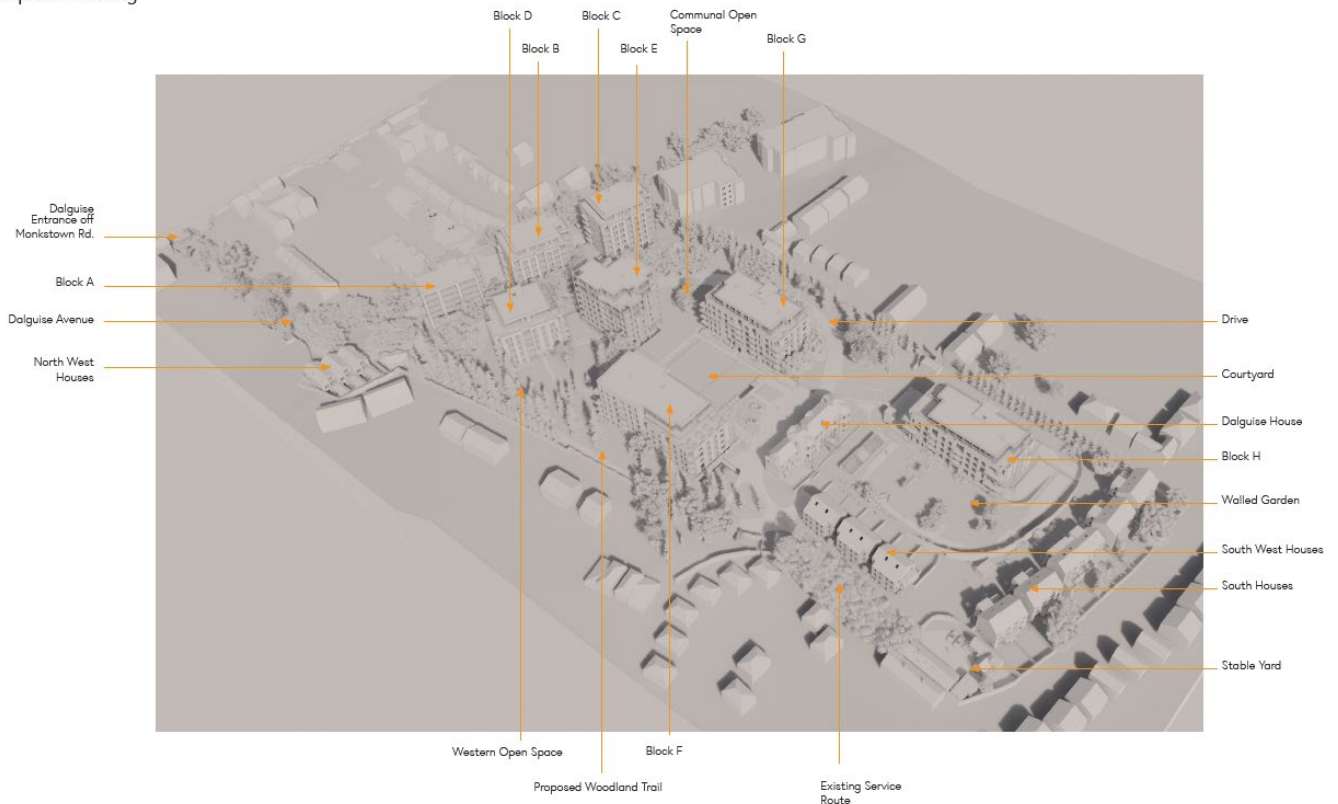


Figure 3 – ADS Massing Study⁹

Notes

- This figure represents the SHD Planning application rather than the Impugned Permission. It does not reflect the Board’s imposed alterations to building height. Therefore it is intended for present purposes only as a general impression of the Proposed Development.
- The proposed new eastern entrance off Monkstown Road is not depicted.

5. §E.3 of the 2nd Amended Statement of Grounds sets out the Factual Grounds on which the Applicants rely – which the Board admits save in one respect. Much of this content is set out above.

In addition, the Applicants say:

- The Applicants and others made submissions in the planning application process opposing the Proposed Development as, essentially, “*too big and too dense*”¹⁰
- DLRCC submitted a report to the Board as required by S.8(5) of the 2016 Act¹¹.
- The Board’s Inspector’s 146-page report is dated 24 July 2020.

⁹ Lulani SHD Planning Application – Architectural Design Statement – horan rainsford architects

¹⁰ Applicant’s written submissions §2

¹¹ S.8(5) of the 2016 Act requires a report to the Board by the Chief Executive of the planning authority – to include

- A summary of the points raised in the submissions or observations to the Board
- the Chief Executive’s views on the effects of the proposed development on the proper planning and sustainable development of the area and on the environment, having regard, inter alia to those submissions and observations
- A summary of the views of the relevant elected members
- the authority’s opinion whether the proposed SHD would be consistent with the relevant objectives of the development plan
- Whether the authority recommends that permission should be granted or refused, - giving reasons
- Any planning conditions it recommends - giving reasons

- The Proposed Development would require the removal of three rows of trees¹² which traverse the site from east to west. One is at the northern edge of the site, along the Stradbrook Stream. The middle row runs along the northern section of the main avenue to Dalguise House. The third crosses that avenue as it swings south towards Dalguise House.
- The Board granted permission authorising a material contravention of the Development Plan as to building height. The Plan's Building Heights Strategy¹³ allows for a maximum building height of 2 to 3 storeys, subject to upward and downward modifiers¹⁴, but the Board considered that the Special Planning Policy Requirements ("SPPR") in the Height Guidelines 2018¹⁵ warranted permitting a development that would exceed the Building Heights Strategy limits by as many as 6 storeys.
 - As will be seen, while authorisation of the material contravention is agreed, the precise basis of that authorisation by reference to SPPRs is in dispute.

THE PLANNING PERMISSION APPLICATION

6. It is not possible, nor desirable, here to describe comprehensively the information before the Board in making its decision, but it included the following submitted in the Planning Application and exhibited in the proceedings. I will refer to certain further information later in this judgment.

- Covering Letter and Application Form
- Statement of Consistency with the Development Plan and relevant Ministerial Guidelines issued under S.28 PDA 2000¹⁶ and other relevant national, regional and local policy.
- Statement of Material Contravention of the Development Plan. This is non-committal whether there is a material contravention but is directed in considerable part, if not primarily, at the question of building height in the context of the Development Plan Building Heights Strategy
- EIA¹⁷ Screening Report – it asserted that EIA was unnecessary.
- AA¹⁸ Screening Report – it asserted that AA was unnecessary.
- Ecological Impact Statement (note, not an EIAR) (this is variously cited as an "Ecological Impact Statement" and as an "Ecological Impact Assessment Report". It is entitled as the former and I will use that title).
- Visual Impact Assessment
- Architectural Design Statement¹⁹ and drawings

¹² See Figure 1 Above

¹³ at Appendix 9 of the Development Plan

¹⁴ As recited by the Inspector, Development Plan Policy UD6 adopts the Development Plan Building Height Strategy which is in Appendix 9 of the Development Plan. §4.8 states a general recommended height of 2 storey in overtly suburban areas. 3 to 4 storeys for apartments in commercial cores of such areas may be permitted in appropriate locations - for example on prominent corner sites, on large redevelopment sites or adjacent to key public transport nodes - providing they have no detrimental effect on existing character and residential amenity.. These maxima may be modified. Upward modifiers (more than one required) include location within 500m walking distance of a train station and sites large than 0.5 hectares that can set their own context for development. Downward modifiers include adverse effects on residential living conditions through overlooking, overshadowing or excessive bulk and scale, or on the setting of a protected structure In some contrast the 2018 Height Guidelines seek at least 3 to 4 storeys in suburban areas.

¹⁵ Urban Development and Building Height Guidelines for Planning Authorities 2018 published under S.28 PDA 2000

¹⁶ Planning & Development Act 2000

¹⁷ Environmental Impact Assessment

¹⁸ Appropriate Assessment under Habitats law

¹⁹ ADS

- Architectural Heritage Impact Assessment [“AHIA”]
- Residential Amenity Report
- Landscape Design Rationale
- Arboricultural Report
- Hydrological and Hydrogeological Qualitative Risk Assessment (“HHQRA”)
- Irish Water Statement of Design Acceptance dated 6 March 2020
- Bat Impact Assessment and a Derogation Licence²⁰ dated 27 February 2020 - allowing the felling of one beech tree containing a temporary Leisler’s Bat mating perch.

THE IMPUGNED PERMISSION

7. The Board’s Direction records that the “*Board decided to grant permission generally in accordance with the Inspector’s recommendation*”.

8. In granting the Impugned Permission, the Board’s Order set out its Conclusions on Proper Planning and Sustainable Development as follows²¹:

- The proposed development is, apart from building height, broadly compliant with the Development Plan and would, therefore, be in accordance with the proper planning and sustainable development of the area.
- Permission would materially contravene the Building Height Strategy of the Development Plan as to building height limits.
- Under S.9(6) of the 2016 Act and S.37(2)(b)(i), (iii) and (iv) PDA 2000, permission in material contravention of the Development Plan would be justified for the following reasons and considerations:
 - (a) The proposed development is of strategic or national importance by reason of its potential to contribute to the achievement of Government policy to increase delivery of housing set out in Rebuilding Ireland²², and to facilitate greater density and height in residential development in an urban centre close to public transport and centres of employment.
 - (b) Permission should be granted having regard to Government policies as set out in the National Planning Framework (“NPF”) (in particular objectives 13²³ and 35²⁴) and the [Height

²⁰ Issued pursuant to Article 54 of the Habitats Regulations 2011 which transposes Article 16 of the Habitats Directive

²¹ Not verbatim

²² Rebuilding Ireland – Action Plan for Housing and Homelessness issued in July 2016

²³ In urban areas, planning and related standards, including in particular building height and car parking will be based on performance criteria that seek to achieve well-designed high-quality outcomes in order to achieve targeted growth. These standards will be subject to a range of tolerance that enables alternative solutions to be proposed to achieve stated outcomes, provided public safety is not compromised and the environment is suitably protected.

²⁴ Increase residential density in settlements, through a range of measures including reductions in vacancy, reuse of existing buildings, infill development schemes, area or site-based regeneration and increased building heights.

Guidelines 2018] - in particular SPPR1²⁵ and SPPR 3.

- (c) Having regard to the pattern of existing and permitted development in the vicinity of since the Development Plan was adopted.

- Subject to compliance with the conditions imposed, the Proposed Development would:
 - constitute an acceptable quantum and density of development in this accessible urban location.
 - not seriously injure the residential or visual amenities of the area.
 - be acceptable in terms of urban design, height and quantum of development.
 - be acceptable in terms of pedestrian and traffic safety.

- Any potential issues/concerns relating to ecology (specifically heronry) could be adequately mitigated subject to conditions (as recommended by the relevant prescribed body).

- The Proposed Development would, therefore, be in accordance with the proper planning and sustainable development of the area.

9. The Board in the Impugned Permission “*noted, but did not accept fully the opinion of the planning authority in its Chief Executive’s Report and that of the inspector in his report, that the omission of two floors from Blocks B, C and E would be necessary*”. Instead, it reduced Blocks B and C by 1 storey to 7 storeys and did not reduce Block E from the 9 storeys applied for. It also rejected the Inspector’s recommendation that Block F be replaced with a mirrored version of Block G. These decisions were put in the context of relationship to Dalguise House explicitly as a protected structure.

10. The Impugned Permission screened out Appropriate Assessment [“AA”²⁶] under Habitats law as unnecessary – explicitly adopting the Inspector’s report in this regard and concluding that, by itself or in combination with other development in the vicinity, the proposed development would not be likely to have a significant effect on any European site in view of the conservation objectives of such sites.

11. The Impugned Permission also screened out Environmental Impact Assessment (“EIA”) as unnecessary. Perhaps in contrast to its decision as to AA, the Board did not explicitly adopt its Inspector’s report in this regard. But it considered that Lulani’s EIA Screening Report adequately identified and described the effects of the proposed development on the environment. Having regard to the:

²⁵ Specific Planning Policy Requirement. S.28 PDA empowers the Minister to issue guidelines to which, inter alia, the Board shall “have regard”. S.28(1c) PDA 2000 empowers the Minister to include in such guidelines specific planning policy requirements with which, inter alia, the Board shall, “comply”.

²⁶ I will refer to Appropriate Assessment as “AA” and Screening for Appropriate Assessment as “AA Screening”

- (a) nature and scale of the proposed development on an urban site served by public infrastructure,
- (b) absence of any significant environmental sensitivities²⁷ in the area, and
- (c) location of the development outside of any sensitive location specified in article 109(3) PDR 2001²⁸,

the Board concluded that, by reason of the nature, scale and location of the subject site, the Proposed Development would not be likely to have significant effects on the environment. The Board decided, therefore, that an environmental impact assessment report (“EIAR”) was unnecessary.

12. However, the Board did, by Condition 17 require that *“The mitigation measures outlined in the Ecological Impact Assessment ... shall be carried out in full, except where otherwise required by conditions of this permission”* – giving its reason as *“To protect the environment and in the interest of wildlife protection”*. By Condition 18 it required protection of herons and their nests on site. Condition 26 sought to regulate architectural conservation.

THE PLEADINGS & ISSUES

13. The papers in this case are voluminous. The 2nd Amended Statement of Grounds²⁹ lists 15 core grounds (and numerous sub-grounds) upon which the decision is impugned. There are 15 affidavits (though many short), 74 exhibits (many not short) and about 80 authorities. It is fair to say that many of the affidavits engage considerably on what are, essentially, the merits of the Impugned Decision and there was little reference to them during the trial – though much reference to their exhibits.

2nd Amended Statement of Grounds

14. Given issues which arose as to the scope of the trial, it is prudent to set out the reliefs sought and the grounds on which they are sought in some detail.

Reliefs Sought

15. The 2nd Amended Statement of Grounds at §D seeks, inter alia, the following reliefs:
- 1 Certiorari of the Impugned Permission.

²⁷ Emphasis added: this significance of this finding is addressed below in the context of EIA Screening.

²⁸ Planning and Development Regulations 2001 (as Amended). Art 109(3) was deleted by article 69(c) of S.I. No. 296/2018 - European Union (Planning and Development)(Environmental Impact Assessment) Regulations 2018 but nothing appears to turn on that for present purposes.

²⁹ Amended by directions of the court on 19 October and 29 October 2020

- 3 A declaration of invalidity of the Height Guidelines 2018.
- 4 A declaration of unconstitutionality of S.28 PDA 2000.
- 5 A declaration pursuant to Article 4(3) TEU³⁰ and such other provision as may be considered appropriate that the Board was required to ignore the Irish Water letter of 6 March 2020³¹ stating that it had no objection to the connection of the Proposed Development to its network.
- 6 If necessary, Certiorari of Irish Water’s consent to the connection of the Proposed Development to its network, and an extension of time to challenge the validity of that decision.
- 6A. Certiorari of the derogation licence dated 27 February 2020 issued by the Minister³² to the Developer pursuant to Article 54³³ of the Habitats Regulations 2011³⁴, relevant declarations and an extension of time to challenge that licence.
- Various reliefs as to costs protection

Grounds

16. The 2nd Amended Statement of Grounds³⁵ lists the following Core Legal Grounds³⁶ on which those reliefs are claimed:

- 1. Failure to adequately state reasons for the Impugned Permission - as required by Section 10³⁷ of the 2016 Act and common law.
- 2. Error in application of Article 12 of the Habitats Directive³⁸.
- 3. The Minister erred in granting the derogation licence contrary to Article 16 of the Habitats Directive and Article 54 of the Habitats Regulations 2011.

³⁰ Treaty on European Union – Article 4(3), pursuant to the principle of sincere cooperation, obliges the union and the member states to “in full mutual respect, assist each other in carrying out tasks which flow from the treaties. The member states shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the treaties or resulting from the acts of the institutions of the union. The member states shall facilitate the achievement of the union's tasks and refrain from any measure which could jeopardise the attainment of the union's objectives.”

³¹ Affidavit of Sean Laffey 1 April 2021 Exhibit SL1

³² The Respondent Minister for Housing, Heritage And Local Government

³³ Article 54 transposes Article 16 of the Habitats Directive and allows the Minister to grant a Derogation Licence absolving the licensee from complying with Regulations 51, 52 and 53 which transpose Habitats Directive obligations as to strict protection of species.

³⁴ European Communities (Birds And Natural Habitats) Regulations 2011 (S.I. No. 477 of 2011)

³⁵ Amended by directions of the court on 19 & 29 October 2020

³⁶ Edited somewhat

³⁷ S.10(3) reads in part:

A decision of the Board to grant a permission under section 9(4) shall state—

- (a) the main reasons and considerations on which the decision is based,
- (aa) the reasoned conclusion, in relation to the significant effects on the environment of the proposed development, on which the decision is based,
- (b) Where the board grants a permission in accordance with section 9(6)(a), the main reasons and considerations for contravening materially the development plan or local area plan
- (c) the main reasons for imposing [any planning conditions]
- (e) that the Board is satisfied that the reasoned conclusion on the significant effects on the environment was up to date at the time of the taking of the decision.

³⁸ Council Directive 92/43/EEC of 21 May 1992 On the Conservation of Natural Habitats and of Wild Fauna And Flora (OJ L 206, 22.7.1992, P. 7) as amended. Article 12 requires Member States to establish a system of strict protection for the animal species listed in annex iv, prohibiting, inter alia, their capture, killing or deliberate disturbance.

- 4. Error in screening out EIA, contrary to Articles 2 and 3 of the EIA Directive³⁹. And failure to consider relevant material or to give adequate reasons as required by Sections 9 and 10 of the 2016 Act and by common law.
- 5. Error in screening out AA, contrary to Article 6⁴⁰ of the Habitats Directive.
- 6. Failure to properly apply the Bathing Water Directive.⁴¹
- 7. The Board lacked sufficient scientific expertise to adequately, objectively and scientifically evaluate the proposal before it, and failed to carry out an independent scientific review of the proposal for the purposes of Article 12 of the Habitats Directive.
- 8. Error in application of S.3 PDA 2000⁴² and S.9 of the 2016 Act⁴³ in failing to have proper regard to the Development Plan and the Architectural Heritage Guidelines⁴⁴ and failing to determine the curtilage of Dalguise House. It also failed to give adequate reasons for the purposes of S.10 of the 2016 Act.
- 9. Misinterpretation of the zoning of the area and misapplication of the Development Plan contrary to S.9 of the 2016 Act⁴⁵.
- 10. Error in granting permission for a material contravention of the Development Plan pursuant to S.9(6) of the 2016 Act and S.37(2) PDA.

³⁹ Directive 2011/92/EU of the European Parliament And of the Council of 13 December 2011 On the Assessment of the Effects of Certain Public And Private Projects On the Environment (OJ L 26, 28.1.2012, P. 1) as Amended By: Directive 2014/52/Eu of the European Parliament And of the Council of 16 April 2014 (OJ L 124, 25.4.2014, P. 1)

Article 2.1 reads: Member states shall adopt all measures necessary to ensure that, before development consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects on the environment. Those projects are defined in article 4. Article 3 describes the substantive content of EIA.

⁴⁰ Art 6(3) Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

⁴¹ Directive 2006/7/EC of the European Parliament And of the Council of 15 February 2006 Concerning the Management of Bathing Water Quality.

⁴² Definition of "Development".

⁴³ Decisions by Board on SHD Permission Applications. S.9(2) Reads in Part:

(2) in considering the likely consequences for proper planning and sustainable development in the area in which it is proposed to situate the strategic housing development, the Board shall have regard to—

(A) the provisions of the development plan.....

(B) Any guidelines issued by the Minister under Section 28 of the Act of 2000,

⁴⁴ Architectural Heritage Protection Guidelines for Planning Authorities, Department of Arts, Heritage And the Gaeltacht 2011

⁴⁵S.9(6) reads in part as follows:

(A) the Board may decide to grant a permission for a proposed [SHD] even where the proposed development, or a part of it, contravenes materially the development plan

(B) the Board shall not grant permission under paragraph (a) where the proposed development, or a part of it, contravenes materially the development plan in relation to the zoning of the land.

(C) Where the proposed [SHD] would materially contravene the development plan other than in relation to the zoning of the land, then the Board may only grant permission in accordance with paragraph (A) Where It

considers that, if Section 37(2)(B) of the Act of 2000 were to apply, it would grant permission for the proposed development.

[s.37(2)(b) PDA 2000 states criteria for the grant of permission in material contravention of a development plan.]

- 11. Error and consideration of irrelevant material contrary to S.9 of the 2016 Act and common law in taking a “precautionary approach” to material contravention.
- 12. Error in
 - misinterpreting and misapplying SPPR1 and SPPR3 of the Height Guidelines 2018,
 - failing to consider relevant material and
 - failing to give adequate reasons for its decision contrary to Sections 9 and 10 of the 2016 Act and Section 28 PDA.
- 13. Failure, in applying SPPR3, to have regard to Part 5 of the Urban Residential Guidelines 2009⁴⁶ which requires that increased density developments should be stepped down as one moves away from public transport nodes.
- 14. Error in applying SPPR3, which is ultra vires the Minister, invalid, and contrary to Article 15.2 of the Constitution.
- 15. The 2016 Act is invalid and contrary to Articles 40.1 and 40.3 of the Constitution, Article 9⁴⁷ of the Aarhus Convention, and Article 20⁴⁸ of the Charter on Fundamental Rights of the European Union.

Scope of the Trial⁴⁹

State and Irish Water not Participating

17. On the morning of the 2nd day of trial there was considerable discussion as to what issues were properly before me having regard, not least, to the absence from the trial of the Minister, Ireland, the Attorney General (“the State Respondents”) and Irish Water. It appears, though the position was not entirely clear, that it had been decided before trial, or at least agreed inter partes, that the State Respondents need not appear: this on the footing that certain reliefs against them would be left over for later consideration if needs be. This included all “validity” reliefs. The proceedings had been struck out as against Irish Water.

The Derogation Licence

18. The primary difficulty this posed was that counsel for the Applicants told me, as he was entitled to do, that he had not resiled from seeking relief sought at §D.6A of the 2nd Amended

⁴⁶ Sustainable Residential Development in Urban Areas Guidelines 2009 (Department of Housing, Local Government And Heritage). the Plea Merely Instances the “2009 Guidelines” But the Reference Is Adequately Clear From the Context.

⁴⁷ Article 9 Relates to Access to Justice in Environmental Matters.

⁴⁸ Article 20 Relates to Equality Before the Law

⁴⁹ See generally Transcript Day 2 from 10:37

Statement of Grounds, seeking certiorari quashing the Habitats Regulations derogation licence issued to Lulani by the Minister. I was unwilling to entertain that claim for relief in the absence of the Minister.

19. That derogation licence on its face permits Lulani, in effecting their development, to remove a certain Beech tree in which a Leisler's Bat mating roost was found. But for that derogation licence, to do so would be a criminal offence pursuant to Article 51 of the Habitats Regulations which transposes Article 12 of the Habitats Directive. Article 12 requires strict protection of certain species, including all bats.

20. As in part recorded above, the 2nd Amended Statement of Grounds also alleged⁵⁰ error in the Board's application of Article 12 in granting the Impugned Permission - inter alia in having regard to both the (allegedly) invalid derogation licence and the allegedly inadequate bat surveys before it for that purpose. While this was a stand-alone plea of the Board's alleged (and disputed) obligations under the Habitats Directive, the bat surveys were also alleged⁵¹ to have been an inadequate basis for screening out EIA. It seemed to me that considering this EIA screening issue while deferring the question of the validity of the derogation licence would not be an efficient course.

21. The derogation licence issue and its interaction with EIA has been potentially further complicated by the opinion of Advocate General Kokott of the CJEU in the **Namur-Est** case⁵² which relates to Belgian proceedings challenging a derogation licence granted before a "single permit"⁵³ procedure. During the latter procedure EIA was done⁵⁴. Namur-Est contested the absence of EIA and public participation in the earlier derogation licence procedure. The Belgian court asked whether the derogation licence and single permit procedures were to be considered a single development consent procedure for EIA purposes. AG Kokott considers, inter alia, the status – it is posited, provisional – of a derogation licence granted before EIA is done and the obligations of a competent authority performing EIA as to considering the environmental impacts likely to result from actions permitted by a derogation licence. Since trial in this case the CJEU has given judgment in **Namur-Est**⁵⁵. The operative part of that judgment is available in English and holds that a derogation licence falls within the development consent for EIA purposes if both the project can't proceed without the derogation licence and the Board retains the ability to determine its environmental effects more strictly than was done in the derogation licence.⁵⁶ The CJEU also held that the grant of a derogation licence in respect of a project requiring EIA need not necessarily be preceded by public participation if effective public participation occurs before development consent is granted.

⁵⁰ At §E1.2 and §E2.3

⁵¹ At §E5.7

⁵² Case C-463/20 *Namur-Est Environnement ASBL v Région Wallonne & Cimenteries CBR SA*

⁵³ Which, for present purposes can be thought of as analogous to a planning permission

⁵⁴ In fact Development consent was refused but the challenge to the derogation licence proceeded anyway.

⁵⁵ 24 February 2022. The judgment is in French and not yet to hand in English. The answers to the questions referred have been published in English.

⁵⁶ As to terminology, I have "translated" the decision, as it were, to Irish circumstances.

22. That case does, of course, differ from the present in that, in Namur-Est, the necessity for EIA was clear, whereas in the present case it was screened out. But AG Kokott has expressed the view that “*derogations from the requirements of EU environmental law are significant by their very nature*⁵⁷, irrespective of whether they should ultimately be justified under Article 16 of the Habitats Directive or Article 9 of the Birds Directive”. So, counsel for the Applicants argued, it followed that EIA could not be screened out in a development consent application⁵⁸ for a development which would include works and effects on protected species envisaged by a derogation licence. Short of that, it seems likely that an argument arises that EIA screening must, in considering whether significant environmental effects are likely such that EIA is required, include a consideration of the likelihood of environmental effects deriving from works and effects on protected species envisaged by a derogation licence. To put it another way, it seems at least arguable that an environmental effect is not rendered insignificant, and EIA is not rendered unnecessary in respect of such an effect, by reason of its being licensed by a derogation licence.

23. Whether the pleadings permit such arguments and whether the CJEU judgment in Namur-Est support them and, indeed, whether the CJEU differed significantly from AG Kokott remain to be argued. As the challenge to the Derogation Licence was to be adjourned in any event to allow the Minister to be heard, Namur-Est seemed to me an additional reason to defer consideration of all issues as to bats, bat surveys and the Derogation Licence – including the significance of such issues for the validity of the EIA Screening in this case.

Irish Water Correspondence, Appropriate Assessment & Ringsend WwTP capacity

24. As to Irish Water, I had at an earlier hearing made an order, by consent of the Applicants, striking out the proceedings against Irish Water as the Applicants no longer sought to quash its “Statement of Design Acceptance” letter dated 6 March 2020⁵⁹ from Irish Water to Lulani and enclosed by Laluni with its SHD planning application to the Board. In that letter, Irish Water said it had “no objection” to the Proposed Development.

25. However, the Applicant sought at trial to pursue arguments pleaded in respect of ground §E1.5 of the 2nd Amended Statement of Grounds - error in screening out AA, contrary to Article 6 of the Habitats Directive. Those arguments are pleaded at §E1.6 of the 2nd Amended Statement of Grounds as follows⁶⁰ under the heading “AA Screening: Project Overload”.

6.1. Failure to consider the effect of discharges from the Proposed Development in-combination with other discharges currently overloading the Ringsend WwTP⁶¹ to which it is proposed to discharge sewage from the Proposed Development.

⁵⁷ Emphasis Added

⁵⁸ I.E. Planning Permission Application

⁵⁹ Exhibit CC1 Tab 12 & Exhibit SL

⁶⁰ Edited somewhat

⁶¹ Waste Water Treatment Plant

- 6.2. *Error in treating the absence of any objection from Irish Water as significant: the State and Irish Water have been condemned by the European Court for overloading Ringsend WwTP.*
- 6.3. *Error in noting that Ringsend WwTP is subject to emissions licensing and so had been considered by the EPA: no conclusion can be drawn from that licensing; EPA reports confirm the European Court judgment that the Plant is overloaded. It has a design capacity of 1.6 million p.e.⁶², but receives over 2.4 million p.e.*
- 6.4. *Error in having regard to an Irish Water letter indicating no objection to the Proposed Development’s connection to the sewer network. That letter was based on Irish Water failure to consider or assess the making of multiple connections to its network without a prior AA. Irish Water and the Board have thereby failed to consider whether the Ringsend WwTP can meet the treatment standards laid down in the Urban Waste Water Treatment Directive⁶³, and whether, when not so meeting them, that project or series of projects is likely to have a significant effect on SPAs and SACs in Dublin Bay. So, the letter of no objection was contrary to EU law and was required to be set aside.*
- 6.5. *Error in not carrying out an AA of the cumulative or “in combination” effects of the sewage from other developments authorised across Dublin in circumstances where there was no evidence that Irish Water had conducted an assessment, obtained authorisation, or prepared an AA in relation to the project or projects overloading Ringsend WwTP.*

26. As will have been seen, the foregoing grounds alleged failures not merely by the Board, but also by Irish Water and the State.

27. The **SHD Regulations 2017**⁶⁴ envisage Irish Water confirmation of two separate matters. SHD planning application Form 14 §20 of the SHD Regulations 2017 identifies the necessity and respective subject-matters of the two documents. It reads, in part:

20. Water services

Note

Where it is proposed to connect the strategic housing development to a public water or wastewater network or both, the application must be accompanied by —

- (a) evidence that Irish Water has confirmed that there is or will be sufficient water network treatment capacity to service the development⁶⁵,*
- (b) a statement of the applicant’s opinion that the proposals for water or wastewater infrastructure, or both, is consistent with all relevant design standards and codes of practice specified by Irish Water;*

⁶² Population Equivalent

⁶³ Council Directive of 21 May 1991 Concerning Urban Waste Water Treatment (91/271/EEC) (OJ L 135, 30.5.1991, P. 40)

⁶⁴ The Planning and Development (Strategic Housing Development) Regulations 2017

⁶⁵ See also in this regard Article 285(2)(G) and Form 11 §19 as to Pre-Application Consultation and Article 297(2)(D).

28. §20(a) and (b) are colloquially known respectively as “Feasibility” and “Design Acceptance”. §20(a) clearly refers back to Article 297(2)(d) of the SHD Regulations 2017, in which the word “feasible” appears. But §20(a) also, and usefully for clarity, introduces the word “treatment”. So, in this case, it is the Confirmation of Feasibility, not the Statement of Design Acceptance, which is expected to address the capacity of the Ringsend WwTP to accept the sewage of the Proposed Development.

29. While §20(b) as to Design Acceptance refers to a statement of the applicant’s opinion, in practice it seems the opinion is provided by Irish Water in the form of its Statement of Design Acceptance - of which the letter of 6 March 2020 is an example. And, as it relates to “*proposals for water or wastewater infrastructure*” it must be understood as referring to infrastructure to be provided by the aspirant developer as opposed to the existing infrastructure or the Irish Water network generally.

30. The Irish Water letter of no objection cited at §6.4 of the 2nd Amended Grounds⁶⁶ is the Acceptance of Design Submission dated 6 March 2020 which the Applicants no longer seek to quash⁶⁷. It is clearly an Acceptance of Design Submission in response to a Laluni proposal, based on a “Design Submission”, to connect to the Irish Water sewer network. It does not state the number of residential units to which it relates but a later Irish Water letter⁶⁸ records it as relating to a proposed development of 356 residential units.

31. The Irish Water Statement of Opposition asserts that this letter dated 6 March 2020 was merely a Statement of Design Acceptance, confirming Irish Water’s view that the internal layout and configuration of the water services infrastructure within the proposed development is acceptable to Irish Water. While the letter could have been clearer – for example by citing the relevant content of the SHD Regulations 2017 – it is nonetheless clear having regard to those regulations that the Irish Water Statement of Opposition is correct in this regard. Consistent with that proposition, that letter dated 6 March 2020 doesn’t evince any opinion as to the treatment capacity of the Ringsend WwTP. I infer that it was on this basis – that the letter dated 6 March 2020 said nothing of treatment capacity of the Ringsend WwTP - that the proceedings against Irish Water were struck out.

32. That there are separate Irish Water documents is confirmed by a letter dated 4 June 2020 from Irish Water to the Board⁶⁹. It advised the Board, inter alia that:

- The letter dated 4 June 2020 related to a proposed SHD of 298 residential units plus conversion of Dalguise House to 2 units (i.e. 300 units as per the SHD application).

⁶⁶ See above

⁶⁷ That is clear from the Applicants’ Affidavit of Christopher Craig sworn 14th October 2020

⁶⁸ See below - 4 June 2020 from Irish Water to the Board exhibited by Irish Water Affidavit of Sean Laffey 1 April 2021 Exhibit SI1

⁶⁹ Affidavit of Sean Laffey 1 April 2021 Exhibit SI1

- Irish Water had issued to the applicant a Confirmation of Feasibility for 236 residential units. (Unhelpfully, the date of that confirmation is not given.)
- Irish Water had issued to the applicant a Statement of Design Acceptance for the development as proposed for 356 residential units. (Unhelpfully, the date of that statement is not given but it must be that of 6 March 2020⁷⁰)

33. By Confirmation of Feasibility dated 23 July 2019⁷¹ Irish Water says that 236 units, based “*on the capacity currently available in the network(s), as assessed by Irish Water*” “*can be facilitated*”. Though its terms must be understood as encompassing the capacity of Ringsend WwTP to accept sewage, it does not mention Ringsend WwTP and says nothing specific to its capacity. This clearly is the Confirmation of Feasibility cited in the letter dated 4 June 2020 from Irish Water to the Board.

34. But there is yet another Irish Water letter to the Board, dated 11 December 2019. It records that the proposal is for 300 units and that Irish Water had confirmed feasibility for 236 units. It states that “*based upon the Confirmation of Feasibility issued by Irish Water*” “*the proposed connection(s) to the Irish Water networks can be facilitated*”. While, again, this could be clearer, this letter seems to me to be an updating of the Confirmation of Feasibility from 236 units to cover the 300 units proposed. It seems to be to have been the operative Confirmation of Feasibility for purposes of the SHD Planning Application and it is unfortunate and confusing that it was not cited in the letter dated 4 June 2020 from Irish Water to the Board⁷². However, in light of the pleadings and the case made, nothing now turns on that.

35. This letter dated 11 December 2019 is notable for its confirmation that feasibility did not require wastewater network or treatment plant upgrades by Irish Water. In literal terms this seems inconsistent with the undisputed fact that Ringsend WwTP is already overloaded. It would have assisted considerably if the letter had been explicit, but the assertion that treatment plant upgrades were not required is probably to be understood in the context of WwTP upgrades already in train and scheduled – I will return to this issue in due course.

36. The Inspector lists⁷³ an “*Irish Water Statement of Design Acceptance*” as submitted with the planning application but does not record its date or otherwise identify it or list a Confirmation of Feasibility. Narratively, his report cites⁷⁴ only the Irish Water letter dated 4 June 2020 (not that of 6 March 2020) without commenting on the apparent unit numbers discrepancy apparent above and without setting out the terms of the feasibility confirmation – or, indeed, confirming that he has seen the feasibility confirmation. The Inspector observes⁷⁵:

⁷⁰ See above

⁷¹ Affidavit of Sean Laffey 1 April 2021 Exhibit SI1

⁷² Affidavit of Sean Laffey 1 April 2021 Exhibit SI1

⁷³ Inspector’s Report Page 113 - Appendix 1

⁷⁴ Inspector’s Report Page 44

⁷⁵ Inspector’s Report Page 70

“Some observers raised concerns [in] relation to the capacity of the existing infrastructure that results in no bathing notices [being] a regular occurrence. Irish Water identifies no issues with foul water connection and treatment.

While reference to capacity at Ringsend Treatment Plant was raised and the local pumping station at Monkstown⁷⁶, it is noted that IW are subject to EPA licencing requirements, and submit a report on this annually, as well as being subject to ongoing monitoring to ensure all licencing obligations are met, a number of which relate to protection of Dublin Bay. Having regard to this, I am satisfied that this matter can and has been considered by the relevant competent authority and that there is no significant impact on Dublin Bay or any other European Site as a result of foul water drainage.”

37. Predictably, the Applicant:

- observes that the Inspector does not contradict the observers as to no bathing notices being a regular occurrence and yet does not analyse the significance of that issue.
- submits that, as to screening for EIA and AA, neither Irish Water nor the EPA is the competent authority and, whatever weight may be given to the EPA Waste Water Discharge Licensing Regime (“WWDL”) it does not absolve the Board of forming its own view of any likely indirect environmental effects of the Proposed Development on Dublin Bay.

38. As to potential effects on designated sites, the Inspector states⁷⁷

“The foul effluent from the occupation of the houses will be directed to the Ringsend WWTP, this received planning permission in 2019 to increase treatment capacity and⁷⁸ which has the capacity to assimilate the additional load. The WWTP has the⁷⁹ remaining capacity of 33,080 PE. Irish Water have reported that this system can facilitate the proposed development.”

Importantly, the Board does not dispute that Ringsend WwTP is already overloaded and does not in fact, at present and pending further upgrade, have capacity to assimilate any additional load.

Counsel for all parties have failed to find a source for the Inspector’s assertion⁸⁰ that the WWTP “.... has the capacity to assimilate the additional load⁸¹. The WWTP has the remaining capacity of 33,080 PE.” Very properly, counsel for the Board commented as follows on these issues: “..... the Inspector says there’s capacity at 33,080, which I do have to accept isn’t based on the papers and would be at odds with what we know and what was submitted elsewhere, is that the treatment plant is over capacity. I can’t be making the point at all that the Board was of the view that the treatment plant

⁷⁶ sic

⁷⁷ Inspector’s Report Page 85

⁷⁸ Sic

⁷⁹ Sic

⁸⁰ Inspector’s report p85

⁸¹ i.e. the Foul Load from the Proposed Development

*was under capacity. I cannot show the court where 33,080 under capacity comes from.*⁸² On any view and without attributing blame, that is clearly a disquieting situation.

39. Counsel for the Board very properly said: *“There isn't capacity in the system. Mr. Devlin⁸³ is absolutely right on this. I am going to deal with this on the basis of AA screening.”*⁸⁴ Essentially he says that the proposed development will make no difference that matters to the overloading of the plant or the quality of its effluent and, importantly, that the issue for AA Screening purposes is not whether the plant is overloaded but is the question of any resultant effect of its effluent on the integrity of European Sites – as to which the Board stands over the AA Screening, relying on **Dublin Cycling**⁸⁵.

40. While the Board's very proper concession suffices, I should add that the Inspector's assertion of unused capacity in Ringsend WwTP seems inconsistent with the exhibited⁸⁶ EPA site visit reports of 2019 which record that the plant was overloaded and so its effluent was failing nutrient standards. The EPA recorded that, on the occasion in question, *“The levels of nutrients were approximately twice the permitted level”* and *“The EPA has repeatedly highlighted that Ringsend waste water treatment plant is failing to meet national and European Union treatment standards. It is failing to meet these standards because the plant is not big enough to adequately treat all of the waste water that it receives. The plant must be upgraded to provide additional capacity, improve treatment and comply with national and European standards. Additional treatment capacity of 400,000 population equivalent is under construction, with a completion date of 2020. Further upgrade works to bring the plant up to national and European treatment standards are scheduled for completion by 2023.”* However, this latter date seems to have been pushed back to 2025⁸⁷.

41. The Applicants seek to persuade me that in these circumstances (and other circumstances I later address) screening out AA was untenable – and in particular that reliance on, or as the Applicants suggest, abdication to, the EPA and WWDL licensing regime is impermissible when, even on the EPA's own view, the WwTP effluent has been failing to meet standards.

42. Given the foregoing account, it may not surprise that at trial⁸⁸ attempts to clarify the Irish Water documents and the scope of the arguments which might be made on foot of them took over half a day. Indeed it is only since trial that I have been able to clarify them in the respects indicated above. But it is clear, one way or the other, that Irish Water had not objected to the development by reference to any lack of capacity of the Ringsend WwTP. Counsel for the Applicants confirmed that,

⁸² Day 2 15:03 – See also Day 3 14:12 – Counsel for Board said: *“... there isn't capacity in the Ringsend Waste Water Treatment Plant and insofar as the Inspector stated that there was, that is an error. they say it's wrong to say there is 30,308 in capacity and I think that is correct”*. See also Day 3 16:03

⁸³ Counsel for the Applicants

⁸⁴ Day 2 14:21

⁸⁵ Dublin Cycling Campaign CLG v An Bord Pleanála [2020] IEHC 587 (High Court (Judicial Review), McDonald J, 19 November 2020)

⁸⁶ Affidavit of Christopher Craig 14 October 2020 – Exhibit Cc1, Tab 44

⁸⁷ EPA Freedom of Information Reply October 2020 - Re West Pier Storm Water Overflows – Exhibit CC1 Tab 48

⁸⁸ Day 2 14:04 et seq

as to Irish Water's contribution to the Board's consideration of the case, he would confine himself to the proposition that the Board either gave excessive weight to or misunderstood Irish Water's contribution - as opposed to seeking to undermine Irish Water's evidence itself.⁸⁹

43. I declined to shut out the Applicants from arguing, without impugning Irish Water, that in screening out AA the Board relied on the absence of objection by Irish Water in such a way that it failed to itself consider whether Ringsend WWTP can meet the relevant effluent treatment standards. Helpfully, and properly, counsel for the Board responded that that was the case he had thought he was to meet.

44. I also allowed the Applicants to argue that, in screening out AA, the Inspector erroneously relied on the Statement of Design Acceptance dated 6 March 2020 for his conclusion that the plant had adequate treatment capacity. Indeed the error is acknowledged.

Scope of this Judgment – Grounds at Issue

45. As a result of that discussion on the morning of the 2nd day of trial, I identified the issues which I would and would not address in this judgment. It is convenient to tabulate some of them as follows:

Table 1

2nd Amended Statement of Grounds		Status
§D.6	Certiorari of Irish Water Statement of Design Acceptance dated 6 March 2020	No longer sought by the Applicants
§E.1.5 & E.2.6	<p>AA Screening</p> <p>The Applicants may argue,</p> <ul style="list-style-type: none"> • That Ringsend WWTP does not have adequate treatment capacity to adequately treat the sewage of the Proposed Development. • That the Inspector erroneously relied on the Irish Water Statement of Design Acceptance dated 6 March 2020 for his conclusion that Ringsend WWTP had adequate treatment capacity. • Without impugning Irish Water, that in screening out AA the Board erroneously relied on the absence of an objection to the development by Irish Water by reference to any lack of capacity of Ringsend WWTP - such that it failed to itself consider whether the plant can meet the relevant effluent treatment standards. 	

⁸⁹ Day 2 12:10

2nd Amended Statement of Grounds		Status
§D.6A, §§E.1.2, E.1.3 & E.2.3 & E.2.4	Certiorari of derogation licence	Adjourned generally with liberty to re-enter
	Issues arising out of the opinion of AG Kokott in Namur	
	Article 12 - Strictly protected species - bats	
	Adequacy of surveys as to bats	
§E.2.5.7	Adequacy for EIA Screening of surveys as to streams and mammals save bats	No longer argued by the Applicants
§E.2.5.2	Adequacy of birds surveys	To be addressed in this judgment
§D.3	Validity of Height Guidelines 2018	Adjourned generally with liberty to re-enter
§D.4	Validity of Section 28 PDA 2000	
§E.1.14 §§E.2.18 & 21	SPPR 3 ultra vires the Minister	
§§E.2.22, 23 & 24	Challenge to 2016 Act - constitutionality – Aarhus Convention – EU Charter on Fundamental Rights	

46. That leaves the following issues to be decided in this judgment:

Table 2 - Grounds for decision in this judgment

2nd Amended Statement of Grounds⁹⁰ – Grounds for decision in this judgment	
§	Core - §E.1
	Particulars - §E.2
§E.1.1 & §E.2.2	Inadequacy of reasons for the Impugned Permission
	<ul style="list-style-type: none"> The Impugned Decision fails to indicate whether the Board agrees with the analysis in its Inspector’s Report and whether that report is part of the Board’s reasoning. So, it has been impossible for the Applicants adequately to determine whether the Board directed itself correctly in law or adopted its Inspector’s errors.
§E.1.4 & §E.2.5	<ul style="list-style-type: none"> Error in screening out EIA, contrary to Articles 2 and 3 of the EIA Directive.⁹¹ Failure, in screening out EIA, to consider relevant material. or to give adequate reasons as required by Ss.9 and 10 of the 2016 Act and by common law.

⁹⁰ not recorded here verbatim

⁹¹ Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 Amending Directive 2011/92/Eu On the Assessment of the Effects of Certain Public and Private Projects On the Environment

2nd Amended Statement of Grounds⁹⁰ – Grounds for decision in this judgment

§	Core - §E.1	
	Particulars - §E.2	
	<ul style="list-style-type: none"> • 5.1. Failure to determine what test the Board applied to determine significance of likely effects; • The Developer in submitting information adopted a test for significance which is bad in law and inconsistent with the EIA Directive. By that test all effects are ranked - effects considered “Slight” or “Moderate” do not require EIA because, though more than “Not Significant”, they are nonetheless not “Significant.” • 5.3. Failure to consider the impact of the loss of the Dalguise gardens on the wider network of green sites across Dublin. It considered Dalguise merely as a garden surrounded by an urban area, without regard to its function as part of the biodiversity network of the south Dublin area. • 5.4. Failure to consider architectural heritage adequately or at all: Failure to recognise that the Dalguise gardens are part of the curtilage of a protected structure⁹² whose loss should therefore be considered significant in terms of its effect on the built environment. • 5.2. Error in accepting the Developer’s assertion that the site was surveyed for wintering birds and that none were found. This assertion was irrelevant, and incapable of forming a basis for a conclusion that such birds were not present, as the survey was carried out on 31 August 2018 and 2 March 2020, during the breeding season, and not the wintering bird season. 	

⁹² PDA 2000

S.51.—(1) for the purpose of protecting structures, or parts of structures, which form part of the architectural heritage and which are of special architectural, historical, archaeological, artistic, cultural, scientific, social or technical interest, every development plan shall include a record of protected structures, and shall include in that record every structure which is, in the opinion of the planning authority, of such interest within its functional area.

52.—(1) the Minister shall issue guidelines to planning authorities concerning development objectives —

(A) for protecting structures, or parts of structures, which are of special architectural, historical, archaeological, artistic, cultural, scientific, social or technical interest, and

(B) for preserving the character of architectural conservation areas, and any such guidelines shall include the criteria to be applied when selecting proposed protected structures for inclusion in the record of protected structures.

s.2

“Protected Structure” means

(a) a structure, or

(b) a specified part of a structure,

which is included in a record of protected structures, and, where that record so indicates, includes any specified feature which is within the attendant grounds of the structure and which would not otherwise be included in this definition;

“Structure” means any building, structure, excavation, or other thing constructed or made on, in or under any land, or any part of a structure so defined, and —

(A) Where the context so admits, includes the land on, in or under which the structure is situate, and

(b) in relation to a protected structure or proposed protected structure, includes —

(I) the interior of the structure,

(II) the land lying within the curtilage of the structure,

(III) any other structures lying within that curtilage and their interiors, and

(IV) all fixtures and features which form part of the interior or exterior of any structure or structures referred to in subparagraph (I) or (III);

S.57(10)

(A) for the avoidance of doubt, it is hereby declared that a planning authority or the board on appeal—

(I) in considering any application for permission in relation to a protected structure, shall have regard to the protected status of the structure, or

(II)

(B) a planning authority, or the board on appeal, shall not grant permission for the demolition of a protected structure or proposed protected structure, save in exceptional circumstances.

2nd Amended Statement of Grounds⁹⁰ – Grounds for decision in this judgment	
§	Core - §E.1
	Particulars - §E.2
	<ul style="list-style-type: none"> • 5.5. The Developer did not include with the application or make available for public inspection a breeding bird survey it said it had done. It was not before the Board. So, neither the Applicants nor the Board could verify or interrogate the adequacy of the inspection. • 5.6. No bird survey methodology is identified. So, the bird survey conclusions have no verifiable scientific basis and can't form the basis for a conclusion that an EIA was not required.
Error in screening out AA ⁹³ , contrary to Article 6 ⁹⁴ of the Habitats Directive.	
§E.1.5 & §E.2.6	<p>The Applicants may argue,⁹⁵</p> <ul style="list-style-type: none"> • That Ringsend WWTP does not have adequate treatment capacity to adequately treat the sewage of the Proposed Development. • That the Inspector erroneously relied on the Irish Water Statement of Design Acceptance dated 6 March 2020 for his conclusion that Ringsend WWTP had adequate treatment capacity. • Without impugning Irish Water, that in screening out AA the Board erroneously relied on the absence of an objection to the development by Irish Water by reference to any lack of capacity of Ringsend WWTP - such that it failed to itself consider whether the plant can meet the relevant effluent treatment standards.
	<ul style="list-style-type: none"> • 6.1. & 6.5 - Failure to consider the effect of discharges from the Proposed Development in-combination with other discharges currently overloading the Ringsend WwTP. • 6.5 - Error in not carrying out an AA of the effect of discharges from the Proposed Development in-combination with sewage from other developments authorised across Dublin where there was no evidence that Irish Water had conducted an assessment, obtained authorisation, or prepared an AA in relation to the project or projects overloading Ringsend WwTP. • 6.2 & 6.4 - Error in having regard to an Irish Water letter⁹⁶ indicating no objection to the Proposed Development's connection to the sewer network. The Board thereby failed to consider whether Ringsend WwTP can meet the treatment standards laid down in the Urban Waste Water Treatment

⁹³ Appropriate Assessment

⁹⁴ Art 6(3) Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. in the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

⁹⁵ See above

⁹⁶ Dated 6 March 2020

2nd Amended Statement of Grounds⁹⁰ – Grounds for decision in this judgment	
§	Core - §E.1
	Particulars - §E.2 Directive ⁹⁷ , and whether, when not so meeting them, that project or series of projects is likely to have a significant effect on SPAs and SACs in Dublin Bay. <ul style="list-style-type: none"> • 6.3 - Error in noting that Ringsend WwTP is subject to emissions licensing and so had been considered by the EPA: no conclusion can be drawn from that licensing; EPA reports confirm the European Court judgment that the Plant is overloaded. It has a design capacity of 1.6 million p.e.⁹⁸, but receives over 2.4 million p.e.
§E.1.6 & §E.2.7	Failure properly to apply the Bathing Water Directive⁹⁹ <ul style="list-style-type: none"> • 7.1 - The Board failed to consider whether the Proposed Development would <ul style="list-style-type: none"> ○ exacerbate overflows from the West Pier pumping station in Dun Laoghaire¹⁰⁰ which regularly lead to prohibition of bathing at Seapoint, ○ prejudice the achievement of measures to prevent, reduce or eliminate pollution pursuant to Annex II of that Directive, and whether there were any measures in place for that purpose. • 7.2 - In so doing, failure to <ul style="list-style-type: none"> ○ consider and determine a relevant matter, ○ give adequate reasons for its decision, ○ contrary to Ss.9 and 10 of the 2016 Act.
	The Board lacked sufficient scientific expertise to adequately, objectively and scientifically evaluate the proposal before it, and it failed to carry out an independent scientific review of the proposal for the purposes of Article 12 of the Habitats Directive.
§E.1.7 & §E.2.8	<ul style="list-style-type: none"> • Failure to ensure it had access to, or applied, sufficient expertise to its screening for EIA and AA, and for the purposes of Article 12 of the Habitats Directive, and thereby failed to reach a scientific conclusion in relation to the screening decisions and to Article 12. • (Note – the particulars expand the core ground to encompass EIA and AA as well as Article 12 of the Habitats Directive)
	(As to the Protected Structure) error in <ul style="list-style-type: none"> • application of S.3¹⁰¹ PDA 2000 and S.9 of the 2016 Act

⁹⁷ Council Directive of 21 May 1991 Concerning Urban Waste Water Treatment (91/271/EEC) (OJ L 135, 30.5.1991, P. 40)

⁹⁸ Population Equivalent

⁹⁹ Directive 2006/7/EC of the European Parliament And of the Council of 15 February 2006 Concerning the Management of Bathing Water Quality

¹⁰⁰ The West Pier Pumping Station was variously referred to as in Dun Laoghaire and Monkstown.

¹⁰¹ Sic. S.3 defines development. I infer that this should refer to S.2 which, inter alia, defines “protected structure”

2nd Amended Statement of Grounds⁹⁰ – Grounds for decision in this judgment	
§	Core - §E.1
	Particulars - §E.2
§E.1.8 & §E.2.9 - 11	<ul style="list-style-type: none"> • failing to have proper regard to the Development Plan and the Architectural Heritage Guidelines • failing to determine the curtilage of Dalguise House • Failing to give adequate reasons for the purposes of S.10 of the 2016 Act.
	<ul style="list-style-type: none"> • 9.1 - Failure to recognise that <ul style="list-style-type: none"> ○ A Protected Structure includes its curtilage - including the gardens, paths and driveways laid out for the benefit of the Structure. ○ The Proposed Development is to be built within the curtilage of a Protected Structure. • 9.2 - Failure to apply the definition of Protected Structure from S.3¹⁰² PDA 2000 adequately or at all. Failure to <ul style="list-style-type: none"> ○ determine a relevant matter: whether the gardens were a part of the Protected Structure. ○ give any or adequate for its approach to the definition of a Protected Structure. ○ properly consider and apply the Architectural Heritage Protection Guidelines contrary to S.9(2)(b)¹⁰³ of the 2016 Act. ○ properly to apply §8.2.4.9¹⁰⁴ of the Development Plan as to the contribution of gardens to the setting of a Protected Structure, and §8.2.11 as to development within the curtilage of a Protected Structure contrary to Section 9(2)(a)¹⁰⁵ of the 2016 Act. • 10 - followed the erroneous approach of the Developer’s Architectural Heritage Impact Assessment [“AHIA”] which treated the Protected Structure as merely being Dalguise House and its immediate outbuildings. • 11. - failure to consider, determine or give any or any adequate reasons in relation to various submissions¹⁰⁶, as to the definition of Curtilage, and thereby failure to consider relevant material contrary to S.9(1)(iii) • and failed to give adequate reasons contrary to S.10(3) of the 2016 Act and common law.
§E.1.9 & §E.2.12	Misinterpreted the applicable zoning and misapplied the Development Plan contrary to S.9 of the 2016 Act.

¹⁰² Sic. S.3 defines development. I infer that this should refer to S.2 which, inter alia, defines “ protected structure”

¹⁰³ (2) In considering the likely consequences for proper planning and sustainable development in the area in which it is proposed to situate the strategic housing development, the Board shall have regard to

(b) any guidelines issued by the Minister under section 28 of the Act of 2000,

¹⁰⁴ The Grounds say “Chapter” but the reference is clearly to a particular paragraph of the Development Plan

¹⁰⁵ (2) In considering the likely consequences for proper planning and sustainable development in the area in which it is proposed to situate the strategic housing development, the Board shall have regard to —

(a) the provisions of the development plan, including any local area plan if relevant, for the area,

¹⁰⁶ of Rosanne Walker, Dr Grainne O’Regan, Tony O’Brien, Richard Boyd Barrett, Douglas Barry, Bob And Bairbre Stewart, Dr Diarmuid O’Grada, And Bps On Behalf of Residents of Southdene And Richmond Hill And Others

2nd Amended Statement of Grounds⁹⁰ – Grounds for decision in this judgment	
§	Core - §E.1
	Particulars - §E.2
	This assertion was not argued in written or oral submissions and I consider it no further.
§E.1.10 & §E.2.13	Misdirected itself in law in granting permission for a material contravention of the Development Plan pursuant to S.9(6) of the 2016 Act and S.37(2) PDA 2000.
	<ul style="list-style-type: none"> Failed to appreciate that the power to permit a material contravention is limited by the obligation to have regard to the proper planning of the area, and that the criteria for permitting a material contravention must be found in the Development Plan itself. In so doing usurped the function of the local authority under Part II Chapter 1 PDA 2000.
§E.1.11 & §E.2.14	Erred and considered irrelevant material contrary to S.9 of the 2016 Act and common law in taking a “precautionary approach” to material contravention.
	<ul style="list-style-type: none"> Erred in taking a “precautionary approach” to material contravention <i>“having regard to, inter alia, recent Court judgements in relation to decisions on SHD applications.”</i> Failed to adequately explain its reasoning in this respect, as required by S.10 of the 2016 Act. The precautionary approach appears to involve drafting decisions defensively, including as many reasons as possible, out of a fear that the decision might be judicially reviewed. In apparently approaching the matter in this way, the Board had regard to irrelevant considerations. Insofar as its approach is intelligible, this explanation is indicative of prejudgment bias on the basis that the conclusion appears to have been reached first, and the reasons adopted to cover it. It remains unclear what decisions the Inspector is referring to and what precautions are being taken. Further, if and insofar as this may not be what the Board intended, its reasons are inadequate to explain what it did in fact intend.
	<p>As to the proper interpretation and application of SPPR1 and SPPR3 of the Height Guidelines,</p> <ul style="list-style-type: none"> misdirected itself in law failed to consider relevant material and failed to give adequate reasons for its decision contrary to Ss9 and 10 of the 2016 Act and S.28 PDA.

2nd Amended Statement of Grounds⁹⁰ – Grounds for decision in this judgment

§	Core - §E.1
	Particulars - §E.2
§E.1.12 & §E.2. 15 - 19	<ul style="list-style-type: none"> • applied SPPR1 to the proposed decision, when SPPR1 is, by its terms, capable of applying only to the adoption or variation of a County Development Plan.
	<ul style="list-style-type: none"> • failed to give adequate reasons to explain how its application of SPPR1 and SPPR3 accorded with S.9(2)(b) of the 2016 Act.
	<p>SPPR3 – Failure to apply the principles in §3.1 of the Height Guidelines,</p> <ul style="list-style-type: none"> • erred in concluding that SPPR3 applied. • thereby breached S.9 of the 2016 Act and S.28 and 37 PDA 2000. • In assessing the incorporation in the development proposal, for the purposes of SPPR3, of the criteria set out in §3.2 of the Height Guidelines, the Board must apply the broad principles set out in §3.1 of the Height Guidelines. • Where the Development Plan predates the Guidelines, the Board must consider if it can be demonstrated that implementation of the pre-existing policies and objectives of the plan does not align with and support the objectives and policies of the National Planning Framework. • The objective of the National Planning Framework is to obtain additional housing in urban areas through denser development: the Board has not considered or determined whether the Council can meet its housing targets throughout the suburban areas of its functional area and support the objectives and policies of the framework within the existing height restrictions. • Without such consideration, the Board cannot assess the Developer’s justification that the criteria in Part 3.2 of the Height Guidelines are appropriately incorporated into the development proposals.
	<p>SPPR3 – Failure to have regard to absence of a variation,</p> <ul style="list-style-type: none"> • Failed to consider relevant material and failed to give adequate reasons for its decision contrary to Ss9 and 10 of the 2016 Act. • Failed to consider that the Council had had opportunity and time to vary the Development Plan after the Guidelines were published. • Failed to appreciate that the fact that the Council had not done so should be taken as an indication that the Council was content with the Plan as it stood. • If and insofar as the Board may have considered that the Report of the Council supported such an approach, the Council’s planners similarly misdirected themselves in law as to their duties under SPPR1: SPPR1 was a mandate to the Council to consider where increased density development should occur, and to vary its Development Plan to so provide. Variation is provided for in S.13 PDA 2000.

2 nd Amended Statement of Grounds ⁹⁰ – Grounds for decision in this judgment	
§	Core - §E.1
	Particulars - §E.2
§E.1.13 & §E.2.20	In applying SPPR3, failed to have regard to Part 5 of the Urban Residential Guidelines 2009 ¹⁰⁷ which requires that increased density developments should be stepped down as one moves away from public transport nodes.
	Repeats Core Ground

Opposition Papers

47. The Opposition papers essentially dispute all grounds, plead the planning judgment of the Board and recite elements of the Inspector’s Report and Impugned Permission. They are notable also for:

- Asserting generally the inadequacy of the particulars in the 2nd Amended Statement of Grounds and specifically the inadequacy of the particulars of
 - The alleged failure to give reasons.
 - The alleged error in EIA Screening – which is “not understood” by the Board.
 - The Bathing Water Directive plea – no specific provision of the Bathing Water Directive is alleged to have been breached.
- Protesting reliance by the Applicant on evidence not before the Board when it made its Impugned Decision (primarily that of deponent Mr O’Connor, an ecologist).
- As to the reasons ground, noting that the Board’s Direction records that it “*decided to grant permission generally in accordance with the Inspector’s recommendation*”. Absent express disagreement, the Inspector’s reasoning may be imputed to the Board – see **Eoin Kelly**¹⁰⁸. The Board Order states its reasons for disagreeing with the Inspector as to height and not adopting his recommendation that the height of blocks B, C and E be reduced by two floors and that Block F be replaced with a mirrored Block G.
- Asserting that the Board as competent authority had the requisite expertise to perform its obligations. It is not obliged to get independent scientific assistance.
- Asserting that Objectors’ submissions are referred to in the Inspector’s Report and were properly considered on a thematic basis.
- Envisaging upgrade of Ringsend WWTP in the short-medium term.

¹⁰⁷ Sustainable Residential Development in Urban Areas Guidelines 2009 (Department of Housing, Local Government And Heritage)

¹⁰⁸ Kelly v An Bord Pleanála & Aldi [2019] IEHC 84 (High Court, Barniville J, 8 February 2019) §196

48. As to alleged inadequacy of EIA Screening, Lulani plead, inter alia:

- That Articles 2 and 3 of the EIA Directive do not apply to screening - which is governed by article 4.
- As to significance of effects, the EIA Screening Report¹⁰⁹ includes the descriptive terminology for effects from the EPA's draft EIAR Guidelines 2017¹¹⁰ relating to the definition of quality of effects, the criteria used to define significance of effects and a definition of the duration of effects.
- As to the bird survey, that
 - The expert evidence¹¹¹ is that the March 2020 survey was within the period of wintering birds.
 - The Inspector noted that “the March 2020 survey noted no wetland and wading birds, which is within the period of wintering birds”¹¹².
 - The AA screening report concluded that the lands are not suitable for any bird species listed as a feature of interest for any SPA in Dublin Bay.
- As to impact on the wider network of Dublin green spaces, the Ecological Impact Statement found that the site had low local ecological value.
- The EIA Screening report¹¹³ considered architectural heritage and cross-referenced the AHIA. Lulani mistakenly plead that the Inspector recited following AHIA conclusion at §4.121 of his report – in fact it is at §4.121 of the EIA Screening report:

“The loss of any original fabric from the Dalguise House, however small, will be give rise to negative effects of the architectural heritage of the house, but the removal of non-original fabric may give rise to positive effects. The change in the setting of the house will be considerable, giving rise to ‘moderate’ effects on the architectural heritage of the house, if the subject proposed development is regarded as consistent with emerging local and national policy. The demolition of White Lodge and of a modern swimming pool structure beside Dalguise House will give rise to ‘slight’ positive effects on Dalguise House and its setting. Works to the gate lodges, the wall of the walled garden, the buildings in the stable yard and the glasshouse/vinery will give rise to ‘moderate’ positive effects on the architectural heritage of these structures themselves and on the heritage of the Dalguise lands. The providing of long term sustainable use for Dalguise House and the other retained structures will also give rise to ‘moderate’ positive effects architectural heritage.”

- While the Inspector had concerns as to the impact of some of the apartment blocks on the setting of Dalguise House, the Board Order records why it did not accept fully that opinion.

¹⁰⁹ §4.65

¹¹⁰ Draft Guidelines on the Information to Be Contained in Environmental Impact Assessment Reports; EPA 2017

¹¹¹ P.8 of the AA Screening Report

¹¹² P.85 of the Inspector’s Report

¹¹³ §§4.120 and 4.121

49. As to Protected Structures, Lulani plead, inter alia:

- The Board is not obliged to determine the curtilage.
- The AHIA repeatedly refers to the lands and gardens of Dalguise House, addresses “Retention of the Main Circulation Routes within the Site” and “Changes to the Setting of Dalguise House” and in a section headed “Dalguise House and Structures in its Curtilage” refers to structures in the curtilage and continues:

“Dalguise has extensive grounds that includes lawns and paddocks, a stable yard and former stable building, a large though disused walled garden, glasshouses / greenhouses and sundry out offices in a poor state of repair, a tennis court, and numerous areas of established tree and shrub planting.”

- The Board had regard to the effect of the Proposed Development on the Dalguise House lands and setting.

50. As to alleged inadequacy of AA Screening, Lulani plead, inter alia:

- That the HHQRA considered in-combination effects of discharges from the Proposed Development and other discharges and so informed the AA Screening Report. The Inspector records¹¹⁴ his consideration, in AA, of the AA screening report and the other data submitted with the application and gave his reasons for excluding the potential for in-combination effects as follows:
 - *Coastal waters in Dublin Bay are classed as ‘Unpolluted’ by the EPA;*
 - *Sustainable development including SUDs for all new development is inherent in objectives of all development plans within the catchment of Ringsend WWTP;*
 - *The Ringsend WWTP extension is likely to be completed in the short – medium term to ensure statutory compliance with the WFD. This is likely to maintain the ‘Unpolluted’ water quality status of coastal waters despite potential pressures from future development;*
 - *There was no proven link between WwTP discharges and nutrient enrichment of sediments in Dublin Bay based on previous analyses of dissolved and particulate Nitrogen signatures; and*
 - *Enriched water entering Dublin Bay has been shown to rapidly mix and become diluted such that the plume is often indistinguishable from the rest of bay water.*
- The Inspector summarises, and the Board properly had regard to, the Irish Water submission of 4 June 2020 as a prescribed body. It referred to the Irish Water Confirmation of Feasibility and Statement of Design Acceptance. But the Board did not consider the absence of Irish Water objection “significant” as alleged.

¹¹⁴ Pp 89 & 90 of the Inspector’s Report

- That Ringsend WwTP is subject to EPA licensing was only one of a number of matters to which the Board had regard in AA screening. The HHQRA and the AA Screening Report addressed the issue of overloading of the WwTP and shows that despite breaches of the EPA licence water quality assessment overflows have not been shown to have a long term detrimental impact on the water body status of Dublin Bay. Other factors considered included:
 - (i) the relative low volume of any potential discharge events during construction;
 - (ii) any pollution event would not be so large as to have a significant adverse effect on downstream water quality in Dublin Bay due to the level of separation and dilution by the volume of water between the sites;
 - (iii) the Ringsend WwTP is to be upgraded and the foul water discharge from the Proposed Development would be a very small percentage of the overall licensed discharge at Ringsend WwTP and
 - (iv) the EPA in 2018 classified water quality in Dublin Bay as ‘unpolluted’.

51. As to Zoning, Height and Density issues and Material Contravention, the Board and Lulani plead, inter alia:

- That residential development is permitted in principle under zoning objective ‘A’ *“to protect and/or improve residential amenity”*.
- The objective to “protect” residential amenity does not preclude permission for residential development which would impact on residential amenity if the impact is acceptable in terms of proper planning and sustainable development. The Board so concluded, and was entitled as expert to do so, that the Proposed Development *“would not injure the residential or visual amenities of the area”*.
- Development Plan Policy RES3 promotes higher residential densities provided proposals ensure a balance between the reasonable protection of existing residential amenities and the established character of the areas, with the need to provide for sustainable residential development.
- The Apartment Guidelines 2018¹¹⁵ promote higher density development at ‘accessible’ locations.
- Lawful application of SPPR1 & SPPR3 of the Height Guidelines and proper regard to Part 5 of the Urban Residential Guidelines 2009, which requires that increased density developments should be stepped down as one moves away from transport nodes. The Board properly considered the proximity of the site of the proposed development to public transport facilities. The Proposed Development has the highest density at the north of the site closest to public transport, with density decreasing through the site to the lowest density at the south.

¹¹⁵ Sustainable Urban Housing: Design Standards for New Apartments - Guidelines for Planning Authorities 2018

- The Development Plan provides that a maximum of 3-4 storeys may be permitted in appropriate locations - subject to upward or downward modifiers. Despite the modifiers this is a “*blanket numerical limitation on building height*” contrary to SPPR1 – such that it was appropriate that the Board rely on SPPR1 to justify permission in material contravention of the height limits in the Development Plan.
- The Applicants’ plea that Section 3.1 of the Height Guidelines requires that the Board, in applying SPPR3, determine whether the planning authority can meet its housing targets within existing height restrictions is misconceived. Nor does the Board have any remit to review whether the planning authority can achieve housing targets. The fundamental consideration under section 3.1 is whether the proposal can assist in securing National Planning Framework objectives set out broadly in section 3.1.
- That the Inspector concurred¹¹⁶ with the DLRCC Chief Executive that the Site is in the Dublin Metropolitan Area Strategic Plan (“MASP”) area, close to public transport and in line with residential density guidance¹¹⁷, and the Inspector was satisfied that “*the density is applicable*” and that, subject to detailed consideration of potential residential or visual impact, etc., upward modifiers applied. The Inspector noted¹¹⁸ that MASP seeks to focus development on large scale strategic sites and redevelopment of underutilised lands, based on key transport corridors that will deliver significant development in an integrated and sustainable manner.
- It is denied that the criteria for granting a material contravention permission must be found in the Development Plan.

PLEADINGS – GENERAL OBSERVATIONS

52. It is useful to briefly note the importance of pleadings in judicial review. The position has been repeatedly and recently stated in the cases. It has been emphasised in planning and environmental judicial review in particular - not least because of its complexity and the wide range of complaints and arguments so often encountered in a case of this kind. The purpose of what follows is in no way to criticise the pleadings in this case: but it is to confine the parties to them.

53. O.84, r.20(2)(a) RSC¹¹⁹ requires the statement of grounds to contain a statement of each relief sought and of the “*particular grounds upon which each such relief is sought*”. Order 84, rule 20(3) RSC provides that: -

¹¹⁶ P.48 of the Inspector’s Report

¹¹⁷ the text is unclear here. Presumably what is meant is that the proposed development – as opposed to the Site – is in line with Residential Density Guidance.

¹¹⁸ P.15 of the Inspector’s Report

¹¹⁹ Rules of the Superior Courts

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

Corresponding obligations are imposed on the other parties – see Order.84, rule .22(5) RSC.

54. In **Clifford & Sweetman v An Bord Pleanála**¹²⁰ Humphreys J called pleadings “*absolutely vital*” and said that “*Leaving aside any limited latitude that might exist under EU law, the situation is that if there is a potentially viable point, but it isn’t adequately pleaded, then it just isn’t going to be a basis for relief.*” In **Rushe v An Bord Pleanála**¹²¹ Barniville J reviewed the RSC and case law. He noted, inter alia¹²², the reference by Murray CJ in **AP v Director of Public Prosecutions**¹²³ to “*a tendency in some cases, at a hearing of the judicial review proceedings on the merits, for new arguments to emerge in those of the applicant that in reality either go well beyond the scope of a particular ground or grounds upon which the leave was granted or simply raise new grounds*” and the observation of Denham J in the same case that leave to seek judicial review is sought and granted on “*specific grounds stated in the statement*” such that the leave order “*determines the parameters of the grounds upon which the application proceeds. The process requires the applicant to set out precisely the grounds upon which the application is to be advanced.*” Hardiman J, in the same case, referred to “*..... the absolute necessity for a precise defining of the grounds on which relief is sought ...*” Barniville J concluded that **AP** “*set out the obligations on an applicant who seeks judicial review to set out clearly and precisely each ground upon which each relief is sought in the proceedings and make clear that the order giving leave to seek the various reliefs on the grounds set out in the statement of grounds is what determines the jurisdiction of the court to conduct the review.*” Barniville J then reviewed cases¹²⁴ addressing this issue in the specific context of planning judicial review. I will not repeat that exercise but, notably, **Alen-Buckley #1** emphasised the importance of pleading precisely the legal instruments – directives, statutes, statutory instruments – relied upon. Barniville J observed that the rules as to pleading apply:

“... with even greater force in the case of a planning judicial review having regard to the requirements of s.50A(5) of the 2000 Act. That subsection provides that if a court grants leave to apply for judicial review in respect of a planning decision, “no grounds shall be relied upon in the application for judicial review” under O.84 RSC “other than those determined by the court to be substantial” under s.50A(3)(a), on the application for leave. An applicant is, therefore, under an even greater obligation than in ordinary judicial review cases, by reason of this additional statutory provision, to ensure that any ground relied upon by it at the hearing is one which the court granting leave to apply for judicial review has determined to be substantial.”

¹²⁰ [2021] IEHC 459

¹²¹ [2020] IEHC 122

¹²² in citing what follows I have omitted certain content as to amendment of grounds - which has not arisen in this case

¹²³ [2011] 1 I.R. 729

¹²⁴ Alen-Buckley v An Bord Pleanála #1 [2017] IEHC 311; Alen-Buckley v An Bord Pleanála #2 [2017] IEHC 541; Kelly v An Bord Pleanála & Aldi Stores (Ireland) Limited [2019] IEHC 84 And in Sweetman v An Bord Pleanála & Ors & IGP Solar 8 Limited [2020] IEHC [39]

And he concluded that:

“... these pleading obligations imposed upon an applicant in planning judicial review proceedings are particularly important where those cases involve issues of very considerable complexity and give rise to issues under EU Directives, such as the Habitats Directive and the EIA Directive. It is especially important in those types of cases, involving such complex issues, that the applicant’s case is clearly and precisely pleaded in order that the parties opposing the application (whether they be the respondents or the notice parties or both) are clearly aware prior to the hearing of the application for judicial review of what precisely the case is. Such precision is also required, as Murray C.J. pointed out in AP, to ensure that there is no doubt, ambiguity or confusion as to what the applicant’s case is before the High Court, in the context of any appeal from the judgment of that Court to the Court of Appeal or the Supreme Court. It is not appropriate that a case brought on a particular basis, in which reliefs are sought on stated grounds is, when the case comes on for hearing, transformed into one in which different or additional grounds are sought to be advanced in support of the reliefs sought or new and additional reliefs are sought. Such a course would be unfair on the parties opposing the application for judicial review and on the court.”

INFORMATION BEFORE THE BOARD

55. In addition to the planning application and enclosed documents¹²⁵ the information before the Board when it made the Impugned Decision included very many submissions and observations. Particularly notable were those from The Irish Georgian Society, An Taisce and the “DAU”¹²⁶. I will refer to these later. Otherwise the following are notable.

- DLRCC Report¹²⁷: In general terms, it records opposition to the Proposed Development by elected members on grounds including building height and residential density. It records support of the Proposed Development by the DLRCC executive, subject to reducing the height of 3 blocks by 2 floors each. The executive considered the density of 82 units per hectare acceptable¹²⁸ having regard to the location and context of the Site – in particular its location less than 1km from a high frequency rail service - the Salthill/Monkstown DART station – and proximity to bus stops.
- Many local residents – including the Applicants: These generally opposed the planning application on many grounds, including concern at pollution of the Seapoint swimming area by storm water overflows from the West Pier Pumping station.

¹²⁵ Some of which I have listed above

¹²⁶ The Development Applications Unit of the Department of Culture, Heritage and the Gaeltacht. Its submission is in Exhibit CC1 Tab 16 and exhibit PD1 tab 11

¹²⁷ Affidavit of Chris Craig 14/10/20 – Exhibit CC1 Tab 19

¹²⁸ §11.2

56. The DAU agrees that AA is unnecessary. It appears not to object to proposed large-scale tree removal but notes a “*definite risk of potential direct injury to birds and bats*” depending on timing and methods of tree-felling. Its concern for birds is in substance limited to herons. If permission is granted, it suggests conditions, inter alia, as to protection of herons and bats.

THE ROLE OF THE COURT & LAW OF JUDICIAL REVIEW

Presumption of Validity; General Principles, Irrationality & Reasons

57. The starting point in planning and environmental judicial review is that “...*the Board's decisions enjoy a presumption of validity until the contrary is shown*” - **Ratheniska**¹²⁹. The presumption is rebuttable but the applicant for judicial review bears the burden of rebutting it and so proving invalidity. This implies that an applicant must lay a proper basis for criticisms of the adequacy of the Board’s planning and environmental assessments and decisions.

58. The nature of judicial review and the standard by which the Court will review administrative decisions, including planning and environmental decisions, was recorded in **Redrock Developments**¹³⁰. I set out a somewhat edited version of that record below:

- Judicial review does not correct errors in or review decisions so as to render the High Court a court of appeal from those decisions. Judicial review is radically different from appeal. In an appeal, the Court is concerned with the merits of the decision appealed. In judicial review, the Court is concerned with its legality. On an appeal, the question is ‘right or wrong?’ On review, the question is ‘lawful or unlawful?’”
- In judicial review the burden of proof of error of law, or fundamental error of fact leading to an excess of jurisdiction, or of such unreasonableness as flies in the face of fundamental reason and common sense (i.e. irrationality), rests on the applicant.
- By the Planning Acts the legislature unequivocally and firmly placed planning and environmental questions, questions of the balance between development and the environment and the proper convenience and amenities of an area, in the jurisdiction of planning authorities and the Board. They are expected to have special skill, competence and experience in such matters. The court is not vested with that jurisdiction, nor it is expected to, nor can it, exercise discretion with regard to planning matters.
- Bodies charged with roles in the planning process are required to exercise judgment as to what may be the proper planning and development of an area. In coming to such a view, such bodies must have regard to the matters which the law specifies (such as a development plan). Disputed questions of expert opinion (such as the likely effect of a proposed development) may be resolved in a manner similar to the way in which similar issues would be resolved in the courts, by hearing and, if necessary, testing competing expert evidence. However such expert bodies

¹²⁹ Ratheniska v An Bord Pleanála [2015] IEHC 18, Haughton J.

¹³⁰ Redrock Developments Limited v An Bord Pleanála [2019] IEHC 792, Faherty J, Citing North Meath Wind Farm Limited v An Bord Pleanála [2018] IEHC 107 And Dunnes Stores v An Bord Pleanála [2016] IEHC 226, Ratheniska v An Bord Pleanála [2015] IEHC 18 And O’Keeffe v An Bord Pleanála [1993] 1 I.R. 39 And Cases in Turn Cited in Those Cases, Including State (Abenglen Properties) v Dublin Corporation [1984] I.R. 381, Dunne v Minister for Fisheries And forestry [1984] 1 I. R. 230, Henry Denny & Sons (Ireland) Ltd. v the Minister for Social Welfare [1998] 1 I. R. 34 Lancefort Ltd v An Bord Pleanála [1998] IEHC 199 Weston Ltd. v An Bord Pleanála [2010] IEHC 255 Ashford Castle Ltd. v SIPTU [2007] 4 I.R. 70 the State (Keegan) v Stardust Compensation Tribunal [1986] I.R. 642

may bring to bear a great deal of their own expertise as to matters which involve the exercise of expert judgment and as to what is the proper planning and development of an area.

- In consequence flows *“the deference that a court should give to the decisions of different administrative bodies, depending on their nature and the extent of their expertise”* and *“a presumption that the decisions of a body such as An Bord Pleanála are valid until the contrary is shown”*. *“One must assume, in the absence of any evidence to the contrary, that statutory bodies such as the Board in this case, exercise their powers and discharge their functions in a lawful and proper manner.”*
- The court should be slow to interfere with the decisions of expert administrative tribunals. Conclusions based upon an identifiable error of law or an unsustainable finding of fact by tribunals must be corrected. Otherwise it should be recognised, as to tribunals which have been given statutory tasks and exercise their functions, as is now usually the case, with a high degree of expertise and provide coherent and balanced judgements¹³¹ on the evidence and arguments heard by them, that it should not be necessary for the courts to review their decisions by way of appeal or judicial review.
- The circumstances under which the court in judicial review can interfere with a decision on the basis of irrationality are limited and rare. The court cannot interfere for irrationality merely on the grounds that (a) it is satisfied that on the facts as found it would have raised different inferences and conclusions or (b) it is satisfied that the case against the decision made by the authority was much stronger than the case for it.¹³² Once there is any reasonable basis upon which the planning authority or the Board can make a decision in favour of or against a planning application or appeal, or can attach a condition thereto, the Court has no jurisdiction to interfere. To establish that a decision-maker has acted irrationally so that the court can quash its decision, an applicant in judicial review must establish that the decision-maker had before it no relevant material to support its decision. This is the **“O’Keeffe”** standard¹³³.

59. The **“O’Keeffe”** standard again cited **Weston**¹³⁴, has survived – perhaps somewhat softened by the concept of *“proportionality”*¹³⁵ and clarified by recent observations of Humphreys J in **Flannery**¹³⁶ to the effect that it is only a rebuttable presumption that, if there is something before the decision-maker that justifies the decision, then the decision-maker relied on that something - although it is not *“necessarily displaced just because”* the decision-maker does not specify in detail exactly what it did rely upon. But if it can be established that the decision-maker in fact adopted an incorrect reasoning process, whether factually or legally, the outcome will not normally be upheld

¹³¹ This is not to be interpreted as requiring discursive narrative judgments.

¹³² See also *People Over Wind v An Bord Pleanála*, Haughton J. §98

¹³³ *O’Keeffe v An Bord Pleanála* [1993] 1 I.R. 39

¹³⁴ *Weston Ltd. v An Bord Pleanála* [2010] IEHC 255, [2010] 7 JIC 0102 (Unreported, High Court, Charleton J., 1st July, 2010) §11. *“Once there is any reasonable basis upon which the planning authority or An Bord Pleanála can make a decision in favour of, or against, a planning application or appeal, or can attach a condition thereto, the court has no jurisdiction to interfere. The presence in the planning file, including the report to the manager, or in the case of An Bord Pleanála, the report of the inspector, of any material which could rationally justify a refusal on a non-compensatory ground is sufficient to support the lawfulness of a decision.”*

¹³⁵ *Meadows v The Minister for Justice, Equality and Law Reform, Ireland and The Attorney General* [2010] 2 IR 701

¹³⁶ *Flannery v An Bord Pleanála, Tempelogue Syngue Street GAA Club & Ors* [2022] IEHC 83

just because the decision-maker could have adopted a different and lawful reasoning process but didn't actually do so¹³⁷. The words “necessarily” and “just” usefully imply the possibility of interaction in a given case between the law on irrationality and that on reasons, as adequacy of reasons in part depends on the particular circumstances of the case¹³⁸. This possibility informs the necessity of clarity in argument between questions of irrationality on the one hand and adequacy of reasons on the other. Just as it will not necessarily suffice to establish irrationality by observing that the reasons given did not explicitly point to the material before the Board capable of supporting the decision, it will generally not suffice in defending the adequacy of reasons to point to material before the Board capable of supporting the decision if not explicitly or impliedly invoked in those reasons.

Inadequacies of EIA and AA

60. Like Allen J in **Kemper**¹³⁹, I gratefully adopt the statement in **M28**¹⁴⁰, which in turn borrowed from **People Over Wind**¹⁴¹, recalling the role of the court in judicial review in which the Applicant asserts inadequacies of EIA and AA:

“..... it is for the deciding authority to determine whether the EIS and the information contained therein satisfies the requirements of the Regulations and is adequate.”¹⁴²

“In order to show that the Board acted irrationally, it is necessary for the applicant to establish that the Board ‘had before it no relevant material which would support its decision. Thus the court’s jurisdiction to intervene is not unlimited.”¹⁴³

Allen J observed:

“The court is limited to reviewing the legality of the decision. It is not itself to conduct an EIA or an appropriate assessment but will examine whether the competent authority, in this case the Board, applied the correct legal test and whether it reached the findings necessary to support its conclusions. The court is not to conduct an appeal on the merits of the Board’s decision or any elements of it.”¹⁴⁴

61. The foregoing, of course, does not limit the court in its assessment of the legality – as opposed to the substantive correctness – of the Impugned Permission on various well-understood grounds, of which some are alleged in these proceedings. And particular rules apply in judicial review

¹³⁷Humphreys J adds: “... unless perhaps there could only have been one outcome anyway – although that happens less often than one might expect ..”

¹³⁸ See below as to Crekav Trading

¹³⁹ Kemper v An Bord Pleanála [2020] IEHC 601

¹⁴⁰ M28 Steering Group v An Bord Pleanála [2019] IEHC 929

¹⁴¹ People Over Wind v An Bord Pleanála [2015] IEHC 271

¹⁴² People Over Wind v An Bord Pleanála, Haughton J. §98

¹⁴³ M28 Steering Group v An Bord Pleanála MacGrath J §77

¹⁴⁴ Kemper v An Bord Pleanála, Allen J §7

of AA¹⁴⁵ – though, even there, Allen J in **Kemper** noted that “the court will acknowledge and respect the expert knowledge and expertise of the authority entrusted by law to make the decision.”

ADEQUACY OF REASONS – GENERAL OBSERVATIONS

62. The obligation on the Board to give reasons for its decisions is clear – both in statute¹⁴⁶ requiring that planning decisions disclose the “*main reasons and considerations*” underlying them and in the general law of judicial review. The law in this regard also sheds light on the more general question of how, and on what materials, a planning decision is to be interpreted.

63. The law on the obligation to give reasons has evolved over time, imposing more onerous obligations on decision-makers. Gone are the days when there was doubt even as to the existence of the obligation and in which it could be described as is “*very light*” or “*almost minimal*” – see **Crekav Trading**¹⁴⁷. In 2012 Fennelly J in **Mallak**¹⁴⁸ traced that evolution and concluded that the issue was one of fairness and that the obligation was general to administrative decisions:

“[68] In the present state of evolution of our law, it is not easy to conceive of a decision maker being dispensed from giving an explanation either of the decision or of the decision making process at some stage. The most obvious means of achieving fairness is for reasons to accompany the decision. However, it is not a matter of complying with a formal rule: the underlying objective is the attainment of fairness in the process. If the process is fair, open and transparent and the affected person has been enabled to respond to the concerns of the decision maker, there may be situations where the reasons for the decision are obvious and that effective judicial review is not precluded.”

In 2018, Clarke CJ in **Connelly**¹⁴⁹ cited “*significant developments in recent years*” on the topic. He cited O’Donnell J’s “*useful and elucidating analysis*”¹⁵⁰ identifying §68 above as the “*core*” of Fennelly J’s decision in **Mallak**.

64. By giving reasons, fairness is achieved in three overlapping respects by reference to the efficacy of which, fairness is assessed:

¹⁴⁵ See the various judgments in the Kilkenny Cheese case: An Taisce v An Bord Pleanála: [2022] IESC 8 §115 et seq; [2021] IEHC 254; [2021] IEHC 422. See also Reid v An Bord Pleanála (No. 1) [2021] IEHC 230, Flannery v An Bord Pleanála, Tempelogue Synge Street GAA Club & Ors [2022] IEHC 83, Heather Hill Management Company CLG v An Bord Pleanála [2022] IEHC 146 §263 et seq.

¹⁴⁶ Notably S.34(10) PDA 2000 and, as applicable here, S.10(3) of the 2016 Act.

¹⁴⁷ Crekav Trading GP Ltd v An Bord Pleanála [2020] IEHC 400 §164

¹⁴⁸ Mallak v Minister for Justice [2012] IESC 59

¹⁴⁹ Connelly v An Bord Pleanála [2018] IESC 31

¹⁵⁰ O’Donnell, “Mallak And the Rule of Reasons” in of Courts And Constitutions: Liber Americum in Honour of Nial Fennelly, (2014) At 228

- First, Fennelly J in **Mallak**¹⁵¹ observes “*that persons affected by administrative decisions have a right to know the reasons on which they are based, in short to understand them*”¹⁵². So, not merely must the reasons provide knowledge, they must enable understanding by an “*intelligent person who has participated in the relevant proceedings and is apprised of the broad issues involved*”¹⁵³. Murray CJ in **Meadows**¹⁵⁴ phrased this as an entitlement to know the “*essential rationale on foot of which the decision is taken*”. Clarke CJ in **Connelly** phrased it as an entitlement to “*know in general terms why the decision was made.*” Humphreys J in **Balscadden**¹⁵⁵ phrased it as an entitlement to “*broad reasons regarding the main issues*” – not every micro-specific reason addressing every detail. Humphreys J in **Flannery**¹⁵⁶ has pithily reiterated¹⁵⁷ that what is required “*is limited to the main reasons on the main issues*”. A reasoned decision is required – not a discursive, narrative analysis. Humphreys J in **Atlantic Diamond**¹⁵⁸ has also cautioned against the court, under the heading of reasons, being drawn into the merits of the planning application.

What is required in practice in a given instance to meet this standard depends on the context – including the “*type of decision being made and the legal requirements which must be met in order for a sustainable decision of that type to be reached*”¹⁵⁹. So, as Barniville J said in **Crekav Trading**¹⁶⁰ “*reasons which might be adequate in a particular case or in particular circumstances might not be adequate in another case or in other circumstances.*”

The Board’s oft-repeated argument that “*there is simply no obligation to recite determinations or conclusions on every single matter arising*” is correct insofar as it goes but rarely goes very far in practice as in all but all cases the real question is not whether there is such an obligation as to “*every single matter arising*” but is whether there is such an obligation as to the specific matter in respect of which it is alleged that reasons are missing or inadequate.

- Second, the reasons must, with sufficient clarity, convey to the disappointed party sufficient information to enable it to assess whether the decision is lawful or it would have a reasonable chance¹⁶¹ in a challenge in judicial review or if there be a right of appeal, to enable it to assess the chances of success and to adequately present its case on the appeal or its case in judicial review – such that the court has the material on which to conduct such a review. See Clarke CJ in **Connelly**.¹⁶²
- Third, though arguably part of the second, but described by Hardiman J as fundamental, “*it is an aspect of the requirement that justice must not only be done but be seen to be done that the*

¹⁵¹ §69

¹⁵² Emphasis by Clarke CJ in **Connelly**

¹⁵³ See summary of principles at **Balscadden Road SAA Residents Association Ltd v An Bord Pleanála** [2020] IEHC 586 §39

¹⁵⁴ **Meadows v Minister for Justice** [2010] 2 I.R. 701

¹⁵⁵ **Balscadden Road SAA Residents Association Ltd v An Bord Pleanála** [2020] IEHC 586 §39

¹⁵⁶ **Flannery v An Bord Pleanála, Tempelogue Synge Street GAA Club & Ors** [2022] IEHC 83

¹⁵⁷ See also and for example, **Atlantic Diamond Ltd v An Bord Pleanála** [2021] IEHC 322 (Humphreys J, 14 May 2021)

¹⁵⁸ **Atlantic Diamond Ltd v An Bord Pleanála** [2021] IEHC 322, citing **Kemper v An Bord Pleanála** [2020] IEHC 601

¹⁵⁹ in this latter regard see Clarke CJ in **Connelly** §5.3

¹⁶⁰ §174

¹⁶¹ **Kelly J in Mulholland v An Bord Pleanála # 2**[2006] 1 IR 453

¹⁶² §6.13, Citing **EMI Records (Ireland) Limited & Ors v the Data Protection Commissioner** [2013] IESC 34 and §6.14 citing **Oates v Browne** [2016] IESC 7

reasons stated must 'satisfy the persons having recourse to the tribunal, that it has directed its mind adequately to the issue before it'." See Clarke CJ in **Connelly**.¹⁶³

65. In **Balz #2**¹⁶⁴ **O'Donnell J** addressed the first of the three purposes set out above in terms of the important consideration of trust in public administration which serves to reconcile the loser to his defeat and to accepting and abiding by the decision:

"It is a basic element of any decision-making affecting the public that relevant submissions should be addressed and an explanation given why they are not accepted, if indeed that is the case. This is fundamental not just to the law, but also to the trust which members of the public are required to have in decision making institutions if the individuals concerned, and the public more generally, are to be expected to accept decisions with which, in some cases, they may profoundly disagree, and with whose consequences they may have to live."

It may be that the perception of the significance of this passage is still evolving¹⁶⁵ but it is clear that **Connelly** remains the leading case as to practical applicable principles.

66. Clarke CJ in **Connelly** considered that *"it is possible that the reasons for a decision may be derived in a variety of ways, either from a range of documents or from the context of the decision, or in some other fashion."* *"Any materials can be relied on as being a source for relevant reasons"* and *"... it is not necessary that all of the reasons must be found in the decision itself or in other documents expressly referred to in the decision. The reasons may be found anywhere ..."* Reasons may be found outside the decision itself – in planning cases one can look to the documents which were before the Board when it made its decision – most obviously the Inspector's report. As Humphries J said in **Balscadden**, *"there is no obligation to set out the reasons in a single document if they can be found in some other identified document"*. And it may be in some cases that reasons are obvious from the context of the decision, or in some other fashion - Clarke CJ in **Connelly**¹⁶⁶.

67. The observation that the reasons may be found anywhere is subject to a vital proviso or "caveat" which Clarke CJ repeated in different ways, no doubt for emphasis:

- He repeated his requirement in **Christian**¹⁶⁷ that *"the reasons be capable of being determined with some degree of precision."*
- He had said in **EMI Records**¹⁶⁸, and repeated in **Connelly**, *"Legal certainty requires, ... that it must be possible to accurately determine what the reasons were. There should not be doubt as to where the reasons can be found."*

¹⁶³ §6.14 Citing *Oates v Browne* [2016] IESC 7.

¹⁶⁴ *Balz v An Bord Pleanála* [2019] IESC 90

¹⁶⁵ See for example *Balscadden Road SAA Residents Association Ltd v An Bord Pleanála* [2020] IEHC 586 and *Ballyboden Tidy Towns Group v An Bord Pleanála* [2022] IEHC 7 §260 et seq

¹⁶⁶ §7.5

¹⁶⁷ *Christian v Dublin City Council* [2012] IEHC 163

¹⁶⁸ *EMI Records (Ireland) Limited & Ors v the Data Protection Commissioner* [2013] IESC 34

- He had likewise said in **EMI Records**¹⁶⁹, and repeated in **Connolly** that “care needs to be taken to ensure” that the reader must be able to both “readily” and “accurately” “determine what the reasons were.” And “if the search required were to be excessive then the reasons could not be said to be reasonably clear.”
- It followed, Clarke CJ considered in **Christian**, that “any document recording the reasons must be such that it is possible to say that the document concerned actually represents the reasons for the decision in question in a way which ought not be capable of real debate.”¹⁷⁰
- He entered “the important caveat that it must be reasonably clear to any interested party that the materials sought to be relied on actually provide the reasons which led to the decision concerned.”
- The reasons may be found anywhere “... provided¹⁷¹ that it is sufficiently clear to a reasonable observer carrying out a reasonable enquiry that the matters contended actually formed part of the reasoning.”

68. All that said, Clarke CJ in **Connolly** made another important and perhaps, in practice, countervailing observation: while “a party cannot be expected to trawl through a vast amount of documentation to attempt to discern the reasons for a decision.” “... in at least certain types of applications for planning consent, the issues involved may themselves be complex. The reasons put forward either in favour or against a proposed project may involve detailed scientific argument or complex calculation. If such issues arise then it will inevitably be the case that the reasons themselves may be complex and scientific. Where a party wishes to engage with the planning process in a case which raises complex issues of that type .. then it is inevitable that the party concerned will also have to engage with such matters if any part of their opposition or challenge derives from such complex or scientific questions. It could form no part of a legitimate complaint, based on an argument as to reasons or the lack thereof, to suggest that the reasoning was unduly complicated or scientific if the issues which arose in the context of the grant or refusal of permission required engagement with such issues.” This observation seems to me to relate primarily, not to the task of finding the reasons, but to the task of understanding of them once found.

69. In practice, the question generally arises whether the reasons for a planning or environmental decision by the Board are to be found, in whole or part, in the Inspector’s report. In **Connolly** Clarke CJ added, while not making a rule of law on the issue, that “... it would be preferable in all cases if the Board made expressly clear whether it accepts all of the findings of an Inspector or, if not so doing, where and in what respect it differs. It may be possible, in certain circumstances, to reach a significantly clear inference as to what the Board thought in that regard but it would be better if the matter were put beyond inference and were expressly stated. Where the Board differs from its Inspector then there is clearly an obligation for the Board to set out the reasons for coming to that conclusion in sufficient detail to enable a person to know why the Board differed from the

¹⁶⁹ EMI Records (Ireland) Limited & Ors v the Data Protection Commissioner [2013] IESC 34

¹⁷⁰ Emphases added

¹⁷¹ Emphasis added

*Inspector and also to assess whether there was any basis for suggesting that the Board's decision is thereby not sustainable.”*¹⁷²

70. Nonetheless, in **Dublin City v An Bord Pleanála**¹⁷³, Humphreys J lists a “*landslide of jurisprudence*” evincing willingness, on appropriate facts, to infer Board acceptance of its Inspector's report where such acceptance is not express. Clearly, the courts will not strain to find that the Board rejected its Inspector's report.

ADEQUACY OF REASONS – IN THIS CASE

71. The Applicants plead¹⁷⁴ inadequacy of reasons on the basis that the Impugned Permission fails to indicate whether the Board agrees with the analysis in its Inspector's Report and whether that report is part of the Board's reasoning. So, it is pleaded, it has been impossible for the Applicants adequately to determine whether the Board directed itself correctly in law or adopted its Inspector's errors. Though reasons issues arise more specifically, this is pleaded as a general point.

72. The Board's Order expressly adopted the Inspector's report as to AA Screening and in part as to the building height issue in its consideration of proper planning and sustainable development. It did not explicitly say whether it adopted the Inspector's report as to EIA screening or as to planning considerations other than building height. This is disappointing as unnecessarily inviting contrast between the treatment of AA on the one hand and, on the other, EIA screening and planning consideration. It is disappointing also given Clarke J's observation¹⁷⁵ that it would be preferable if the Board was expressly clear on this issue.

73. In this case the Board's Direction records that the “*Board decided to grant permission generally in accordance with the Inspector's recommendation*”. The effect of that formulation was considered by Barniville J. in **Eoin Kelly**¹⁷⁶ to the effect that “... *the Board order and the board direction can be read with the Board inspector's report ...*”. In **Dublin Cycling**¹⁷⁷ McDonald J said:

“While the Board, in its order, did not expressly adopt the entirety of the inspector's report, it is clear from the Board Direction ... that the Board decided to grant permission “generally in accordance with the Inspector's recommendation”. In such circumstances, the decision by the Board to grant permission must be read in conjunction with the report of the inspector.”

¹⁷² §9.6 & 9.7

¹⁷³ [2022] IEHC 5

¹⁷⁴ 2nd Amended Grounds §E.1.1 & §E.2.2

¹⁷⁵ Cited above

¹⁷⁶ Kelly v An Bord Pleanála [2019] IEHC 84 (High Court, Barniville J, 8 February 2019) §209

¹⁷⁷ Dublin Cycling Campaign CLG v An Bord Pleanála [2020] IEHC 587 (McDonald J, 19 November 2020) §60

74. Accordingly, that formulation in the Board's Direction this case suffices to record the adoption of the Inspector's report save to any extent that the Board's decision explicitly or by necessary implication differs from the Inspector's report. I therefore reject the ground in which it is asserted as a general matter that the Impugned Decision should be quashed for failure to indicate whether the Board agrees with the analysis in its Inspector's Report and whether that report is part of the Board's reasoning.

PROTECTED STRUCTURE – EXTENT OF CURTILAGE

Introduction

75. As recorded above, Dalguise House is a protected structure¹⁷⁸. The Site consists, essentially, of the grounds of the house, about 3.66 hectares, in which sit its gardens and various structures: inter alia, two gate lodges, a walled garden, two glasshouses a tennis court, a vinery, a main avenue and a service avenue. While conscious they are controversial and it is not a matter for me to judge their success or otherwise, and not endorsing the ADS in this respect, it seems only fair to record that the ADS stated¹⁷⁹ the following Master-Plan Objectives:

- Retain, restore & re-purpose original historic structures, with minimal intervention, including Dalguise House, the Gate Lodges, Stable Buildings and stone wall of the walled garden. Restore Vinery & relocate within the site.
- Preserve original site features such as historic circulation routes and linkages. Establish a new respectful setting for Dalguise House.
- Identify existing high quality trees that are suitable for retention. Maximize tree retention throughout the site and use high quality trees as a focal point for open spaces.
- Arrange buildings in the landscape to form of a series of interlinked public & semi-public open spaces of varying character that are accessible to all residents and cater for a variety of activities. Create a lively, innovative and durable landscape and public realm which integrates the proposed development into the surrounding context. Emphasis on pedestrian permeability & accessibility.
- Use the natural topography to conceal car parking in basement & under-croft locations to help preserve the parkland setting. Utilize the existing historic routes where possible to minimize disruption of native levels and resultant tree loss.

76. The ADS devotes Chapter 5 to "Protected Structures" identified as, respectively, Dalguise House itself, the Stable Yard, Coach House & Coachman's Cottage, the Wall of the Walled Garden Glasshouse/ Vinery, Gate Lodges & the Dalguise Entrance. Given their locations, these in reality implicate the entire Site as the curtilage of Dalguise House.

¹⁷⁸ As to the meaning of which see further below.

¹⁷⁹ §4.1

77. But the ADS does not address the curtilage as composed of grounds, gardens, open space and the like. The Lulani planning application documents “Design Rationale – Landscape Architecture”¹⁸⁰ and “Response to An Bord Pleanála (ABP) Opinion and DLRCC report”¹⁸¹ by the same landscaper predictably and correctly set out and advocate landscaping proposals. But they do not advert to the Site as curtilage to Dalguise House or to its protected status or analyse the Lulani proposals in terms of effect on the protected curtilage. They set out what is intended but not how it will affect what exists.

78. Given the intended preservation of Dalguise House itself and given the proposal for 8 blocks of apartments, it is inevitable, agreed and immediately apparent from a consideration of the various maps, aerial photographs and graphics before me, that the Proposed Development would entirely occupy and fundamentally alter the grounds, which I will refer to a little incompletely as the gardens, of the house. The Board inevitably and undoubtedly considered the effect which the Proposed Development would have on the gardens and the significance of this issue for proper planning and sustainable development and the file repeatedly demonstrates that it did so. A perusal of the Inspector’s report readily suffices to confirm that. In fact, a mere perusal of Figures 1 and 2 above goes a long way to demonstrate that it is inconceivable that the Board could have “*missed*” the issue of effect of the Proposed Development on the gardens in the general sense of proper planning and sustainable development.

79. Essentially, the Applicants’ point is that the Site is part of the protected structure and the Board was obliged not merely to consider the effect which the Proposed Development would have on the gardens and the significance of that effect for proper planning and sustainable development: it was obliged to, but did not, consider the gardens specifically in EIA Screening and qua protected structure: i.e. specifically having regard to the gardens’ protected status. That is because, the Applicants say, the Board failed to identify the gardens as in the curtilage of the house and so as part of the protected structure.

80. It is the case that neither the Inspector nor the Board explicitly or in terms identified the gardens as part of the protected structure or its curtilage or explicitly or in terms considered the gardens qua protected structure. But the Board says that on a fair reading of the file in its entirety it is clear that that is exactly what the Board did and that suffices. Two distinct questions arise here:

- Identification of the gardens as curtilage and hence as protected being part of the protected structure Dalguise House.
- Consideration in EIA Screening of the effect of the Proposed Development on the gardens having regard to their protected status.

¹⁸⁰ Exhibit PD1 Tab 5

¹⁸¹ Exhibit PD1 Tab 6

Protected Structures & Curtilage – the Law

81. Part IV PDA 2000 deals with Architectural Heritage. Chapter 1 of that Part concerns Protected Structures. **S.51(1) PDA 2000** provides that:

“For the purpose of protecting structures, or parts of structures, which form part of the architectural heritage and which are of special architectural, historical, archaeological, artistic, cultural, scientific, social or technical interest, every development plan shall include a record of protected structures, and shall include in that record every structure which is, in the opinion of the planning authority, of such interest within its functional area.”¹⁸²

Notable here are

- the *“purpose of protecting structures”*
- the concept of *“special interest”*
- that inclusion of every such structure in the record is mandatory.

These establish that such structures require protection and the importance of their protection.

82. **S.52 PDA 2000** requires the Minister to issue guidelines to planning authorities concerning development objectives —

*“(a) for protecting structures, or parts of structures, which are of special architectural, historical, archaeological, artistic, cultural, scientific, social or technical interest, and
(b) for preserving the character of architectural conservation areas,
and any such guidelines shall include the criteria to be applied when selecting proposed protected structures for inclusion in the record of protected structures.”*

83. **S.53 PDA 2000** empowers the Minister to issue recommendations for inclusion of specific structures in the record of protected structures. **S.56 PDA 2000** permits the registration of protected status as a burden on the title to registered land. **S.57 PDA 2000** effectively provides that certain works which would be exempted development of a non-protected structure are not exempted development if done to a protected structure such as to materially affect its character¹⁸³. So, an owner of a protected structure may need planning permission for works for which he would not need permission if the structure were not protected. **S.58 PDA 2000** obliges owners and occupiers of a protected structure to protect it from “endangerment” of its special interest and anyone who damages a protected structure commits a specific criminal offence. Indeed, **by S.59 and S.60 PDA 2000**, a planning authority may require an owner of a protected structure to do works to prevent endangerment of a protected structure or to restore it and assist the performance of those works – including financially. Failure to comply, by **S.63 PDA 2000**, is an offence and **S.69 PDA 2000** entitles the Planning Authority to enter the lands and do the works itself. **S.71 PDA 2000** provides a specific power of compulsory purchase to protect a protected structure.

¹⁸² Emphases Added

¹⁸³ S.57 also provides a specific procedure whereby an owner or occupier of a protected structure can obtain a declaration from the planning authority in that regard as to contemplated types of works.

84. The foregoing brief account makes it readily apparent that such structures are identified for special protection above and beyond the general response of the PDA 2000 to structures – a general response very generally expressed in the phrase “*proper planning and sustainable development*” (though of course that phrase imports far more than merely response to individual structures). Accordingly, it is no surprise to find that **S.57(10) PDA 2000** provides as follows:

“(10) (a) For the avoidance of doubt, it is hereby declared that a planning authority or the Board on appeal —

(i) in considering any application for permission in relation to a protected structure, shall have regard to the protected status of the structure,

(b) A planning authority, or the Board on appeal, shall not grant permission for the demolition of a protected structure or proposed protected structure, save in exceptional circumstances.”

85. The reference above to “*demolition of a protected structure*” seems to reflect a non-technical, as opposed to statutory¹⁸⁴, concept of a structure, and I need not decide whether the section directly applies to a Proposed Development which will cause, as the Inspector describes it in this case, the “*infilling and loss*”¹⁸⁵ of a protected curtilage¹⁸⁶. It suffices to observe that “*infilling and loss*” as it applies to curtilage seems to me closely analogous to “*demolition*” as it applies to a built structure and that, generally, the protective policy of the Act as to protected structures¹⁸⁷, as reflected in S.10, including the use of the phrase “*exceptional circumstances*”, is very clear such that it would, putting it at its mildest, be unsurprising to find that the “*infilling and loss*” of a protected curtilage would be considered significant.

86. It is, however, appropriate to note also the necessary implication of S.57(10), and, indeed, S.57 PDA 2000 as to exempted development, that protection is not necessarily a bar to development of or affecting a structure.

87. Logically, if the Board, in considering a planning application, is sensibly to have regard to the protected status of a protected structure, as required by S.57(10), it must first and necessarily know of what the protected structure consists.

88. **S.2 PDA** defines “*protected structure*” as

¹⁸⁴ See below

¹⁸⁵ Inspector’s report §12.9

¹⁸⁶ I address the question of identification of the curtilage in this case below.

¹⁸⁷ Using that phrase in its statutory sense as including curtilage

“(a) a structure, or (b) a specified part of a structure, which is included in a record of protected structures, and, where that record so indicates, includes any specified feature which is within the attendant grounds of the structure and which would not otherwise be included in this definition;”

However, to understand that definition one must also consider that S.2 PDA 2000 defines “structure” as follows:

“any building, structure, excavation, or other thing constructed or made on, in or under any land, or any part of a structure so defined, and —

(a) where the context so admits, includes the land on, in or under which the structure is situate, and

(b) in relation to a protected structure or proposed protected structure, includes —

(i) the interior of the structure,

(ii) the land lying within the curtilage of the structure,

(iii) any other structures lying within that curtilage and their interiors, and

(iv) all fixtures and features which form part of the interior or exterior of any structure or structures referred to in subparagraph (i) or (iii);

89. Collecting the foregoing, it requires that the Board, in considering a planning application relating to a protected structure, must have regard to its protected status and, in having such regard, must consider the curtilage of the protected structure to be part of the protected structure and protected accordingly. So, the Board must know of what the curtilage consists. It must also be presumed that the Board was aware of this necessity.

Protected Structure & Curtilage – Identification of

90. As stated above, a protected structure, by definition, includes its curtilage. But curtilage is not a precisely defined concept in law. In a given case its extent is a question of fact - see **Begley**¹⁸⁸, citing **Methuen-Campbell**¹⁸⁹, in which it was said that:

“..... for one corporeal hereditament to fall within the curtilage of another, the former must be so intimately associated with the latter as to lead to the conclusion that the former in truth forms part and parcel of the latter. There can be very few houses indeed that do not have associated with them at least some few square yards of land, constituting a yard or a basement area or passageway or something of the kind, owned and enjoyed with the house, which on a reasonable view could only be regarded as part of the messuage and such small

¹⁸⁸ Begley v Bord Pleanála High Court Ó Caoimh J 14 January 2003

¹⁸⁹ Methuen-Campbell v Walters [1979] 1 All E.R. 606

pieces of land would be held to fall within the curtilage of the messuage. This may extend to ancillary buildings, structures, areas such as outhouses, a garage, a driveway, a garden and so forth. How far it is appropriate to regard this identity as parts of one messuage or parcel of land as extending must depend on the character and circumstances of the items under consideration. To the extent that it is reasonable to regard them as constituting one messuage or parcel of land, they will be properly regarded as all falling within one curtilage; they constitute one integral whole."

91. **Simons**¹⁹⁰ cites **Sinclair-Lockhart's Trustees**¹⁹¹ for the view that a curtilage is land used to serve the purposes of the house in some necessary or reasonably useful way and he suggests there must be a reasonable nexus between the use and the house. In that case it was held that:

"The ground which is used for the comfortable enjoyment of a house or other building may be regarded in law as being within the curtilage of that house or building and thereby as an integral part of the same although it has not been marked off or enclosed in any way. It is enough that it serves the purpose of the house or building in some necessary or useful way."

92. In **Skerritts of Nottingham**¹⁹² the question arose whether the curtilage of a listed building – formerly a country house, latterly a hotel – included stables 200m away. Listed buildings were defined, as to curtilage, similarly to our protected structures. The Court of Appeal reviewed the caselaw, rejected the view taken in **Dyer v Dorset**¹⁹³ that a curtilage is necessarily "*small*", and took the view that "*... not even lawyers can have a precise idea of what 'curtilage' means. It is, ... a question of fact and degree.*" Notably, in **Dyer** the court had taken the view that the curtilage of a mansion, is "*an area which no conveyancer would extend beyond that occupied by the house, the stables and other buildings, the gardens and the rough grass up to the ha-ha, if there was one*".

93. The concept of a curtilage is one with which planning authorities and the Board are necessarily familiar: the concept is used as to a class of exempted development specifically referable to the curtilage of a house¹⁹⁴ and it appears also in S.34(12A). In various contexts, the word appears no less than 74 times in the Planning and Development Regulations 2001 ("PDR 2001), in many instances referring to the curtilage of a house, dwelling or residence and forming the unifying concept of no less than 8 classes of exempted development¹⁹⁵. In planning at least, while it may not be a precise concept, it is not an arcane or mysterious concept and I have no doubt that, at least as applied to a house, the concept is generally well-understood, not least by the Board.

¹⁹⁰ Planning Law 3rd Ed'n (Browne) §2-224

¹⁹¹ Sinclair-Lockhart's Trustees v Central Land Board (1950) 1 P&Cr 195

¹⁹² Secretary of State for the Environment v Skerritts of Nottingham Ltd [2000] All ER (D) 245

¹⁹³ Dyer v Dorset County Council [1989] 1 QB 346

¹⁹⁴ S.4(1)(j) PDA 2000

¹⁹⁵ PDR 2001 Schedule 2 Part 1 – Generally "Development Within the Curtilage of A House".

94. The Inspector noted the content of the submissions and observations I describe below. He used the word curtilage twelve times in his report. Notably, he recorded that, in the pre-application consultation phase, the prospective applicant was advised to include in any permission application an *“Architectural Impact Assessment having regard to the both the impact on Dalguise House, other existing structures within the curtilage and the character and setting of the Dalguise House and the Monkstown Architectural Conservation Area (ACA).”* He clearly considered that he understood and was able to apply the concept of curtilage. He noted *“that a number of adjacent protected structures have had their setting altered by developments within their curtilage or attendant grounds over the years”*. He proposed planning conditions using the concept. Notably, in considering the development plan he noted that *“The site includes Dalguise House (RPS 870) and its curtilage”* - RPS 870 is an explicit reference to the Record of Protected Structures.

95. It seems to me that *“ground which is used for the comfortable enjoyment of a house”* is a phrase which naturally – perhaps even inevitably – encompasses its gardens, the ordinary purpose of which is the pleasure and recreation of the occupants of the house. If one need go further, and as applied specifically to Dalguise House, it seems to me that this is especially true of a suburban garden, not surrounded by parkland or a farm, to the front of which lies a tennis court and through which the avenues to the nearby public road pass. The main avenue, while long for suburbia, is short in comparison to the avenues of large country houses which leave the gardens and pass on, beyond the ha-ha, through the park or farm to a relatively distant public road. It seems especially true of gardens to the rear in which are found a walled (presumably kitchen) garden, a vinery and glasshouses. All before me were agreed that the curtilage of Dalguise House included the gardens – or at least no one suggested otherwise. And I frankly consider that, on the maps and drawings before me, that proposition is obvious. I should be reluctant to conclude that it was not equally obvious to the Inspector and the Board or that, given their inevitable and recorded familiarity with the concept of a protected structure and that it includes any curtilage, the legal and planning significance of these gardens as part of the protected structure being Dalguise House escaped them or that they did not consider those matters in making their decision.

96. The presumption of validity and the resultant onus of proof on the Applicants, which I consider they have failed to discharge, suffices to dispose of the issue. But lest I am wrong that the issue can be so decided, I will refer briefly to some of the materials which were before the Board.

97. It is clear that the submissions and observations repeatedly complained of damage to the gardens in the curtilage of a protected structure. The Irish Georgian Society were, in terms, concerned at the effect of the development on the protected structure, Dalguise House – citing loss of architectural heritage, removal of structures and infilling of its gardens/grounds. The Society’s concern was primarily (though not solely) the *“irretrievable loss of what may be the largest surviving nineteenth century garden in the Monkstown and Dun Laoghaire areas”*. The Society explicitly cited the Development Plan policy AR1 to *“Ensure that any development proposals to Protected Structures, their curtilage and setting shall have regard to the Department of the Arts, Heritage and the Gaeltacht `Architectural Heritage Protection Guidelines for Planning Authorities”* The Society

explicitly cited §13.1.2 of those Guidelines to the effect that *“In the case of a large country house, the stable buildings, coach houses, walled gardens, lawns, ha-has and the like may all be considered to form part of the curtilage of the building unless they are located at a distance from the main building”* and noted that the Guidelines discourage *“the infilling of gardens and notes the important role of stable buildings, coach-houses, walled gardens, lawns etc in defining the character of the curtilage of country houses - though not a country house, the grounds of Dalguise possess a similar arrangement of features”*. The Society considered *“that insufficient information has been provided about the gardens of Dalguise House to provide a complete picture of the heritage impact of the development proposals. It is of great concern that all evidence of a potentially important historic garden could be lost and, in doing so, that a significant heritage site would be consumed by a major residential development”*. And it suggested further expert report on the impact the proposals would *“have on the character and setting of a significant protected structure.”* And the Architectural Heritage Protection Guidelines to which the Society refers, explicitly address the position that *“By definition, a protected structure includes the land lying within the curtilage of the protected structure”*. It is not lightly to be inferred that an expert body such as the Board and its Inspector would have failed to appreciate the significance of the Society’s juxtaposition of and emphases on references to concepts of protected structure, curtilage, setting and gardens.

98. An Taisce, inter alia, was concerned at *“a significantly detrimental impact on the heritage character of the house, surrounding buildings, and grounds ... The large scale and height of the proposed apartment blocks will overwhelm the house and associated historic structures”*.

99. Dr Rosanne Walker, who signed herself, inter alia, as *“P.Grad.Dip Applied Building Repair and Conservation”*,

- Identified Dalguise House as a protected structure and as *“a rare surviving example of a large and fully intact nineteenth century suburban estate comprising of house, gate lodge, outbuildings, avenue, walled gardens etc. in Dun Laoghaire”*.
- Complained of the impending *“destruction of our irreplaceable built heritage. This proposed development has inadequately protected the built and garden heritage of an important nineteenth century suburban estate.”*
- Noted that *“a protected structure includes all buildings within its curtilage.”*
- Considered that *“The construction of apartment blocks ... on the historic grounds profoundly impacts the special character of Dalguise House. The proposed buildings and re-ordering of the site strongly alters the setting of the house and undermines the interspatial relationship of the estate buildings and gardens.”*
- Asserted that the poor state of repair of the walled gardens and outbuildings should not be used as a justification for invasive interventions that *“undermine the special character of the gardens.”*

100. By way only of further examples, SSA Architects for MRRA noted *“the proposed demolition of a number of structures within the curtilage of Dalguise House which is a protected structure, RPS Ref. 870. The Planning & Development Act 2000 states that any structure within the curtilage of a*

protected structure is considered to have the same status as that of the protected structure.” Aidan and Luke O’Brien explicitly associated the protected structure and its curtilage: “9 storey blocks will have detrimental impact on RPS-870 and associated curtilage.” Richard Boyd Barrett TD explicitly cited the Development Plan policy AR1 and the Architectural Heritage Protection Guidelines. Dr Diarmuid O’Grada, planning consultant for some local residents, refers to “the curtilage of a protected structure where the heritage gardens include protected stands of trees” and analyses examples of planning decisions where “infill housing was intended within the curtilage of a protected structure” and, as to Dalguise House, places “the gardens within the curtilage” and says, “this site forms the curtilage of a protected structure”. BPS Planning Consultants, for Southdene Residents, locate the development “within the curtilage of a protected structure”, make numerous references to the curtilage and say “The Applicant planning application and the AHIA do not refer to the curtilage of the protected structure. By definition, a protected structure includes the land lying within the curtilage of the protected structure and other structures within that curtilage. The notion of curtilage is not specifically defined by legislation, but is understood to be the parcel of land immediately associated with that structure, the landscape setting within which the structure stands and which contributes to the structures essential character.”

101. The DAU makes 10 pages of “heritage-related” observations¹⁹⁶ including reference to the “Protected structure” and expresses “key concerns regarding the scale of the development and the impact that it will have on the adjoining historic village as well as one of the few surviving planned landscapes in the area”. The blocks “either side of the protected structure .. undermine the and overwhelm the approach and setting of the original property”. The DAU “urges the reconsideration of the impact of the proposed design on the context of the protected structure and the historic village in terms of the plan arrangement, scale, density and height”. It agrees with the Georgian Society’s submission as to the infilling of the gardens and the detrimental fragmentation and removal of key components and elements of the former design. It recommends that the historic character and evolution of site over time should be carefully considered and that the proposal be revised to retain a greater proportion of the surviving landscape, the walled garden and the glasshouses and mature planting to produce a revised scheme “with the protected structure and its gardens as a central focus of the site”. It states that the proposal “of such significant density and height in the surviving 19th century property is of concern” – particularly the 9-storey Block E severing the House’s connection with the village and the sea. The scale proposed is inappropriate. The proposal “makes no connection to the scale of the adjoining housing, the historic village nor addresses the sensitivity of the surviving protected structure and its ancillary structures of note.”

102. The AHIA entitled a large section of its Assessment “Dalguise House and Structures in its Curtilage” and noted that the house was on “extensive grounds that include lawns and paddocks, a stable yard and former stable building, a large though disused walled garden, glasshouses /greenhouses and sundry out offices in a poor state of repair, a tennis court, and numerous areas of established tree and shrub planting”. Inter alia, it identifies the curtilage by locating features within the “extensive grounds”.

¹⁹⁶ Exhibit PD1 Tab 11

103. The AHIA also set out Development Plan Policy AR1 as to *“development proposals to Protected Structures, their curtilage and setting”* and asserts that *“a considered approach has been taken in the proposed scheme to the protection of the architectural heritage of the site and the setting of the protected structure, which is consistent with the relevant policies of Chapter 6 of the Development Plan, and, in particular, Policy AR1.”* It is not for me to agree or disagree: I merely observe that the Board was entitled to agree or disagree and that the effect on *“curtilage and setting”* – necessarily at least in part the gardens – was addressed in the AHIA.

104. The planning application also included a statutorily required Statement of Consistency¹⁹⁷ with relevant guidelines and the Development Plan. As to Built Heritage, it again set out¹⁹⁸ Development Plan Policy AR1 as to protected structures and their curtilage - to which I have referred above. It records the AHIA conclusion at some length - inter alia and notably, that *“the change to the setting of the house will be considerable”*.

105. The Statement of Consistency records that the AHIA *“also addresses structures within the curtilage of the protected structure, Dalguise House, including the two glasshouses.”* The smaller is *“of limited heritage value and so does not contribute much to the architectural heritage value of Dalguise.”* The larger will be moved to survive as a functioning vinery and as a focal point in the walled garden. The Statement of Consistency concludes that a considered approach has been taken in the proposed scheme to the protection of the architectural heritage of the site and the setting of the protected structure, consistent with Chapter 6 of the Development Plan, and, in particular, Policy AR1. It asserts that the proposal has been designed sensitively to mitigate, to the greatest extent possible, the impact upon the setting of the protected structure. It refers to the Visual Impact Assessment as illustrating the limited impact of the proposed development on the setting of the protected structure and the adjoining ACA.

106. As this judicial review ground relates to the gardens, it is notable that the Statement of Consistency considers the issue of Trees & Woodland¹⁹⁹ in terms of Development Plan Policy OSR7 *“to implement the objectives and policies of the Tree Strategy for the County.... to ensure tree cover... is managed and developed”*. The zoning map also includes an objective *‘To protect and preserve Trees and Woodlands’* on the Site. Having in the preceding section²⁰⁰ noted that Dalguise House is a protected structure, the Statement of Consistency records that *“The site is currently occupied by a significant number of trees in the form of tree belts which largely define the perimeters of the main body of the lands within the curtilage of Dalguise House.”* – i.e. it specifically records the belts of trees as in the curtilage and as defining its boundaries. As figure 1 above shows clearly, that necessarily locates the front gardens as part of the curtilage.

¹⁹⁷ Exhibit CC1 Tab 14

¹⁹⁸ §6.55 et seq

¹⁹⁹ §6.11 et seq

²⁰⁰ §6.10

107. The Statement of Consistency cites the Tree Survey as recording 364 trees on the site – of which 174 will be retained and protected – including one of the two ‘Category A’ (good quality specimen) trees. 51 trees are to be removed because of their condition. 139 are to be removed because of the proposed development.²⁰¹ 246 new trees will be planted and the trees form an important feature in the landscaping plan. It is said that development proposal complies with DLRCC policy in this regard. Agree or disagree with the foregoing, it clearly identified the gardens as in the curtilage and the trees as an important element of those gardens, and clearly identified Lulani’s intent and analysis in those regards.

108. Finally, in this regard, the EIA Screening report²⁰² recorded that *“The greenfield site extends to circa 3.72 ha and forms part of the wider curtilage of Dalguise House, a protected structure ...”* – again and clearly identifying the Site as curtilage – a point which cannot have been lost on the Inspector and the Board.

Conclusion - Protected Structure – Extent of Curtilage

109. From a neutral perspective, I can appreciate (without expressing a substantive view on) the objectors’ disappointment at, and disagreement with, the Board’s decision on the substantive issues bearing on the gardens, being curtilage, as a part of the protected structure. And it would have been better – more thorough – had the Inspector and the Board identified the bounds of the curtilage and explicitly recorded that they had regard to its protected status. Indeed it is regrettable that they did not.

110. But the foregoing account of the papers before the Board establishes that it would have required wilful blindness by the Inspector and the Board, when addressing the effect of the development on the gardens (as clearly they did), to have failed to appreciate that the gardens, being curtilage, were part of the protected structure and to be analysed accordingly. I see no reason to consider that the Board failed in this regard and reject the ground of challenge as to identification of the curtilage of Dalguise House in performance of its obligations to have regard to its protected status and as to proper planning and sustainable development.

111. However, as will be seen, that is not the end of the relevance in this case of protected status and its application to curtilage.

²⁰¹ the Inspector’s report at p12 records that the Laluni Landscape Design Rationale states that tree retention was an important part of the design process. But the need to widen the existing access road has had an impact on the number of trees that can be retained.

²⁰² §3.2

EIA SCREENING - “Significance of Effects”

112. The Applicants cite **Bozen**²⁰³ to the effect that:

“It is for the national court to review whether, on the basis of the individual examination carried out by the competent authorities which resulted in the exclusion of the specific project at issue in the main proceedings from the assessment procedure established by the Directive, those authorities correctly assessed, in accordance with the Directive, the significance of the effects of that project on the environment.”

113. They cite **Ó’Nualláin**²⁰⁴ as a case in which the Court substituted its own view that EIA was required on the basis of its own view that it was likely to have a significant effect on the environment. In so doing Smyth J relied on **Kraaijeveld**²⁰⁵ as to the “*wide scope and .. broad purpose*” of the EIA Directive and for its affirmation that significant effects are not confined to adverse effects. **Ó’Nualláin** is also notable for its application of the Directive as to EIA of effect on architectural heritage. It is fair to say that the facts may have been unusually compelling: the impugned decision related to what became the Spire on O’Connell St. Dublin.

114. Amongst the pleaded Grounds is an assertion that in EIA screening a test of significance of likely effects was adopted which is bad in law. The Lulani Opposition pleads that its EIA Screening Report²⁰⁶ includes the descriptive terminology for effects included in the Environmental Protection Agency's *Draft Guidelines on the information to be contained in Environmental Impact Assessment Reports*²⁰⁷, (“the EPA Draft”) relating to the definition of quality of effects, the criteria used to define significance of effects and a definition of the duration of effects. The Board’s opposition pleads reliance on that EIA Screening Report. The EIA Screening report, under the heading “EIA Screening Methodology”²⁰⁸, asserts that the screening was done in accordance with listed legislation and guidance - including the EPA Draft, the 2018 EIA Guidelines published by the DoHPLG²⁰⁹ and the 2017 EU Commission Guidance on EIA Screening.

115. Such EU Commission Guidance is not, and does not purport to be binding²¹⁰ nor an aid to interpretation of the EIA Directive nor even necessarily the official opinion of the Commission. A similar comment may be made as to the EPA Draft Guideline. However, the 2018 DoHPLG EIA Guidelines were issued under S.28 PDA 2000 such that the Board is obliged by statute to “*have regard*” to them. The 2018 DoHPLG EIA Guidelines²¹¹ identify “*Other important guidance documents*

²⁰³ Case C-435/97 World Wildlife Fund v Autonome Provinz Bozen §48

²⁰⁴ Ó’Nualláin v Dublin Corporation [1999] 4 IR 137

²⁰⁵ Aannemersbedrijf PK Kraaijeveld BV v Gedeputeerde Staten Van Zuid Holland (Case C-72/95) [1996] ECR I-5403

²⁰⁶ §4.65

²⁰⁷ EPA, 2017

²⁰⁸ §2.1 & 2.2

²⁰⁹ Environmental Impact Assessment – Guidelines for Planning Authorities and An Bord Pleanála on carrying out Environmental Impact Assessment (2018; DoECLG);

²¹⁰ E.g. *Ui Mhuirnin v Minister for Housing Planning and local Government* [2019] IEHC 824 (High Court, Quinn J, 5 December 2019)

²¹¹ §1.14

that should be consulted” as including the EPA Draft Guideline and the three 2017 EU Commission EIA Guidance documents on, respectively, Screening, Scoping and EIAR preparation. Their aim is to provide “*practical insight*” “*for use by Competent Authorities, Developers, and EIA practitioners*”.²¹² In those circumstances it is unsurprising that all these Guidelines are widely considered likely to reflect EIA law and as at least indicative of good practice in its implementation.

116. The EU Screening Guidance states “*The decision to be made for Screening is essentially whether the proposed Project is or is not likely to have significant effects on the environment.*” So, whether screening excludes the need for EIA turns on whether “significant” effects of a proposed development are “likely”. It is therefore centrally necessary to know what effects are, and are not, “significant” in this context.

117. Notably, the EU Screening Guidance states, of likely effects requiring EIA, “*These environmental effects can, in principle, be either positive or negative*”. **Ecologistas**²¹³ and **Terre Wallone**²¹⁴ are clear to that effect. **Simons** states that “*It is well established that the requirement to describe the likely significant effects of a proposed development is not confined to adverse effects but extends to include even beneficial effects.*”²¹⁵ Simons cites **British Telecom v Gloucester**²¹⁶ in terms which seem very apt to the present case:

“In my judgment an important feature of this democratic process, as the part of the government publication which I have emphasised notes, is that individuals ‘should form their own judgments on the significance of the environmental issues raised by the project.’ This involves a recognition that it is not always clear whether an impact is beneficial or not. In particular, where the development sites of historic or architectural interest are concerned, there will generally be a range of views held about the artistic and aesthetic features of the scheme and whether they best preserve the true character of the area which is the subject of the development. It would frustrate the process of debate about the merits of such a development if the planning authority could determine that the impact was beneficial and as a consequence rule that no environmental statement was needed. In this context benefit, like beauty, is in the eye of the beholder. Moreover, as Lord Hoffmann points out in his judgment, even the wrongheaded and misguided are entitled to express their views.”²¹⁷

One could make similar observations as to the facts in **Ó’Nualláin**²¹⁸ which took the same view that significant effects are not confined to adverse effects.

²¹² E.g. See Environmental Impact Assessment of Projects Guidance on Screening (EU Commission, 2017), p10 - Preface

²¹³ *Ecologistas en Acción-CODA*, C-142/07, EU:C:2008:445, §41

²¹⁴ Case C-321/18 *Terre Wallone ASBL v Region Wallone*

²¹⁵ *Planning Law*, 3rd Ed’n, Browne 2021 §14.788 et seq Citing *Ó Nualláin v Dublin Corporation* [1999] 4 I.R. 137 at 148.

²¹⁶ *British Telecommunications plc v Gloucester City Council* [2002] J.P.L. 993 at para.69.

²¹⁷ Emphases added

²¹⁸ *Supra* – the case related to the O’Connell St Spire

118. **Tromans**²¹⁹ asserts that “A key principle so far as the courts are concerned is that significance is not a hard-edged concept and the assessment of what is significant requires an exercise of judgement. they will, therefore, not lightly interfere with the decision reached by the planning authority”. Tromans cites, inter alia, **Bateman**²²⁰ in which Moore-Bick LJ states: “ I do not think that one should attempt to place too rigid an interpretation on the word “significant” in this context,”. Lulani cites **R(Jones) v Mansfield District Council**²²¹ to similar effect – that:

- The word “significant” does not lay down a precise legal test.
- Whether a project was likely to have significant effect on the environment is a question of degree which calls for the exercise of judgment.
- The screening decision determination of “significance” is a matter for the administrative authorities - reviewable for irrationality.
- Although a planning authority must have sufficient information about the impact of the project to be able to make an informed judgment as to whether it was likely to have a significant effect on the environment, that does not mean that all uncertainties must be resolved or that a decision that an EIA is not required could only be made after a detailed and comprehensive assessment had been made of every aspect of the matter. Uncertainties might or might not make it impossible reasonably to conclude that there was no likelihood of significant environmental effect.
- Everything depends on the circumstances of the individual case.

119. Understandably, the EIA Screening report invoked the EPA Draft. I do not know why, 4½ years after publication, it remains in draft but that it is as yet in draft may explain some infelicities of the text – to which I will come - relevant to this case. It is clear that the EPA draft was not considered overtaken by the 2018 EIA Guidelines published by the DoHPLG²²². In addition to citing the EPA Draft, the EIA Screening report stated that its methodology was in accordance with those DoHPLG EIA Guidelines 2018. They address significance as follows:

“6.8. ‘Significance’ is a core concept of the EIA Directive and is project-specific. Common criteria used to evaluate significance include the magnitude of the predicted effect and the sensitivity of the receiving environment. ‘Significance’ considers whether or not a project’s impact can be determined to be unacceptable in its environmental and social contexts²²³. EPA draft Guidelines define ‘significant effect’ as an effect which, by its character, magnitude, duration or intensity alters a sensitive aspect of the environment. The same draft Guidelines provide useful definitions in relation to quality of effects, significance of effects, context of effects, probability of effects and duration and frequency of effects.”²²⁴

²¹⁹ EIA, 2nd Edition §3.141

²²⁰ R(Bateman) v South Cambridgeshire District Council [2011] EWCA Civ 157 §19

²²¹ R (Jones) v Mansfield District Council and another - [2003] EWCA Civ 1408, [2003] All ER (D) 277 (Oct)

²²² See EIA Screening report §2.1 & 2.2 – citing Environmental Impact Assessment – Guidelines for Planning Authorities and An Bord Pleanála on carrying out Environmental Impact Assessment (2018; DoECLG); §1.14 identified the EPA Draft as “important” and to “be consulted” and says, “These are expected to be finalised shortly and the final text should be consulted when available.”

²²³ Citing EC EIA Guidance – EIAR, April 2017, Sn. 1.4.1.

²²⁴ Emphases added

So, not merely do the 2018 Guidelines invoke the EPA Draft: they purport to do so as defining significance.

120. The EPA Draft, though nominally a Guideline on preparing EIARs, in fact addresses screening²²⁵. Inter alia, it notes a recital of the EIA Directive²²⁶ to the effect that *“The screening procedure should ensure that an environmental impact assessment is only required for projects likely to have significant effects on the environment.”* No doubt that is because unnecessary EIA is expensive, wasteful, time-consuming and burdensome to no useful end. The requirement²²⁷ is notable that for EIA Screening purposes, and with a view to discerning whether significant effects are likely, the description of the project must include a description of its location - with particular regard to *“the environmental sensitivity of geographical areas likely to be affected”*.

121. This requirement derives from Annex III of the EIA Directive which identifies as a screening criterion the *“the environmental sensitivity of geographical areas likely to be affected”* with particular regard, inter alia, to the existing and approved land use; and the absorption capacity of the natural environment, paying particular attention to, inter alia, areas classified or protected under national legislation;²²⁸ and landscapes and sites of historical, cultural or archaeological significance. It would seem very difficult to conclude that these criteria do not encompass protected structures, including their curtilage. Indeed in **Doorly**²²⁹ Humphrey’s J has acknowledged as much.

122. As to “Descriptions of Effects”²³⁰ the EPA Draft says they *“need to be precise and concise. Each effect usually needs to be qualified to provide a comprehensive description”*. As to “Significance of Effects”, the EPA Draft says significance can be a central issue when the findings of an EIAR come under scrutiny. It is said that significance is usually understood to mean the importance of the outcome of the effects (the consequences of the change). Significance is determined by a combination of (objective) scientific and subjective (social) concerns. While guidelines and standards help ensure consistency, the professional judgement of competent experts plays a role in the determination of significance. These experts may place different emphases on the factors involved. As this can lead to differences of opinion, the EIAR sets out the basis of these judgements so that the varying degrees of significance attributed to different factors can be understood. These are undoubtedly helpful observations but it bears remembering that they relate to EIA not to EIA screening. Having regard to the precautionary principle applicable in EIA Screening by virtue of its being a general principle of EU Environmental Law²³¹ careful consideration and reasoning would seem to be required by decision-makers in EIA Screening whether EIA is required for resolving, in particular, differences of professional judgement and expert emphasis on subjective (social) concerns.

²²⁵ §3.2

²²⁶ Recital (27) of Directive 2014/52/EU

²²⁷ P22 - §3.2.4 Consultation On Screening

²²⁸ Specifically listed, but not apparently exclusively, are Natura 2000 areas designated by Member States pursuant to Directive 92/43/EEC and Directive 2009/147/EC;

²²⁹ *Doorly v Corrigan* [2022] IECA 6 §176

²³⁰ §3.7.3 et seq

²³¹ See *Article 191 TFEU* and *Re River Faughan Anglers Ltd* [2014] NIQB 34

123. The draft moves to “Descriptive Terminology”, as follows (again, helpfully):

“The description of effects is usually subjected to closer scrutiny than any other part of the EIAR. Clarity of method, language and meaning are vital to accurately explain the full range of effects. Adherence to a systematic method of description can be of considerable assistance in this matter.”

124. The EPA Draft then introduces “Table 3.3 Descriptions of Effects” as follows: “The relevant terms listed in the table below can be used to consistently describe specific effects”.²³² It is the second part of Table 3.3 – “Describing the Significance of Effects” that concerns us and bears reproduction in full below. By way of introduction to it, the following points occur:

- The EPA Draft is based on an assertion²³³ that there are seven generalised degrees of impact significance commonly used in EIA: Imperceptible, Not Significant, Slight, Moderate, Significant, Very Significant and Profound.
- However, these are general descriptions – necessarily applicable to a wide range of, no doubt, highly varied circumstances - and excessively rigorous analysis of the descriptions may be inappropriate. The EPA Draft states that where more specific definitions exist within a specialised factor or topic these should be used. The EU Commission states²³⁴ that significance is always context-specific so tailored criteria should be developed for each Project and its settings.
- Nonetheless, Table 3.3 is expressly presented in terms of “definitions” – albeit proffered on the basis that they “*may be useful*”. As stated, the DoHPLG EIA Guidelines 2018 also speak of the EPA draft as defining significance. So, it is entirely predictable, not least in the absence of any other definition of significance²³⁵, that in practice those “definitions” in Table 3.3 will in fact be used in EIA Screening - as supplying an analytical framework of EPA provenance.

125. The EU Commission EIA Screening Guidance²³⁶ states “*Those responsible for making Screening Decisions often find difficulties in defining what is ‘significant’. More detailed descriptions of this concept and methodological considerations to approach it are presented as part of the Scoping guidance document.*” The question of significance is addressed in the EU Commission EIA Scoping Guidance 2017 in illuminating terms²³⁷. It is not possible to reproduce all relevant content here, but the following are notable:

²³² the various parts of the table address Quality of Effects (Positive, Neutral, Negative/adverse), Describing the Extent and Context of Effects, Describing the Probability of Effects (Likely, Unlikely), Describing the Duration and Frequency of Effects, Describing the Types of Effects (including Indirect, Cumulative, Worst-case and residual).

²³³ Section: 3 Page: 53 - Guidelines on the Information to Be Contained in Environmental Impact Assessment Reports; EPA August 2017

²³⁴ EU Commission, 2017 - Guidance on the preparation of the EIA Report (Directive 2011/92/EU as amended by 2014/52/EU)

²³⁵ See below

²³⁶ Environmental Impact Assessment of Projects Guidance on Screening (EU Commission, 2017)

²³⁷ P41 et seq

- The assessment of significant effects (or impacts) is an essential concept of the EIA Directive.
- The EIA Directive limits the consideration of the effects or impacts a project may have on the environment to those which are significant or important enough to merit the costs of assessment, review, and decision-making.
- The EIA Directive provides no clear definition of significance – which has to be assessed in light of the project’s specific circumstances.
- Though largely undefined, certain characteristics are associated with the concept of ‘*significant effects*’ including:
 - The assessment of significance relies on informed experts’ judgements about what is important, desirable or acceptable as to changes triggered by the Project. These judgments are relative and must always be understood in their context.
 - These judgments are value-dependent: though mostly informed by scientific data, they are subjective to some degree as the opinion of one or more experts. Experts’ judgements vary.
 - These judgments are context-dependent: judgments are made within the socio-cultural, economic, and political contexts of a project. A thorough understanding of contextual factors (e.g., local ecological, social, and cultural conditions, judgements in related decision-making areas), likely to influence judgements’ significance, is essential when identifying a project’s impact on the environment.
- There is no consensus among practitioners on a single or common approach for assessing the significance of impacts. This makes sense as the concept of significance differs across the varying political, social, and cultural contexts that projects face.
- Nevertheless, the determination of impacts’ significance can vary considerably, depending on the approach and methods selected for the assessment.
- The choice of appropriate procedures and methods for each judgement varies depending on the Project’s characteristics. Several methods, be they quantitative or qualitative, can be used to identify, predict, and to evaluate the significance of an impact.
- As good practice, all assessment methods should define clear thresholds or criteria for determining whether an impact is significant, based on the characteristics of an impact, in a clear and unambiguous manner that can be understood by anyone reading the EIA Report.

126. Returning to the European Commission's EIA Screening Guidance 2017, it suggests that a useful simple check as to whether an effect is significant is to ask oneself whether it is one that ought to be considered and to have an influence on the decision whether to grant development consent. It suggests a checklist of useful questions for that purposes including:

- Will there be a large change in environmental conditions?
- Will new features be out-of-scale with the existing environment?
- Is there a risk that protected sites, areas, features will be affected?
- Will the effect be permanent rather than temporary?
- Will the impact be continuous rather than intermittent?
- Will the impact be irreversible?

127. Some comments on the foregoing are possible here:

- It does not purport to be a complete account of the concept of significance: notably, the relevance of the precautionary principle is not addressed.
- While one cannot be absolute, that the assessment of significance is primarily a matter for the judgment of the expert Board rather than the Court will be clear: not least, a Court is not an expert. Also, a Court cannot enter the arena of subjective, value-dependent assessment by reference to political, social, economic and cultural contexts. Or, in common-law terms, the court in judicial review is not hearing an appeal on the merits of an impugned decision.
- It bears repeating from the foregoing that assessment methods should define clear thresholds or criteria for determining whether an impact is significant, based on the characteristics of an impact, in a clear and unambiguous manner that can be understood by anyone reading the EIA Report.

128. In light of that last comment in particular, I set out the second part of Table 3.3 of the EPA Draft Guidance. This content is also found in the EIA Screening Reports' invocation²³⁸ of the EPA Draft.

Extract from Table 3.3, EPA Draft Guidance on EIAR Content – 2017	
Describing the Significance of Effects	
"Significance' is a concept that can have different meanings for different topics – in the absence of specific definitions for different topics the following definitions may be useful (also see Determining Significance below).	
Imperceptible	An effect capable of measurement but without significant consequences.
Not significant	An effect which causes noticeable changes in the character of the environment but without significant consequences.
Slight Effects	An effect which causes noticeable changes in the character of the environment without affecting its sensitivities.
Moderate Effects	An effect that alters the character of the environment in a manner that is consistent with existing and emerging baseline trends.
Significant Effects	An effect which, by its character, magnitude, duration or intensity alters a sensitive aspect of the environment.
Very Significant	An effect which, by its character, magnitude, duration or intensity significantly alters most of a sensitive aspect of the environment.
Profound Effects	An effect which obliterates sensitive characteristics.

²³⁸ EIA Screening Report §4.65 & Table 1.2 Significance of Effects

129. The question of significance is binary - it is either/or. A likely effect must be either significant, in which case EIA must assess it, or insignificant, in which case EIA need not assess it. The answer must be justifiable. Clearly, a very considerable degree of expert, scientific, and even partly subjective, judgment is brought to bear on answering that question. Nonetheless, the answer must be clear – is the likely effect significant or is it not?

130. Remembering the necessity that significance be determined in *“a clear and unambiguous manner that can be understood by anyone reading the EIA Report”* the difficulty I see is that the second part of Table 3.3 creates a grey area of “Slight” and Moderate” effects lying between significance and insignificance. Or, to put it another way, and as far as the Table implies, some slight and moderate effects may be significant and others insignificant. While “Slight” and Moderate” designations are undoubtedly useful, informative, comprehensible and commonplace, they are presented in the Table in a manner which can be read as enabling of an approach in EIA in which the question of significance/insignificance can be impermissibly blurred, or even avoided, as to a particular effect.

131. In an EIA Screening Report and in the EIA Screening Decision and as to a particular effect, whether it is considered significant or insignificant must always be made clear. By reference to Table 3.3, merely describing an effect as “Slight” or “Moderate” does not achieve that required clarity. So, given the intermediate position between significance and non-significance assigned to them by Table 3.3 - indeed, particularly because of that intermediate position - why an effect described as “Slight” or “Moderate” is deemed significant or non-significant, requires at least some explanation in EIA Screening.

132. Also, I confess that the concept, as to Moderate Effects, of an *“emerging baseline trend”* seems to me particularly amorphous. A *“trend”* may be difficult to identify – all the more so one that is merely *“emerging”* - which can only refer to a trend not yet clearly established and which may yet not become established. That may or may not be a criticism in what is necessarily a very generalised description, albeit purporting to be a definition. And perhaps in a dynamic and fast-moving world of climate change and given the precautionary principle, it is an idea with which we must grapple. Further, the phrase may be an attempt to capture in summary the content of Annex IV §3 of the EIA Directive 2014²³⁹. But it is not elucidated or explained in the EPA Draft.

133. However, one thing is clear: the concept of the *“baseline”* refers to *“the relevant aspects of the current state of the environment”*.²⁴⁰ It does not refer to law or policy. I need not decide the

²³⁹ Annex IV Information Referred To In Article 5(1) (Information For The Environmental Impact Assessment Report)

3. A description of the relevant aspects of the current state of the environment (baseline scenario) and an outline of the likely evolution thereof without implementation of the project as far as natural changes from the baseline scenario can be assessed with reasonable effort on the basis of the availability of environmental information and scientific knowledge.

²⁴⁰ Annex IV(3) EIA Directive – cited in EPA Draft §3.6 Describing the Baseline

issue, but confess to a fear that a concept such as an emerging baseline trend in law or policy could be incompatible with requirements of certainty in the law.

EIA SCREENING - PROTECTED STRUCTURE

134. The Statement of Grounds asserts²⁴¹ as to EIA Screening, failure to consider architectural heritage adequately or at all: failure to recognise that the Dalguise gardens are part of the curtilage of a protected structure whose loss should therefore be considered significant in terms of its effect on the built environment. The Applicants contend that the impact on the gardens is impact on the environment, potentially significant, and should have been screened for. The Board counters that impact on the gardens was considered. The Applicant replies that it was not considered in EIA screening as to its significance in terms of triggering an EIA.

135. The underlying statutory reason why a structure is protected – “*special architectural, historical, archaeological, artistic, cultural, scientific, social or technical interest*” - implies that the fact of and reasons for protection is, in addition to being a consideration generally relevant to proper planning and sustainable development and a statutorily mandated consideration under S.57(10), also a relevant consideration in EIA screening given that the EIA Directive and Regulations specify, as elements of the environment for EIA purposes, “*cultural heritage*” and “*sites of historical (or) cultural ... significance*” “*including Architectural ... aspects and landscape*” including “*urban historical sites and landscape*” and the “*change in the appearance or view of the built or natural landscape and urban areas*”. For convenience and as to such effects on Dalguise House and its grounds, I will refer to this as “the Cultural Heritage issue”.

EIA Screening report

136. Dalguise House is addressed under “Cultural Heritage” at §4.120 of the EIA Screening report²⁴². The report, as recorded above, clearly identified²⁴³ the Site as curtilage of a protected structure. As to “*Cultural Heritage*”²⁴⁴ it reprises much of the content of the AHIA - as also reprised in the Statement of Consistency in part reprised above. I will endeavour not to repeat content, but the following are notable as statements recorded in the specific context of an EIA Screening report – remembering that significant positive effects require EIA just as much as negative effects:

- *Dalguise House is a Protected Structure*

²⁴¹ §5.4

²⁴² The EIA Screening report is confusing. Chapters 3 and 4 are both headed “EIA Screening Statement” and the introductory text is the same. The content overlaps somewhat.

²⁴³ §3.2

²⁴⁴ §4.120

- Comment: this establishes it as, statutorily, “of special architectural, historical, archaeological, artistic, cultural, scientific, social or technical interest”²⁴⁵
- *The architectural features of value on the site are being retained.*
- *While the change to the setting of Dalguise House will be significant²⁴⁶, but in line with emerging policy to densify development in the existing built envelope.*
 - Comment: this use of the word “significant” in an EIA Screening report can hardly be accidental.
- *The change in the setting of the house will be considerable, giving rise to ‘moderate’ effects²⁴⁷ on the architectural heritage of the house, if the subject proposed development is regarded as consistent with emerging local and national policy.*
- *The demolition of White Lodge and of a modern swimming pool structure beside Dalguise House will give rise to ‘slight’ positive effects on Dalguise House and its setting. Works to the gate lodges, the wall of the walled garden, the buildings in the stable yard and the glasshouse/vinery will give rise to ‘moderate’ positive effects on the architectural heritage of these structures themselves and on the heritage of the Dalguise lands. The providing of long term sustainable use for Dalguise House and the other retained structures will also give rise to ‘moderate’ positive effects architectural heritage.”*

137. Indeed, Counsel for Lulani, submitted, correctly, of the passage cited in the last bullet-point above²⁴⁸ that it reflected a focus “on Dalguise House as a set piece” such that “if you are impacting on the gardens it’s going to impact on Dalguise House” and it was “acknowledging a very significant change²⁴⁹ in the setting of the house in terms of its gardens and the structures and so on”. It is impossible to disagree.

138. It seems to me useful to add reference to a further and striking excerpt from the AHIA not reprised in the EIA Screening Report but bearing clearly on the question of significance of effect on the curtilage of Dalguise House:

Changes to the Setting of Dalguise House

.... a large new development on the lands will bring about a major change to the setting of the house. Despite being in suburban Monkstown, because of the extent of the lands belong to Dalguise, its existing setting is almost rural in character. Any development on the site will completely change that.”²⁵⁰

²⁴⁵ S.51(1) PDA 2000

²⁴⁶ Emphasis added

²⁴⁷ Emphasis added

²⁴⁸ In its Statement of Consistency iteration

²⁴⁹ Emphasis added

²⁵⁰ Emphasis added

139. Returning to the EIA Screening report, its “Cultural Heritage”²⁵¹ section does not record, other than as noted above, whether the “Slight” and “Moderate” effects identified are significant, much less are reasons given for such a designation. For reasons stated above, as to Table 3.3 of the Draft EPA guidelines, a finding of “Slight” or “Moderate” effect is inconclusive as to significance. As noted above, the only relevant invocation of the concept of significance in the EIA Screening report is to the effect that “*the change to the setting of Dalguise House will be significant*”.²⁵² I return to this below.

140. The sentence, taken from the AHIA, that “*The change in the setting of the house will be considerable, giving rise to ‘moderate’ effects on the architectural heritage of the house, if the subject proposed development is regarded as consistent with emerging local and national policy*” is opaque at very best. In describing the effect on the setting as “considerable”, it comes at least close to describing it as significant. It does not convey why “considerable” and “significant”²⁵³ changes in the setting of a protected structure – being curtilage, that setting is itself protected – are classed as “moderate”. Nor does it say whether or why those “Moderate” effects are significant or insignificant. Nor is it explained what “emerging local and national policy” is considered relevant, what is meant by “emerging” in this context, by what mechanism or criteria it renders the effect “moderate” or how the effect would be characterised but for such “emerging local and national policy”. It is difficult to see how “emerging local and national policy” could render insignificant an effect otherwise significant. Indeed, it is difficult to attribute any real meaning to this sentence.

141. However, by reference to the EPA guideline Table 3.3 definition of Moderate, it appears that the author confused “emerging local and national policy” with the phrase “emerging baseline trends”²⁵⁴. Whatever the latter means in detail, the baseline clearly refers to “*the relevant aspects of the current state of the environment*”²⁵⁵ rather than to environmental or planning policy. Whether or not that is so, “emerging local and national policy” may be relevant to whether an effect is justifiable. It is by no means apparent that it relevant to whether that effect is significant – especially as the policy in mind seems to relate to housing provision as opposed to the protection of cultural heritage.

142. And as I have said, and importantly, even taking the effect as “moderate”, there is no statement in this passage of the EIA Screening report, extracted from the AHIA, whether the “considerable” effect will be significant or insignificant.

143. However, as noted above, the preceding text of the EIA Screening report itself addresses precisely the same subject matter – the setting of the house – slightly more informatively as follows:

²⁵¹ §4.119 et seq

²⁵² Emphasis added

²⁵³ C.f. EIA Screening report as cited above

²⁵⁴ See above as to EPA Draft Guidance Table 3.3

²⁵⁵ Annex IV(3) EIA Directive – cited in EPA Draft §3.6 describing the baseline

“While the change to the setting of Dalguise House will be significant, but in line with emerging policy to densify development in the existing built envelope.”

This seems to me to be a central expression of the reasoning of the EIA Screening report as to effect on the setting of the House and acceptance of the Board of that report must encompass acceptance of that reasoning. Despite grammatical infelicities, this sentence seems to me to contain two distinct propositions. The first is that *“The change to the setting of Dalguise House will be significant.”* That can hardly be an accidental statement in an EIA screening in which *“‘Significance’ is a core concept”*.²⁵⁶ It is difficult to see how that finding alone did not imply EIA on Cultural Heritage Grounds.

The second proposition appears to be that the identified significant change may be acceptable as *“in line with emerging policy to densify development in the existing built envelope”*. But whether a significant effect is acceptable is irrelevant to EIA screening. It is a matter for EIA.

In addition, this passage again likely reflects the confusion of *“emerging policy”* with *“emerging baseline trends”*.

144. The EIA Screening report tabulates its response to the criteria set out in Schedule 7 PDR 2001 for determining whether EIA is required. Under the heading *“2. Location of Proposed Development”* it is noted that *“The subject lands are part of Dalguise House, a Protected Structure”* and it is asserted that *“An Architectural Heritage Impact Assessment and Visual Impact Assessment has also been prepared with accompanying Photomontages. These demonstrate that the site can accommodate the proposed development without significant adverse effects.”* But as I have said, the AHIA conclusion, that *“The change in the setting of the house will be considerable, giving rise to ‘moderate’ effects on the architectural heritage of the house, if the subject proposed development is regarded as consistent with emerging local and national policy”* is opaque at very best. I have explained why above. Leaving all that aside, while it is legitimate to assert absence of *“significant adverse effects”* that does not of itself suffice as to significant effects.

145. The EIA Screening report contains nothing more of this issue. Notably, in concluding²⁵⁷ that EIA was not required, the EIA Screening report listed a series of factors which included no mention of the Protected Status of or cultural environmental sensitivity of Dalguise House and its curtilage.

146. Of the Schedule 7 table the following can be said:

- No reasons are given, or rationale stated, for the conclusion that the “slight” and “moderate” effects earlier identified, but not then identified as significant or not significant, are now identified as not significant. Given the ambiguity of the Draft EPA Guidelines Table 3.3, such

²⁵⁶ DoHPLG EIA Guidelines.

²⁵⁷ §5.4

reasons were required to demonstrate that the issues had been understood and considered - as required by **Bateman**.

- No reasons are given for the conclusion that, despite an explicit finding that *“the change to the setting of Dalguise House will be significant”* and *“considerable”* and *“moderate”*, nonetheless *“the site can accommodate the proposed development without significant adverse effects.”* In short, an effect earlier in the report identified as significant is now identified as not significant and we are not told why.
- The Schedule 7 table conclusion is that *“the site can accommodate the proposed development without significant adverse effects”* is explicitly limited to adverse effects. As previously observed, EIA is required as to even positive significant effects.

147. Accordingly, the adoption of this report could not of itself, in law, provide an adequate basis for, or reasons for, an EIA screening determination that EIA was not required.

The Inspector’s Report – EIA Screening - & Comment thereon

148. There is no doubt but that Inspector devoted considerable attention to the architectural and cultural heritage and protected structure aspects of the planning application from various points of view: having regard to the protected status of Dalguise House, the development plan and considerations of proper planning and sustainable development. Much of the substance of what one would expect in an EIA of the Development Proposal as to these issues appears in the planning application, the associated documents²⁵⁸ and the Inspector’s report. Public participation clearly occurred. Clearly, the conclusion was reached that the Proposed Development, as to its effect on the protected structure (including its curtilage) was acceptable. An EIA would have replicated much of what was in fact done and it may be that EIA would not have resulted in any different a planning decision. I am not competent to decide such questions. But for EIA Screening purposes such questions are not the point.

149. What the EIA Directive requires is not something approximating to or as good as EIA. As has often been said, EIA is procedural rather than substantive: it does not mandate the outcome of a development consent application. Its whole point is to require compliance with EIA procedures which serve to ensure the incorporation of environmental concerns into the development consent process. So when the authority competent as to development consent says in EIA screening that a proposed development is unlikely to have significant environmental effects and says in consequence that it did not perform EIA – as was said here – it is taken at its word. In that circumstance there is no room for an argument that what the competent authority in fact did equated to EIA. In that respect, there is no grey area between doing and not doing an EIA. As CJEU caselaw makes clear –

²⁵⁸ such as the AHIA, the Statement of Consistency, the Visual Impact Assessment and the Arboricultural report

for example **Case C-66/06 Commission v Ireland** – what the EIA Directive requires is EIA in accordance with the requirements of that Directive.

150. Nor is this a case, such as **Redrock**²⁵⁹, in which, despite no explicit statement to that effect, one may infer that EIA was done. Nor is it a case such as **South West Regional Shopping Centre**²⁶⁰ in which it was inferred that EIA Screening had been done and EIA deemed unnecessary. In this case the Board, by explicitly screening it out, explicitly conducts EIA Screening and explicitly disavows that EIA was done. It is inescapable that a deliberate decision was made not to do EIA and so EIA was not done. Whether that decision was correct or not is not a mere matter of form but is a matter of compliance with mandatory legal obligations.

151. And in any event, form matters as it provides to all participants a shared understanding and expectation of the procedural and analytical skeleton to which the flesh of environmental assessment can adhere. The form assists in ensuring adequate consideration of environmental issues – that is the very purpose of the form. It aids effective interaction of stakeholders, including the public, on the environmental issues and promotes public confidence in the assessment. This is not the type of formalism decried by Advocate General Sharpston in **Boxus**²⁶¹ where she said that “[t]he EIA Directive is not about formalism. It is concerned with providing effective EIAs for all major projects; and ... with ensuring adequate public participation in the decision-making process.” Where an express decision was made not to do EIA it is no answer to say we did as good as.

152. In fairness to all concerned, no argument was made that what the Board did in this case equated to or sufficed as EIA. I make the point as to form for two reasons: first to acknowledge that in many respects the Inspector’s report and hence the Board’s decision in reliance on it, represented a careful, though not complete, consideration of the substance and acceptability of the likely environmental effects of the Proposed Development as they relate to Cultural Heritage; second to observe that the Board’s understandably directing me to that careful consideration is, at least as to EIA screening, beside the point. The point in EIA screening is not whether the environmental effects of the proposed decision are acceptable: it is whether they are significant.

153. The Inspector’s report as to EIA Screening²⁶² is brief. It cites the Laluni EIA screening statement as including the information required under Schedule 7A PDR 2001²⁶³ and records that Schedule 7 PDR 2001 states criteria by which the need or otherwise for EIA is to be determined. The Inspector does not systematically state or apply those criteria – though he certainly addresses specific issues he considered relevant.

²⁵⁹ Redrock Developments Ltd v An Bord Pleanála [2019] IEHC 792 (High Court, Faherty J, 21 October 2019) – leaving aside altogether the absence in this case of an EIAR.

²⁶⁰ South West Regional Shopping Centre v An Bord Pleanála [2016] IEHC 84

²⁶¹ Joined Cases C-128/09 to C-131/09, C-134/04 and C-135/09 *Boxus v Région Wallonne*, (Court of Justice of the European Union, 19th May, 2011, ECLI:EU:C:2011:319)

²⁶² §11

²⁶³ Schedule 7A - Information to be provided by the applicant or developer for the purposes of screening sub-threshold development for EIA

154. Notably, Schedule 7 PDR 2001 §2 is headed “Location of proposed development” and requires consideration of “The environmental sensitivity of geographical areas likely to be affected by the proposed development, with particular regard to (a) the existing and approved land use (c) the absorption capacity of the natural environment, paying particular attention to the following areas: (viii) landscapes and sites of historical, cultural or archaeological significance.”

155. The Inspector’s report as to EIA Screening identifies Dalguise House as a protected structure. That necessarily identifies it as, statutorily, “part of the architectural heritage and ... of special architectural, historical, archaeological, artistic, cultural, scientific, social or technical interest”. It necessarily follows that, by reference to Schedule 7 PDR 2001 and as a matter of the “environmental sensitivity of geographical areas likely to be affected by the proposed development”, “particular regard” and “particular attention” must be paid in EIA Screening to “the absorption capacity” of the Site as a “landscape and site of historical, cultural or archaeological significance.”

156. Given that requirement of “particular regard” and “particular attention”, it is very surprising that the Inspector’s report as to EIA Screening says nothing more of the significance or otherwise of effect on Cultural Heritage than that Dalguise House is a protected structure. There is no analysis of why it is a protected structure, no identification of effect and no analysis of effect, nor even reference back to other elements of the Inspector’s report considering the protected status of and effects on Dalguise House and its curtilage. There is no explanation why the complete alteration of the curtilage element of the protected structure can be considered environmentally insignificant.

157. In a general conclusion applicable to all environmental considerations – not at all specific to Cultural Heritage – the Inspector says:

“I consider that the location of the proposed development and the environmental sensitivity of the geographical area would not justify a conclusion that it would be likely to have significant effects on the environment. The proposed development does not have the potential to have effects the impact of which would be rendered significant by its extent, magnitude, complexity, probability, duration, frequency or reversibility. In these circumstances, the application of the criteria in Schedule 7 to the proposed sub-threshold development demonstrates that it would not be likely to have significant effects on the environment and that an environmental impact assessment is not required before a grant of permission is considered. This conclusion is consistent with the EIA screening assessment report submitted with the application.”²⁶⁴

²⁶⁴ P46 - emphasis added

158. As the Inspector had not himself applied the Schedule 7 Criteria to the Cultural Heritage issue and given his reference to the EIA Screening report, he must have been taken to have adopted it and its Schedule 7 exercise. There is nothing in principle wrong with this, but he takes the EIA Screening report warts and all. And, for the reasons stated above, the adoption of this report could not of itself, in law, provide an adequate basis for or reasons for an EIA screening determination that EIA was not required.

159. I have read the Inspector's report as to EIA Screening in the context of consideration of cultural heritage issues elsewhere in the Inspector's report. The Inspector's report must be read as a whole. As stated above, the Inspector addresses the cultural heritage issue from various points of view in his planning assessment.²⁶⁵ First, there is no doubt that the Inspector was conscious of the cultural heritage issue objections, some of which I have mentioned above²⁶⁶. Second, he was conscious of the protected status of Dalguise House and gardens – as to which see above.

160. As to Design²⁶⁷, the Inspector recognises the site as “*challenging due to its constrained nature, sylvan setting and Protected Structures*” and, as he is entitled to be, he is in general highly complementary of the design of the Proposed Development. He states, in a passage which must be read as a whole:

“I consider the proposal before the Board is the optimum design solution for this site, that it would not adversely impact on the character of the receiving environment and, subject to the reduction in height of three blocks, would comply with the provision of the policies and objectives of the current County Development Plan. In this instance, while I am satisfied that a modern intervention is the appropriate design approach at this location I am not satisfied that the proposal before the Board has been fully executed given the sensitives of the site and the presence of Dalguise House and its setting (as discussed in section 12.4 of this report), by sufficiently incorporating them into the overall design and layout.”

161. As text in the planning assessment section of the report explaining why the Proposed Development is acceptable, this passage is entirely proper. It might well have appeared in an EIA. But looking at it as part of an exercise in considering the report as a whole for purposes of EIA Screening, it is impossible to reconcile with a finding of insignificant effect.

162. First, a finding of no adverse impact is not a finding of no significant impact. It is difficult to see how the proposed development could have no significant impact on the character of the receiving environment when the Inspector later observes²⁶⁸ that “*the only way to develop the site is by the infilling and loss of the grounds and gardens of Dalguise House*”. Not least, this is a difficult

²⁶⁵ Inspector's report §12

²⁶⁶ See for example Inspector's report Appendix Summary of Observer Submissions: Architectural Heritage

²⁶⁷ Inspector's report §12.2.1

²⁶⁸ Inspector's report §12.9

conclusion to understand when the grounds and gardens to be infilled and lost are part of a protected structure. It is difficult to avoid the impression that the Inspector regarded the residential zoning and the conclusion that residential development was in principle acceptable as in some way determinative of the question whether the development was likely to have significant environmental effect. Such a conclusion confuses acceptability with significance.

163. Second, and as to Planning Assessment, as far as the Inspector is concerned, acceptability depends on reduction in height of three blocks. From an EIA point of view this is not merely mitigation (which can be considered in EIA screening) - but mitigation not proposed by the developer and contemplated as to be imposed upon the developer by planning condition. Hence it was not considered in the EIA Screening report.

164. As to Building Height²⁶⁹ and Visual Impact the Inspector says:

“Having regard to the sites locational context and the presence of Dalguise House I consider that the height of development to be²⁷⁰ unacceptable. In this regard, a reduction in the height of the development is necessary in this instance.”

And later:

“However, I am not satisfied that a reduction in height alone will address the overall sensitivities of the site and relationship with Dalguise House. This matter is further addressed in section 12.4 and, in my opinion, amendments would also require that the omission of Block F (51 units) and its replacement²⁷¹ with a building that resembles Block G (44 units) in alignment and scale.”

165. Note here the Inspector’s acknowledgement of “sensitivities of the site and relationship with Dalguise House”. In a passage from his report cited above²⁷² the Inspector referred to the “environmental sensitivity of the geographical area” – a phrase taken from Annex III of the EIA Directive and, by Schedule 7 of the 2018 EIA Regulations²⁷³, requiring “particular regard”. Yet, in contrast, the Board, in the Impugned Permission found “the absence of any significant environmental sensitivities in the area” and gave no reasons for that view.

166. **Simons**²⁷⁴ cites English caselaw²⁷⁵ to the effect that in EIA Screening it is inappropriate to start from the premise that significant impacts can be mitigated to insignificance and that the

²⁶⁹ Inspector’s report §12.2.3

²⁷⁰ sic

²⁷¹ sic

²⁷² From Inspector’s report p46

²⁷³ Schedule 7

²⁷⁴ Planning Law 3rd Edition, Browne 2021 §14-642

²⁷⁵ Including *British Telecommunications plc v Gloucester City Council* [2001] EWHC Admin 1001, [2002] 2 P. & C.R. 33, [2002] J.P.L. 993. R. (Lebus) v South Cambridgeshire District Council [2002] EWHC 2009 (Admin), [2003] 2 P. & C.R. 5, [2003] J.P.L. 446.

appropriate question to be addressed is: what are the likely environmental impacts of the proposed development in the absence of mitigation measures?” **Simons** continues²⁷⁶ by considering the English caselaw more widely in terms suggestive that they are significantly divergent on the issue. He notes that the matter is undecided at Irish law and suggests that mitigation should not be considered in EIA screening on the basis of analogy with AA Screening, in which, it is clear, mitigation may not be considered.

167. However, since publication of *Simons*, Humphreys J in **Eco Advocacy**²⁷⁷ dismissed a challenge asserting error in having regard to mitigation in EIA screening – finding that the “*point is acte clair against the applicant because consideration of mitigation during screening is baked into art. 4(4) and 4(5) as well as annex III, para. 3(h).*” Article 4(2) of the EIA Directive provides for EIA Screening – it requires for projects listed in Annex II, Member States shall determine whether the project shall be subjected to EIA. Article 4(4) requires that for purposes of such a determination the developer shall provide information on the characteristics of the project and its likely significant effects on the environment and “*may also provide a description of any features of the project and/or measures envisaged to avoid or prevent what might otherwise have been significant adverse effects on the environment.*” Article 4(5) of the EIA Directive provides that the competent authority shall make its determination, on the basis of the information provided by the developer in accordance with Article 4(4). Annex III of the EIA Directive lists, referring to Article 4(3) criteria to determine whether projects listed in Annex II should be subject to EIA. Annex III para. 3(h) lists “*the possibility of effectively reducing the impact*”. These elements of Article 4(4) and Annex III para. 3(h) did not appear in the EIA Directive before 2014²⁷⁸, the deadline for implementation of which change was in 2017. The reasons for the decision of Humphreys J in **Eco Advocacy** will be readily clear as the 2014 Directive resolved the doubt – in favour of considering mitigation in EIA Screening.

168. However, inasmuch as the Inspector was “*..... not satisfied that the proposal before the Board has been fully executed given the sensitives of the site and the presence of Dalguise House and its setting (as discussed in section 12.4 of this report), by sufficiently incorporating them into the overall design and layout*” his report tends towards, rather than against, a finding of significant effect for EIA Screening purposes. Here we have yet another acknowledgment by the Inspector of “*sensitives of the site and the presence of Dalguise House and its setting*” in contrast to the Board’s view that there were no such sensitivities, for which no reason is given as bearing on Cultural Heritage.

169. As I have said, the Inspector devotes considerable attention, in his Planning Assessment to Architectural Heritage²⁷⁹. He notes “*numerous objections*”, including by the Irish Georgian Society and An Taisce. The DAU had what the Inspector acknowledges as “*serious concerns*” – I have recorded some of these above. A perusal of the DAU submission readily confirms that

²⁷⁶ §14-640 to §14-663

²⁷⁷ [2021] IEHC 610 (High Court Humphreys J, 4 October 2021)

²⁷⁸ Directive 2014/52/EU Of The European Parliament and of the Council of 16 April 2014 (OJ L 124, 25.4.2014, p. 1)

²⁷⁹ Inspector’s report §12.4

characterisation of its view and its agreement with the Georgian Society’s view as to the loss of the gardens. For example, the Inspector records the DAU view that *“Block G and F which flank the central Square to the front of Dalguise House undermine and overwhelm the approach to the protected structure and its setting”*. The Inspector records similar concerns of DLRCC – for example it sought height reductions and that Block F be pulled back to minimise encroachment on Dalguise House. The Inspector agreed that: *“From an architectural heritage viewpoint, I am of the opinion that the location and scale of Block F is such that it obscures the Protected Structure and detracts from its setting and therefore should be omitted and replaced with the Block that mirror Block G in terms of scale and set back in line with Block G to address this issue.”*²⁸⁰ This passage inevitably implies that the Proposed Development would have a significant effect on Dalguise House. The Inspector’s view of the absence of significant effect turned at least in part on mitigation not adopted by the Board.

170. The Inspector accepts that Dalguise House is one of the few remaining examples of its kind in the Dun Laoghaire area – inhabited and not redeveloped. He records that the *“proposed development results in significant infilling of gardens, development of the grounds, alterations and removal of protected structures, demolition of outbuildings and significant removal of mature trees.”*²⁸¹ I do not criticise this text in its own terms, but it cannot supplement the Inspector’s EIA screening finding of no significant effect on Cultural Heritage. Indeed, not least given the repeated use of the descriptor *“significant”*, this passage would seem to undermine rather than bolster the EIA Screening decision. That this passage relates to a protected structure (that part of it consisting of curtilage) amplifies that view. Further, and as the Inspector had noted²⁸², the Georgian Society had noted that *“The Architectural Protection Guidelines (2012) discourages the infilling of gardens and notes the important role of stable building, coach-houses, walled gardens, lawns, etc in defining the character of the curtilage of Country houses – though not a country house, the grounds of Dalguise possess a similar arrangement of features. The Guidelines also emphasise the importance of understanding the historical development of a site and the interrelationship of its elements.”*

171. In the conclusion of his planning assessment of impact on Dalguise House²⁸³ the Inspector says, *“On balance, the proposal is a well-executed for the most part, I consider subject to amendments that the proposal will not have such an impact on Dalguise House to warrant its refusal.”*²⁸⁴ Again, as a planning assessment this is entirely proper. But it does nothing to bolster the EIA Screening finding of no significant effect. That the proposal will not have such an impact on Dalguise House as to warrant its refusal, is very far from saying the proposal will have no significant effect on Dalguise House. It is a commonplace of EIA that it is procedural, not substantive, such that a finding in EIA of significant effect does not preclude development consent. Indeed permissions are often and correctly granted against the background of EIA findings of significant effect. But that does not absolve the decision-maker of the obligation of EIA.

²⁸⁰ sic

²⁸¹ Inspector’s report p61 §12.4.

²⁸² Inspector’s report p131

²⁸³ Inspector’s report §12.4.2

²⁸⁴ sic

172. In his more general conclusion on Architectural Heritage²⁸⁵ the Inspector says:

“I support the case for a modern intervention that contributes to and adds to the narrative of the area, in this instance I consider the overall design strategy, subject to the recommended amendments relating to height and the Block F, is appropriate and does not result in a development that unduly detracts from the integrity and character of Dalguise House. I am satisfied that the amendments to the height of apartment buildings and the replacement of Block F with a building that mirrors Block G in scale and siting will address the concerns raised by the DAU and the DLR Conservation Division relating to the encroachment on Dalguise House that overpowers the protected structure and detracts from its vista from the northern approach and when viewed in the context of this site. I consider, therefore, subject to the amendments set out above, the proposal for a modern intervention at this location which introduces a high quality design through the appropriate use of materials and finishes. Any development of this site will have an impact. In this instance I consider the impact to be a positive one that will contribute positively to the architectural narrative of the area by providing a development that is contemporary and of its time.”

173. I set this conclusion out in full as it reflects the considered and balanced planning assessment of the Inspector - perfectly proper even though others vehemently disagree. But, importantly, it acknowledges the legitimacy of the concerns of the DAU and the DLRCC as to *“encroachment on Dalguise House that overpowers the protected structure and detracts from its vista from the northern approach and when viewed in the context of this site”* such that mitigatory conditions were required. Notably, the Inspector says, *“Any development of this site will have an impact.”* In the context of what has preceded this observation, it is difficult to resist the conclusion that the Inspector would not have bothered making this point if the impact was not significant. Indeed, his point is not that the impact is insignificant – but that it is positive. That is a planning judgment to which I of course defer - but that an impact will be positive is no answer to the question in EIA Screening whether the impact is significant.

174. As to Trees, the Inspector says the following²⁸⁶:

- Numerous third-party observers, including the DAU and the Irish Georgian Society, raised objections to the proposal based on loss of historical landscape grounds. The fundamental issue raised related to site clearance and the removal of trees and the impact this would have on the character of the area, the setting of Dalguise House, the loss of formal gardens and the loss of outlook for adjoining residential properties, including a number of protected structures. I mention this not to agree or disagree with such objections (which is not for me to do) but to identify the issue which the Inspector considered he was addressing in what followed.

²⁸⁵ Inspector's report §12.4.5

²⁸⁶ Inspector's report §12.9

- The *“issue remains that in order to facilitate the development of the site, which contains Dalguise House, substantial site clearance and tree removal is required.”* He states, *“I have examined the Architectural Impact Assessment and the arborist report and I conclude that there is no doubt that any site clearance will have an irreversible impact on the character of the site.”*²⁸⁷ Indeed, a perusal of figures 1 and 2 above renders this conclusion inescapable.
- *“In relation to the impact on the adjoining protected structure. I am of the view that the setting of Dalguise House is one of the few intact examples of its type left in the Dun Laoghaire area.”*
- *“I note that in this instance for the most part the development is designed to have cognisance of the sensitive and restricted nature of the site. The fact remains however, that the only way to develop the site is by the infilling and loss of the grounds and gardens of Dalguise House. Furthermore the proposal involves the retention of significant amount of trees with additional landscaping proposed where required. The clearing trees from the site to accommodate a residential development will inevitably have an irreversible impact on the setting of the protected structure and a visual impact on the surrounding area. In my opinion the grounds of Dalguise House lend themselves to redevelopment, the sustainable use of a zoned serviced site and also ensure the continued use of protected structures that otherwise may fall into further disrepair.”*²⁸⁸

Yet again the Inspector acknowledges the sensitive quality of the site – whereas the Board’ Impugned Decision deemed it devoid of environmental sensitivities.

175. As text in the Planning Assessment section of the Inspector’s Report explaining why the Proposed Development is acceptable the foregoing passage is entirely proper. It might well have appeared in an EIA. But looking at it as part of an exercise in considering the report as a whole for purposes of EIA Screening, it is impossible to reconcile with a finding of insignificant effect. Not least, when one remembers that the protected designation establishes the environmental sensitivity of the lands, the following sentences are irreconcilable with a finding of insignificant effect:

- *The only way to develop the site is by the infilling and loss of the grounds and gardens of Dalguise House.*
- *The clearing trees from the site to accommodate a residential development will inevitably have an irreversible impact on the setting of the protected structure and a visual impact on the surrounding area.*

176. In my view, in pursuit of reading the EIA Screening as part of the Inspector’s report as a whole, I have found nothing to supplement and much that at very least tends to undermine the finding of no significant effect.

²⁸⁷ Emphasis added

²⁸⁸ Emphases added

177. It is perfectly possible to understand from his report why the Inspector found the effects of the Proposed Development on Architectural Heritage acceptable. It is also possible to understand from the report why the Inspector found some effects on Architectural Heritage positive. Both are legitimate questions in a planning assessment and in EIA. But neither is the question to be answered in EIA Screening. In EIA Screening the only question is whether the effect of the proposed development will be significant. As to the matter of Cultural Heritage, I am unable to discern the reasons for the Inspector's view that the effects would be insignificant. Indeed, insofar as rationale is discernible, it tends distinctly to the opposite conclusion.

The Impugned Permission – EIA Screening

178. As recorded earlier, the Impugned Permission also screened out EIA. The Board did not explicitly adopt its Inspector's report in this regard but, as its direction records that the "*Board decided to grant permission generally in accordance with the Inspector's recommendation*", the Inspector's EIA screening must be taken as the Board's save to the extent the Board explicitly disagrees.

179. While the Inspector must be inferred to have done so²⁸⁹ in any event the Board explicitly considered that the EIA Screening Report submitted by Lulani identified and described the effects of the proposed development on the environment – and did so "adequately". Give that the whole purpose of the Screening Report is to address the possibility of significant such effects, I read the Board's decision as encompassing and endorsing the adequacy of the EIA Screening Report's treatment of significance of effect. I have already explained why this cannot have been adequate. Counsel for the Board says that it was open to the Board to form its own view of significance. That is undoubtedly true but there is no evidence or record that it did - whereas it did endorse the EIA Screening Report.

180. The Board's EIA screening was explicitly based on a finding of "*absence of any significant environmental sensitivities in the area*". Counsel for the Board repeated this view – describing the Proposed Development as in an area which has "*no particular environmental sensitivities.*" Absent reasons explaining this assertion, it seems impossible to understand of a Site of which all, or almost all, is a Protected Structure consisting of Dalguise House and its curtilage, the designation of which as such is a statutory determination that it is of "*special architectural, historical, archaeological, artistic, cultural, scientific, social or technical interest*". Not merely that, but the designation is necessarily that it is of such interest to such a degree that its entry on the Register of Protected Structures is a mandatory statutory obligation of the Planning Authority. And further, in consequence of that designation Dalguise House and its curtilage requires to be, and is, protected in the manner laid down by statute. Accordingly, it is difficult to see that statutory protection does not amount in substance to a declaration of significant environmental sensitivity. The Board must make

²⁸⁹ See above

its own determination of environmental sensitivity and is not formally bound by the Planning Authority's compliance with its obligation as to designation of protected structures – but such circumstances at least require that the Board articulate its reasons for its finding of *“absence of any significant environmental sensitivities in the area”*. No such reasons are given in the Board's decision and, as my analysis of the Inspector's report demonstrates, none are apparent in that report. Indeed, it seems to me that the Inspector had explicitly found such sensitivities and the Board gave no reason for disagreeing – as to the significance of which in SHD cases see **Clonres**²⁹⁰.

181. The finding of *“absence of any significant environmental sensitivities”* on a site largely consisting of a protected structure is all the more difficult to understand given the EIA Directive:

- Specifically recites the aim of *“protection and promotion of cultural heritage comprising urban historical sites and landscapes, which are an integral part of the cultural diversity that the Union is committed to respecting and promoting”*. The recital continues:

“In order to better preserve historical and cultural heritage and the landscape, it is important to address the visual impact of projects, namely the change in the appearance or view of the built or natural landscape and urban areas, in environmental impact assessments.”

- At Article 3, requires EIA of significant effects on *“cultural heritage and the landscape”* and Annex III, setting out the Criteria for EIA Screening – replicated in Schedule 7 PDA 2001 - lists *“The environmental sensitivity of geographical areas likely to be affected by the proposed development, with particular regard to (a) the existing and approved land use (c) the absorption capacity of the natural environment, paying particular attention to the following areas: (viii) landscapes and sites of historical, cultural or archaeological significance.”*

182. Once one identifies that the Site has *“significant environmental sensitivities”* as to *“cultural heritage and the landscape”*, reflected in its Protected Status and which extends to a curtilage which will, in the Inspectors' terms, be *“no doubt”* irreversibly transformed²⁹¹ as the *“only way to develop the site is by the infilling and loss of the grounds and gardens of Dalguise House”* involving inevitable *“irreversible impact on the setting of the protected structure and a visual impact on the surrounding area”*²⁹², it is impossible on the information before me to see from the Impugned Decision how it was concluded that, as to Cultural Heritage, EIA was not required.

²⁹⁰ Clonres CLG v An Bord Pleanála [2021] IEHC 303 §99

²⁹¹ Inspector's report §12.4

²⁹² Inspector's report §12.9

EIA Screening - Reasons

183. **Simons**²⁹³ records that an EIA screening determination must include, or refer to the main reasons and considerations, with reference to the relevant criteria listed in Sch.7 to the Planning and Development Regulations 2001, on which such determination is based. In **Eco Advocacy**²⁹⁴ Humphreys J has referred questions to the CJEU as to the form and content of reasons in EIA screening but I don't think I need the answers to decide the present case. **Mellor**²⁹⁵ is authority that an EIA screening decision that a development did not require EIA must contain or be accompanied by sufficient information and reasons to make it possible for third parties to check that it was based on adequate screening carried out in accordance with the EIA Directive. **Bateman**²⁹⁶ emphasised that an EIA screening decision need not be elaborate, but must be carefully and conscientiously considered, must be based on information both sufficient and accurate and must demonstrate that the issues have been understood and considered. In the **Basildon Golf Course**²⁹⁷ case Pill LJ emphasised that a screening need not be elaborate, but must demonstrate that the issues have been understood and considered.

184. The reason why the irreversible infilling and loss of a curtilage which merited mandatory entry on the Register of Protected Structures and statutory protection accordingly would, as a matter of EIA Screening not be likely to have significant effects on the environment can only be described as a main reason. Yet it nowhere appears in the decision. In making this observation I am conscious that the Inspector clearly considered such infilling and loss justified but that was not the issue in EIA Screening – the issue was whether it was significant²⁹⁸. Indeed the same observation could be made as to Dalguise House more generally – not just the curtilage. We are given by the Impugned decision to understand why the likely effect of the proposed development is acceptable but not why it is insignificant.

185. Indeed the very attention devoted by the Inspector to a non-EIA justification of the infilling and loss of the protected curtilage implies the answer to the “significance” question posed by the Commission²⁹⁹ whether that loss “*ought to be considered and to have an influence on the decision whether to grant development consent*”. The other checklist questions listed above include:

- Will there be a large change in environmental conditions (as to Cultural Heritage)?
- Will new features be out-of-scale with the existing environment? (This is to be answered not by way of a pejorative value judgment but simply as a factual matter of scale)
- Is there a risk that protected sites, areas, features will be affected?
- Will the effect be permanent rather than temporary?
- Will the impact be continuous rather than intermittent?

²⁹³Planning Law, 3rd Ed'n (Browne) §14 - 593

²⁹⁴ Eco Advocacy CLG v An Bord Pleanála [2021] IEHC 610 (Humphreys J, 4 October 2021)

²⁹⁵ (Mellor) v Secretary of State for Communities and Local Government (Case C-75/08), [2010] Env LR 18

²⁹⁶ R(Bateman) v South Cambridgeshire District Council [2011] EWCA Civ 157 citing R (Friends of Basildon Golf Course) v Basildon District Council [2010] EWCA Civ 1432

²⁹⁷ R (Friends of Basildon Golf Course) v Basildon District Council [2010] EWCA Civ 1432 §62

²⁹⁸ I apologise for repeating this point but it arises repeatedly on the facts and is essential.

²⁹⁹ European Commission's EIA Screening Guidance 2017 see above

- Will the impact be irreversible?

As applied to the present case, the answer to at least the last four questions is obvious.

186. It is relevant also to note that EIA screening must be considered in light of the precautionary principle – as is recognised by the relevant Ministerial Guidelines.³⁰⁰ It is difficult to see that the answers as to Cultural Heritage in this case could rationally suggest other than significance. Even if that is not so, the precautionary principle points up the necessity that the screening decision state reasons why the infilling and loss of the protected curtilage is insignificant.

The Board's Arguments

187. The Board argues that it suffices, to identify that it applied the correct test, to note that the Inspector concluded that *“the application of the criteria in Schedule 7 to the proposed sub-threshold development demonstrates that it would not be likely to have significant effects on the environment”*. I disagree in circumstances where such a finding was irretrievably dependent on an EIA Screening Report which could not properly be a basis for discerning significance or insignificance because it had adopted an erroneous approach to discerning significance.

188. And as to the proposition, based on **Weston**³⁰¹ that a decision cannot be quashed if there is any evidence to support it, that addresses an irrationality argument not made here. But in any event I have seen no such evidence - none which could support the proposition that the irreversible infilling and loss of a curtilage which merited mandatory entry on the Register of Protected Structures and statutory protection accordingly would, as a matter of EIA Screening, not be likely to have significant effects on the environment.

189. I note in particular and agree with the observation of Humphreys J in **Doorly v Corrigan**³⁰² that:

“It is verging on self-evident that removal of a significant portion of trees surrounding a historic house set in a wooded heritage garden potentially has significant effects on the environment, certainly enough effects to pass any screening test and require full environmental impact assessment.”

190. The wooded heritage garden in question in that case was, significantly, on the record of the Heritage Gardens maintained on the National Inventory of Architectural Heritage (NIAH) established

³⁰⁰ Guidelines for Planning Authorities and An Bord Pleanála on carrying out Environmental Impact Assessment August 2018 §3.12.

³⁰¹ *Weston v An Bord Pleanála* [2008] IEHC 71

³⁰² [2022] IECA 6 §184

by statute³⁰³ and also a protected structure. Dalguise House is the latter only but, as recorded earlier in this judgment, Humphreys J considered³⁰⁴ protected structure status to bring a location within the contemplation of Annex III of the EIA Directive. It is also of interest that, in considering the question whether to order remediation³⁰⁵, Humphreys J considered impact on the protected structure status relevant – as was a consideration of the damage to the environment that would be caused by not ordering reinstatement.

191. It seems very likely that the observations of Humphreys J, in their full force, will not apply to all works on protected structures so as to require EIA. I am very far from saying anything of the sort or that works on protected structures cannot be screened out of a requirement of EIA. It is easy to see such a view resulting in the legislative overkill feared by Sharpston J³⁰⁶. Questions of degree and judgment will arise as to significance of environmental effect. And entry in the NIAH may in some senses be a “step above” protected status. But the observations of Humphreys J appear to me to provide considerable support for the necessity that EIA screening should address the question of significance of environmental effect on protected structures and provide adequate reasons for deeming them insignificant – at least where works such as the “*infilling and loss*” of a protected curtilage is concerned.

Conclusion – EIA Screening, Cultural Heritage

192. Accordingly, the Impugned Permission must be quashed for two reasons:

- In finding that the EIA Screening Report submitted by Lulani identified and described adequately the effects of the proposed development on the environment the Board adopted a report which did not describe those effects adequately and could not of itself, in law, provide an adequate basis for or reasons for an EIA screening determination that EIA was not required.
- Whether or not I am correct in my first reason, I find that the Board failed to give adequate reasons for its EIA Screening decision as to insignificance of effect on Cultural/Architectural Heritage.

193. As the issue whether EIA should be done turns on the question of “significance” of effect, and notwithstanding my analysis above of the significance of the protected status of Dalguise House, including its curtilage, EIA Screening should be done by the Board rather than the Court. My view is that remittal of this matter to the Board, if appropriate, would not merely be to enable statement of reasons for the EIA Screening decision but would be to require repetition of the EIA Screening itself. I

³⁰³ the Architectural Heritage (National Inventory) and Historic Monuments (Miscellaneous Provisions) Act 1999

³⁰⁴ [2022] IECA 6 §176

³⁰⁵ §214

³⁰⁶ See below

am also of this view given the view I take of the EIA Screening report and the Board's reliance on it. But before forming a final view I will hear the parties further.

194. Given the conclusion reached above I do not find it necessary to decide the allegation of failure properly to apply §6.1.3 of the Development Plan and in particular Objectives AR1 and AR8 as to the protection of 19th century houses and estates contrary to S.9(2)(a) of the 2016 Act. However my conclusion above that the Board failed to give adequate reasons for its EIA Screening decision as to insignificance of effect on Cultural/ Architectural Heritage is amplified by Objective AR1 establishing policy to

- protect protected structures *“from any works that would negatively impact their special character & appearance”*.
- ensure that development proposals to Protected Structures, their curtilage & setting have regard to the Architectural Heritage Protection Guidelines.
- ensure that new & adapted uses are compatible with the character & special interest of Protected Structures.

My point is not to find a failure to apply or to have regard to Objective AR1 but to point up the failure to give reasons for considering the Proposed Development environmentally insignificant as to cultural heritage.

EIA SCREENING – BIRDS & GREEN SITES NETWORK

Bird Surveys

Pleadings & Submissions

195. The Applicant pleads³⁰⁷ as to EIA Screening:

- That the Developer failed to include its breeding bird survey with the application or make it available for public inspection so neither the Applicants nor the Board could verify or interrogate the adequacy of the inspection.
- Error in accepting the Developer's assertion that the site was surveyed for wintering birds and that none were found - as the survey was not done in the wintering bird season.
- The Developer failed to state its bird survey methodology – such that its scientific basis is not verifiable.

196. The Board pleads, in addition to a traverse, that:

³⁰⁷ §E.1.4 & §E.2.5

- The AA screening report³⁰⁸ by an expert and the Inspector³⁰⁹ noted that “*the March 2020 survey noted no wetland and wading birds, which is within the period of wintering birds*”.
- The Inspector³¹⁰ noted that a breeding bird survey on 2 March 2020 was in the optimal nesting season. Listed birds³¹¹ were displaying nesting/breeding behaviour. The adequacy of the bird survey is classically a matter for the Board to determine.
- The AA screening report concluded that the lands are not suitable for any bird species listed as a feature of interest for any SPA³¹² in Dublin Bay.

197. Lulani pleads likewise, asserts that the surveys done were appropriate and sufficient and adds that the Inspector records³¹³ that:

- the breeding bird survey of 2 March 2020 is referred to in the Ecological Impact Statement³¹⁴
- the Ecological Impact Statement notes that the treelines and woodland provide habitat for common breeding bird.

198. The Applicants’ written submissions on this issue are brief. They are limited to the failure to provide the Bird Surveys to the Board - such that neither the public nor the Board was able to scrutinise the claims made in the application against the raw data on which they were purportedly based. That data, it is said, is “relevant material” for the purposes of S.9 of the Act, and for screening purposes. That the Inspector noted the conclusions of, or based on, the Bird Surveys or that their adequacy may be “*classically a matter for the Board to determine*” is irrelevant to the question whether the Board actually had the Bird Surveys - which it did not. The Applicants’ written submissions cite no authority in this regard.

199. The Board’s written submissions on this issue are as brief: they essentially repeat its pleadings and assert that “*the evidence that resulted from the survey was presented in the Ecological Impact Statement and was before the Board on the presence of breeding birds and the Board could act accordingly.*” Neither in pleadings nor written submissions does the Board assert that it had the Bird Surveys themselves. Again no authority is cited.

200. Lulani’s written submissions on this issue are also brief and also cite no authority. They deny any requirement for the bird survey raw data to be included with a permission application. Otherwise they essentially repeat their pleadings as to the content of the Ecological Impact Statement³¹⁵ as referred to in the Inspector’s report³¹⁶ and also assert that information from the bird survey was in the EIA Screening Report.

³⁰⁸ p8

³⁰⁹ Inspector’s report p85

³¹⁰ Inspector’s report p42 & 73

³¹¹ Magpie, wood pigeon, hooded crow, blackbird, blue tit, coal tit, grey tit and heron (*ardea conerea*)

³¹² Special Protection Area designated under the Birds Directive.

³¹³ Inspector’s report §12.8.2

³¹⁴ Ecological Impact Statement §3.4 – Exhibit CC1 Tab 5

³¹⁵ §§3.4 and 3.5

³¹⁶ §12.8.2

The Information before the Board & the Evidence in the Judicial Review

201. The AA Screening Report contains no more relevant information than is pleaded. The Ecological Impact Statement records:

- A site visit on 30 August 2018 and that August lies within the season for surveying breeding birds (although sub-optimal).³¹⁷
- Again, that August lies within the general breeding season but outside the optimal season for surveying breeding birds, as many birds have finished nesting and/or may have moved on. The following list of birds from the site is indicative however, and species listed can be assumed to be breeding: Magpie *Pica pica*, Great Tit *Parus major*, Blackbird *Turdus merula*, Wood Pigeon *Columba palumbus* and Robin *Erithacus rubecula*. These species are of low conservation concern/green list (Colhoun & Cummins, 2013).³¹⁸
- A breeding bird survey on March 2nd 2020 was in the optimal nesting season. The following birds displayed nesting/breeding behaviour: Magpie, Wood Pigeon, Hooded Crow *Corvus corone*, Blackbird, Blue Tit *P. caeruleus*, Coal Tit *P. ater*, Great Tit and Grey Heron *Ardea cinerea*. Suitable nesting habitat is available for common garden birds in treelines, woodland and areas of horticultural shrubs. There is no suitable habitat of high conservation concern.³¹⁹
- While the Grey Heron is subject to no special protection measures, and is not a species of conservation concern, these nesting sites are unusual³²⁰ in suburbia. Four nests were observed – three clustered in three separate Pines along the western boundary, and one in a Beech close to the Stradbrook Stream. The three nests along the western boundary were complimented by three further nests, in a Pine in the neighbouring residential estate outside the Site.³²¹
- High value treelines and woodland provide habitat for common breeding birds.³²²

202. Dr William O'Connor, Biologist and Environmentalist, provided two reports and an affidavit³²³ for the Applicants. He addressed, inter alia, the adequacy of the Bird Survey before the Board. Lulani objects that these cannot inform the Court's decision as they were not before the Board. Mr Fogarty, Ecologist, who prepared the Ecological Impact Statement and the AA Screening report swore an affidavit in response to the first O'Connor report, to which affidavit the second O'Connor report is in turn a response. They disagree vehemently and in some detail, giving reasons, as to the adequacy of the Bird Survey and each cites third party standards/publications in support. There is no suggestion that Dr O'Connor's views had been before the Board.

³¹⁷ §2

³¹⁸ §3.4.2

³¹⁹ §3.4.2

³²⁰ The text says "usual" but that this is a typo is clear from §5.1 which states: "their nests on this site are unusual features in a suburban context."

³²¹ §3.4.2 - These nests are marked on Figure 2 - a habitat map.

³²² §3.5

³²³ Affidavit of William O'Connor 31 May 2021 - Report 14 October 2020 in Exhibit WOC1 tab 1 – Report 28 May 2021 in Exhibit WOC1 tab 2. The report of 14 October 2020 was first exhibited to Christopher Craig's Affidavit of 14 October 2020 at CC1 Tab 49

203. SSA Architects for MRRA objected³²⁴ in the planning process as to the adequacy of the Bird Survey regarding Brent Geese and as to the effect of the development on herons. The DAU submission noted that *“A survey of nesting birds on the site on the 2nd of March 2020 identified eight bird species displaying breeding behaviour on the site, all tree nesting species. This was early in the breeding season and it is likely that other bird species also nest on the site including summer migrants. Of the eight species identified seven are birds commonly nesting in suburbia.”* The seventh was the Heron – which the DAU addressed in some detail. That the Heron was taken into account by the Board is reflected in the Inspector’s report and the Impugned decision – most notably in Condition 18, which requires a grey Heron Conservation Plan for the Site. However neither SSA Architects nor the DAU made, or made anything like, the fundamental and swingeing complaints of Dr O’Connor as to formality, methodology and data of the Bird Survey. Other observers also addressed the issue of birds in lesser detail but I found none – and the Applicants directed me to none – making criticisms of the order or expertise made by Dr O’Connor after the impugned decision was made.

Discussion & Conclusion

204. To note the paucity of the contributions of all sides on this question in legal and oral submissions is in no way to doubt the highly expert legal teams on all sides. In the context of the onus of proof being on the Applicants it seems more likely to reflect an underlying paucity in the Ground. In general terms, neither the Board nor observers can properly be expected to have faith in a developer’s experts and take his/her conclusions on faith as properly drawn from the methodological approach and data on which they are based. The drawing of conclusions is an exercise in professional judgment with which others are entitled not merely to disagree but to be enabled to disagree: they are entitled to know the methodological approach and the data underlying those experts’ conclusions which will render their conclusions comprehensible, interrogable and comparable to other evidence on the same topic. This is of the essence of the right of public participation in the planning process.

205. However the call for information can be never-ending and is not an end in itself. The nature and detail of the information required to render the conclusions comprehensible, interrogable and comparable to other evidence will inevitably vary with the expert discipline in question, the question the expert is addressing and the conclusion the expert draws. Also, and ex hypothesi, screening for EIA is not EIA. One of its purposes is to avoid imposing the burden of EIA unnecessarily. Inherent in that is the implication that typically, the information and data required for EIA screening will not be of the same order as is required for EIA. The adequacy of the information and data supplied is assessed by reference to the requirements of the task in hand – which in this case is EIA screening, not EIA.

³²⁴ Exhibit CC1 tab 15

206. It is for the Board in the first instance to decide if the information supplied suffices for its purpose. The Board's reply that *"The adequacy of the bird survey is classically a matter for the Board to determine"* was met with the understandable response by the Applicants that the Board cannot decide the adequacy of a survey with which it has not been provided. However it seems to me that the Board's reply could properly be reformulated to read: *"The adequacy of the information supplied as to the bird survey is classically a matter for the Board to determine"*. As so reformulated it seems to me valid.

207. The Ecological Impact Statement refers to its methodological approach. On the specific issue of "data", there was "data" before the Board by way of identification of listed species of wintering and breeding birds found on site on two particular dates. Whether that information sufficed for the purpose of the EIA Screening decision the Board had to make was a matter for the expert Board. Whether, on the contrary, that data was insufficient for that purpose for any of the reasons ventilated by objectors - for example as to the Brent Goose - was equally a matter for the expert Board. Whether that data was insufficient for that purpose for any of the reasons ventilated by Dr O'Connor in these proceedings should and would have been a matter for the Board had those reasons been ventilated before the Board.

208. This seems to me to be an issue on which the Board is to be judged on the information which was before it when it made the impugned decision. That is perhaps all the more so where the MMRA did object by reference to the Bird Survey but did not do so, as it might have done, in the terms now advanced by Dr O'Connor. Judicial review is not, at least generally, a second chance to raise issues which could have been raised before the Board. The Applicants now ask me to quash the Impugned Decision on the basis that the Board failed to decide a controversy on the basis of evidence not before it before it. That I respectfully decline to do.³²⁵

209. I emphasise that I make no finding, as between Mr Fogarty's views and Dr O'Connor's views, regarding the substantive adequacy of the Bird Survey. That is not for me – as Ferriter J has recently said in **Madden**³²⁶ in an AA context: *"It is not the role of the Court to enter the arena by seeking to weigh the qualitative merits of the respective submissions made on behalf of the applicant and the notice party on the question of the adequacy of the NIS*". I think I can properly say that Dr O'Connor's views had at least sufficient substance that, had they been before the Board, the Board would have had to take them seriously and give adequate reasons for preferring one view over the other. But they were not before the Board.

³²⁵ The Board and Lulani correctly cite in this regard *Hennessy v An Bord Pleanála* [2018] IEHC 678; *People Over Wind v An Bord Pleanála* [2015] IEHC 271; *Sliabh Luachra against Ballydesmond Windfarm Committee v An Bord Pleanála* [2019] IEHC 888 and *Reid v An Bord Pleanála* [2021] IEHC 230,

³²⁶ *Madden v An Bord Pleanála* [2022] IEHC 257

Impact on wider network of green sites.

210. The Applicant pleads³²⁷ as to EIA Screening that the Board failed to consider the impact of the loss of the Dalguise gardens on the wider network of green sites across Dublin. The Applicant's written submissions on this account are very short and cite no authority:

"The Board failed to consider the impact of the loss of the Dalguise gardens on the wider network of green sites across Dublin. It considered Dalguise merely as a garden surrounded by an urban area, without regard to its function as part of the biodiversity network of the south Dublin area, as required by Annex III(2)(b)³²⁸. The inspector said that the site "is not subject to a nature conservation designation and does not contain habitats or species of conservation significance." This is erroneous because bats are of conservation significance. She did not consider the significance of the impact on the network of sites used by bats in south Dublin."

211. The Board's submissions reply that:

- the wider network of green sites across Dublin is unspecified – which I read as not identified.
- The Board did not misunderstand the nature of the development and the footprint it would occupy or, as stated in the Ecological Impact Statement that the site was generally of "low ecological value."
- The papers before the Board expressly treated of the ecological value of the Site
- The issue was addressed further in the EIA Screening Report³²⁹:

"In terms of the 'relative abundance, quality and regenerative capacity of natural resources in the area', the proposed development will not, individually or in combination with other projects, significantly impact on the integrity of the natural resources in the area, having regard to the nature and extent of the proposed development and the character of the receiving environment and the surrounding area. The area in the immediate vicinity of the proposed development has absorption capacity in terms of any environmental effects of the proposed scheme."

- It is not enough in law for the Applicant to simply assert without a basis that this was just wrong. The question of wider impact was addressed and no such impact was found. In this respect, it does not lie for the Applicant to make some general allegation that a lack of cumulative assessment occurred by reference to no specific facts or argument.³³⁰

³²⁷ §E.1.4 & §E.2.5

³²⁸ Annex III of the EIA Directive 2014 sets out EIA screening criteria for determining if EIA is needed. Annex III(2)(b) states that "The environmental sensitivity of geographical areas likely to be affected by projects must be considered, with particular regard to: (b) the relative abundance, availability, quality and regenerative capacity of natural resources (including soil, land, water and biodiversity) in the area and its underground;" It is replicated, by way of transposition to Irish Law, in Schedule 7 PDR 2001

³²⁹ §4.24

³³⁰ See e.g. Fitzpatrick v An Bord Pleanála [2019] IESC 23 where the Supreme Court held clearly that in carrying out an EIA (and logically also in screening for EIA) the assessment is to "carried out of the project or proposed development for which the planning permission is sought."

³⁶ See Tabs 3 to 6 to the Affidavit of Pierce Dillon.

212. Lulani submits that the Inspector did consider the issue but cite an excerpt³³¹ which is unconvincing to that effect as it only very vaguely refers to effect on the surrounding area as opposed to effect on the Site itself.

213. The Ecological Impact Statement Site Survey and Evaluation³³² state, inter alia:

- This part of south Dublin is a built-up residential zone and is predominantly composed of artificial surfaces although parks and gardens do provide some semi-natural habitat.
- The site is composed of a combination of buildings and artificial surfaces .. and amenity grassland ... interspersed scattered trees and stretches of treeline ... Trees are a range of species but are predominantly non-native ... Native trees are infrequent.
- Suitable nesting habitat is available for common garden birds in treelines, woodland and areas of horticultural shrubs. There is no suitable habitat which are of high conservation concern.
- Reference is made to the herons on site.
- In summary, [the] site is grassland with trees and artificial habitats within a built-up area. There are no examples of habitats listed on Annex I of the Habitats Directive or records of rare or protected plants.
- High value treelines and woodland provide habitat for common breeding birds and foraging areas for bats.

214. Table 15 of the Ecological Impact Statement summarises the “*Evaluation of the importance of habitats and species on the Dalguise House site*” as follows:

<ul style="list-style-type: none"> • Buildings and artificial surfaces • Amenity grassland 	Negligible ecological value
<ul style="list-style-type: none"> • Non-native treeline • Mixed woodland • Monkstown Stream 	Low local ecological value

215. The Ecological Impact Statement considers construction phase impact³³³ due to “*The removal of habitats including buildings, amenity grassland, treelines and individual trees*” and says: “*These are predominantly of negligible or low local value*”.

216. The EIA Screening report in a table explicitly by reference to Annex III(2)(b) EIA Directive /Schedule 7 PDR 2001 states:³³⁴

- “*As stated in the Ecological Impact Assessment, the lands are generally low ecological value, save for the tree line.*”

³³¹ Citing §12.9 of the Inspector’s report

³³² §3.3 – 3.5

³³³ §5.1

³³⁴ p41

- The perimeter tree line is generally being retained and augmented, adding the ecological value of the site.
- The AA Screening Report excludes the possibility of significant impacts on European Sites.
- There will be no significant likely effects on the environment in relation to natural resources in the area.
- Mitigation measures relative to woodland and bat habitats will be implemented.
- There will be no significant loss of soil, land, water or biodiversity.

217. The EIA Screening report also addresses “Biodiversity” narratively³³⁵ in terms which expand on that table and by reference to the Ecological Impact Assessment. Inter alia it states that *“The tree lines are high value and provide habitat for birds and bats. However overall, the site is of low, local ecological value. Mitigation measures are proposed to deal with habitat loss, disturbance to birds’ nests and bats.”*. Of the 364 trees on site 174 will be retained including both category A trees and 246 new trees will be planted.

218. I pause to observe that there is some dissonance in the EIA Screening report and the Ecological Impact Statement as to the ecological value of the trees – whether high or low. However on an overview the thrust is clear that they are mostly non-native and of low intrinsic value save as habitat for common breeding birds and foraging areas for bats. I do not see this as an issue creating a real difficulty nor, in fairness, was that argued.

219. The DAU appears to have so understood the position – observing³³⁶ that as the trees to be removed are for the most part non-native species, their loss is not considered of major significance from a nature conservation perspective. However, the DAU sees a definite risk of potential direct injury to birds and bats on site depending on the timing and methods of tree felling employed. The DLRCC report to the Board³³⁷ noted the biodiversity/ecology objections and the views of such as the DAU and the content of the Planning Application as bearing on such issues³³⁸ but does not comment. The Inspector notes the absence of a report from the DLRCC Biodiversity officer. No doubt that Biodiversity officer might have been best placed to consider the posited biodiversity network of the south Dublin area and the DLRCC would have drawn attention to any serious concerns. But as the DLRCC, when noting these materials, explicitly defers to the Board as competent authority in EIA and AA it may be best to draw no inferences. In any event, to do so might be to stray into the merits. But that I should draw no inferences from the absence of a report from the DLRCC Biodiversity officer does not mean the Inspector should not.

³³⁵ §4.33 et seq

³³⁶ As cited by the Inspector at p42 of his report

³³⁷ Exhibit CC1 Tab 19

³³⁸ Listing the AA Screening Report; EIA Screening Report; Ecological Impact Assessment; Bat Impact Assessment, HHQRA

220. The Inspector notes the objections as to biodiversity/ecology and assesses these issues³³⁹. His conclusion on ecology³⁴⁰ should have been more explicit as to his own views, as opposed to the views of others, as to the absence of likely significant ecological impact. But it is nonetheless tolerably clear overall that, as he was entitled to do, the Inspector accepts the content of the Ecological Impact Statement and the EIA Screening report. He is clearer in his acceptance of the position as to tree loss³⁴¹.

221. It is fair to say that the Inspector did not in terms address a general question of effect of ecological loss on the Site on any wider biodiversity network of the south Dublin area. But, importantly, he did do so in respect of the most important such network – of Natura Sites – and screened out AA.

222. The Applicant did not draw my attention to any evidence before the Board:

- Identifying the posited biodiversity network of the south Dublin area (assuming it to be other than the network of Natura Sites).
- Of any biodiversity function performed by such a network.
- Of the present contribution of the Site to the performance of any such function.
- Of any effect of the development on the contribution of the Site to the performance of any such function.
- Of any resultant consequence for the posited biodiversity network.

223. Given the overall thrust of the evidence which was before the Board as to the generally low ecological value of the site, it is not apparent that there was any reason to expect the Board to treat of this “biodiversity network” issue on foot of the loss of a site of generally low ecological value in the context of mitigation measures as to the loss of its primary ecological virtues – its trees and Herons. Overall this ground seems to me to fall into the category of a theoretical and unsubstantiated argument. I respectfully reject it.

224. From this observation I would except bats. As I have deferred consideration of all issues as to bats I will allow the possibility of further argument at a later hearing of this matter as to the function performed by any such network as it relates to bats.

SCIENTIFIC EXPERTISE OF THE BOARD

225. The Applicant pleads that the Board lacked sufficient scientific expertise to adequately, objectively and scientifically evaluate the proposal before it, such that it failed to carry out an

³³⁹ Inspector’s report §12.8 & 12.9

³⁴⁰ Inspector’s report §12.8.3

³⁴¹ Inspector’s report §12.9

independent scientific review of the proposal for the purposes of Article 12 of the Habitats Directive. The particulars expand the core ground to encompass EIA screening and AA screening also.

226. But no particulars are pleaded identifying any specific expertise allegedly lacking or how any such lack undermined any of the assessments. Nor was the issue addressed in the Applicant’s written submissions. Accordingly I must reject the plea as insufficiently pleaded and argued.

BUILDING HEIGHT - MATERIAL CONTRAVENTION & APPLICATION OF SPPRs

227. As recorded above, the Board granted permission authorising a material contravention of the Development Plan as to building height. There is no dispute as to the existence of such a material contravention. Nor is it disputed that this material contravention was the subject of submissions by objectors, the DAU, the elected members of DLRCC – all very critical of the Proposed Development by reference to height and density, inter alia by reference to the protected status of Dalguise House and its location with reference to the historic village of Monkstown. The DLRCC executive and the Inspector considered the Proposed Development acceptable from such perspectives only if altered in a degree only very partly accepted by the Board.

S.9(3) & (6) of the 2016 Act, S.37(2)(b) PDA 2000 & S.28 PDA 2000

228. **S.9(3) of the 2016 Act** requires the application of SPPRs to decision of planning applications where “relevant”. S.9(6) permits permissions in material contravention of the development plan if the criteria of **S.37(2)(b) PDA 2000** are met. **S.9(3) and S.9(6)** read as follows:

“(3) (a) When making its decision in relation to an application under this section, the Board shall apply, where relevant, specific planning policy requirements of guidelines issued by the Minister under section 28 of the Act of 2000.

(b) Where specific planning policy requirements of guidelines referred to in paragraph (a) differ from the provisions of the development plan of a planning authority, then those requirements shall, to the extent that they so differ, apply instead of the provisions of the development plan.

(c) In this subsection “specific planning policy requirements” means such policy requirements identified in guidelines issued by the Minister to support the consistent application of Government or national policy and principles by planning authorities, including the Board, in securing overall proper planning and sustainable development.

.....

(6) (a) Subject to paragraph (b), the Board may decide to grant a permission for a proposed strategic housing development in respect of an application under section 4 even where the proposed development, or a part of it, contravenes materially the development plan or local area plan relating to the area concerned.

(b) The Board shall not grant permission under paragraph (a) where the proposed development, or a part of it, contravenes materially the development plan or local area plan relating to the area concerned, in relation to the zoning of the land.

(c) Where the proposed strategic housing development would materially contravene the development plan or local area plan, as the case may be, other than in relation to the zoning of the land, then the Board may only grant permission in accordance with paragraph (a) where it considers that, if section 37(2)(b) of the Act of 2000 were to apply, it would grant permission for the proposed development.”

229. **S.37(2)(b) PDA 2000** now reads as follows:

“(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.*

(c) Where the Board grants a permission in accordance with paragraph (b), the Board shall, in addition to the requirements of section 34(10), indicate in its decision the main reasons and considerations for contravening materially the development plan.”

230. **S.28 PDA 2000**, as relevant, now reads as follows:

“28. (1) The Minister may, at any time, issue guidelines to planning authorities regarding any of their functions under this Act and planning authorities shall have regard to those guidelines in the performance of their functions.

.....

(1C) Without prejudice to the generality of subsection (1), guidelines under that subsection may contain specific planning policy requirements with which planning authorities, regional assemblies and the Board shall, in the performance of their functions, comply.”

231. As McDonald J commented in **O’Neill**³⁴² – *“The difference between the requirement to have regard to ministerial guidelines (contained in s.28(1) of the 2000 Act) and the requirement to comply with specific planning policy requirements (contained in s.28(1C) of the Act) is obvious. Section 28(1C) imposes a very clear mandatory requirement that, where specific planning policy requirements are specified in ministerial guidelines, they must be complied with. It is not sufficient merely to have regard to them (which is a relevant requirement in relation to other aspects of the guidelines).”*

SPPR1 & Material Contravention - The Impugned Decision, the Pleadings & Submissions

232. As recited earlier in this judgment, by the Impugned Decision the Board records that the proposed SHD would materially contravene the Building Height Strategy of the DLRCC Development Plan with respect to building height limits. It cites S.9(6) of the 2016 Act and S.37(2)(b) PDA 2000 in considering permission nonetheless justified, inter alia:

“..... having regard to Government policies as set out in³⁴³ the National Planning Framework (in particular objectives 13 and 35) and the Urban Development and Building Height Guidelines for Planning Authorities, in particular Specific Planning Policy Requirement 1 and Specific Planning Policy Requirement 3.”

233. The Applicants plead that the Board misdirected itself in law in that *“... it applied SPPR1 to the proposed decision, when that requirement is, by its terms, only capable of applying to the adoption or variation of a County Development Plan by a local authority.”*³⁴⁴

³⁴² O’Neill v An Bord Pleanála et al, including & Ruirside Developments [2020] IEHC 356 McDonald J, 22 June 2020 §145

³⁴³ Emphasis added

³⁴⁴ 2nd Amended Statement of Grounds §15

234. The Board's Statement of Opposition denies³⁴⁵ that it misdirected itself as alleged – a mere traverse. However, and significantly, it goes on to positively plead its obligation under S.9(3) of the 2016 Act to apply relevant SPPRs – even if they differ from the Development Plan and pleads that specific obligation as the basis for a plea that it “*lawfully applied SPPR1*”. So, the Board positively pleads that it deployed SPPR1 – by necessary implication on foot of and because it was obliged by s.9(3) to do so. It pleads that it:

“..... lawfully applied SPPR1³⁴⁶ which provides that in accordance with Government policy to support increased building height and density in locations with good public transport accessibility, particularly town/ city cores, planning authorities shall explicitly identify, through their statutory plans, areas where increased building height will be actively pursued for both redevelopment, regeneration and infill development to secure the objectives of the National Planning Framework and Regional Spatial and Economic Strategies and shall not provide for blanket numerical limitations on building height.

235. From the words “*In accordance ...*”, the foregoing recites SPPR1 verbatim. I need not set out SPPR3 for present purposes save to observe that whereas SPPR1 explicitly applies to the content of statutory plans – such as Development Plans and Local Area Plans – SPPR3 explicitly applies to decisions on planning permission applications.

236. Remembering that the obligations of precision of pleading apply to the Board as to the Applicant, the Board's foregoing pleas unequivocally assert that the Board did apply SPPR1 in making its decision and did so in fulfilment of its obligation under S.9(3) of the 2016 Act. Not only that, but there are no pleas that the Board:

- did not apply SPPR1,
- applied SPPR1 but pursuant to S.9(6) of the 2016 Act, not S.9(3),
- did not apply SPPR1 but merely relied, pursuant to S.9(6) of the 2016 Act and S.37(2)(b) PDA 2000, on the Government Policies identified in SPPR1.

237. So it does not appear to me that it was open to the Board at trial to argue, as it did in reliance on the words “*as set out in*” underlined in the decision text set out above, that it had not applied SPPR1 in making the Impugned Permission but had merely referred to it in the decision as a shorthand means, as it were, of referring in turn to the policies mentioned in SPPR1, which policies it had applied. That was nowhere pleaded. Not merely that, but the argument directly contradicts what the Board did plead.

³⁴⁵ Statement of Opposition §82 et seq

³⁴⁶ Emphasis added

238. That the Board did not, in its Impugned Decision, explicitly invoke S.9(3) of the 2016 Act is immaterial: had the shoe been on the other foot, if it had relied on S.9(3) – as it explicitly did in its pleadings – it would have successfully argued that its invocation was clearly implicit in its decision.

239. I find, as a matter of interpretation of the Impugned Permission in accordance with “XJS” principles³⁴⁷, that the Board did rely on and apply SPPR1 in making its decision - indeed it explicitly did so “*in particular*”. That means the Board regarded SPPR1 as “relevant” and was obliged by S.9(3) of the 2016 Act to apply it – and to do so pursuant to S.9(3), which is what it pleads it did.

240. While the Board’s argument, as to interpretation of its decision, that it relied on the policies stated in SPPR1 but not on SPPR1 per se, appeals to the lawyer/draftsperson, it seems to me to be the kind of argument that the adoption of the XJS intelligent layperson interpretive standard is designed to avoid. And even on the premise of its argument – that its reference to SPPR1 and SPPR3 was merely a convenient shortcut means of citing the relevant policies - the Board could have easily avoided the problem by not taking a shortcut destined, it seems to me, to confuse, if indeed the Board’s purpose was that argued, as opposed to that pleaded.

241. There is a further consideration. SPPR3 is explicitly applicable to decisions on planning applications. The Board cites SPPR3 - from which it follows that SPPR3 is relevant to its decision. By S.9(3), where an SPPR is relevant to its decision the Board must apply it. It must therefore be taken to have applied SPPR3 in this case. On the wording of the decision, SPPR1 and SPPR3 are, for want of a better phrase and not speaking pejoratively, lumped in together. It is not possible to discern in the wording different types or methods of application as between SPPR1 and SPPR3. So that SPPR3 was applied, as I find, at least suggests and in reality implies that SPPR1 was also applied.

Clonres

242. In **Clonres**³⁴⁸ Humphreys J considered an SHD planning permission³⁴⁹ for 657 apartments on lands in Raheny, Dublin. The Board’s impugned order³⁵⁰ included the following:

“The Board considered that a grant of permission that could materially contravene the maximum building height as set out in Section 16.7.2 of the Dublin City Development Plan 2016-2022 would be justified in accordance with sections 37(2)(b)(i) and (iii) of the Planning and Development Act 2000, as amended, having regard to -

³⁴⁷ See *In re XJS Investments Ltd* [1986] IR 750 and many cases since – most recently *Barford Holdings Ltd v Fingal County Council* [2022] IEHC 233. Essentially this line of authority requires that planning documents be construed in their ordinary meaning as it would be understood by intelligent and informed members of the public without particular expertise in law or planning.

³⁴⁸ *Clonres clg v An Bord Pleanála* [2021] IEHC 303

³⁴⁹ By Board Order Abp-307444-20

³⁵⁰ The terms of the Order made by the Board in *Clonres* are not recited by Humphreys J but were made available to me by agreement of the parties.

- objective 13 of the National Planning Framework 2018-2040
- Specific Planning Policy Requirement 1, Specific Planning Policy Requirement 3 and section 3.2 of the Guidelines for Planning Authorities on Urban Development and Building Height 2018 published under Section 28 of the Planning and Development Act 2000,

which state policy³⁵¹ in favour of greater density and height at central accessible locations such as the current application site, subject to performance and development management criteria with which the proposed development would comply.”

243. Humphreys J said of that text in the Clonres decision:

“ 109. The applicant in Clonres pleads that the board erred in relying on SPPR 1 of the 2018 guidelines which requires local authorities to vary their development plans to give effect to the Minister’s policy. The board offered reliance on SPPR 1 as one of the reasons for the material contravention. However, SPPR 1 is clearly about development plans and is not in any way a basis for material contravention. Thus, it is erroneous in law to rely on it as the basis for deciding to permit such a contravention. That is a separate and final ground of invalidity here.”

244. Humphreys J could not be clearer: SPPR1 is not in any way a basis for material contravention. Thus, it is erroneous in law to rely on it as the basis for deciding to permit such a contravention. Given my interpretation of the impugned decision it follows that, following Clonres, the decision must be quashed on this account also.

245. As stated above the Board attempts a distinction between, on the one hand, reliance on SPPR1 per se in applying S.9(3) of the 2016 Act and, on the other hand, reliance for purposes of S.9(6) of the 2016 Act on the policies recorded in SPPR1 (as opposed to SPPR1 per se). It seems to me that the foregoing text of the Board’s decision in Clonres, read as an intelligent layperson, is in all material respects indistinguishable from the text in the present decision. Accordingly Humphrey J’s decision in Clonres is directly on point and, ceteris paribus, binds me to quash the decision in this case on this account.

246. In the oft-quoted words of Clarke J in **Re Worldport**³⁵²: *“It is well established that, as a matter of judicial comity, a judge of first instance ought usually follow the decision of another judge of the same court unless there are substantial reasons for believing that the initial judgment was wrong.”* Clarke J explained: *“If each time such a point were to arise again a judge were free to form his or his own view without proper regard to the fact that the point had already been determined,*

³⁵¹ Emphasis Added

³⁵² [2005] IEHC 189

the level of uncertainty that would be introduced would be disproportionate to any perceived advantage in the matter being reconsidered.” In similar vein, Costello J said in **Heather Hill #1**³⁵³:

“The doctrine of stare decisis plays an important role in ensuring, as far as possible, consistent and uniform interpretation of the law and of statutory provisions in particular. This fulfils the vital role of bringing clarity and consistency to the law, which benefits all and helps to avoid, or at least reduce, unnecessary litigation. Conflicting interpretations of statutory provisions by judges of the High Court are to be avoided if possible, and then only if there are substantial reasons for believing that the initial judgment was wrong.”

247. It is fair to say that Clonres was not, in this respect and for good reason given the impugned decision was quashed in that case for other reasons also, a detailed considered decision as was the decision of Kearns J followed by Clarke J in Worldport. That could affect the degree to which a court would resist reliance on the acknowledged exceptions to the general rule of stare decisis. But it cannot change the starting point – that the general rule applies unless displaced.

248. Incidentally, lest it be thought I did not consider it, I do not in this context agree with the Board in its written submissions that Clonres favours its case.

Pembroke Road

249. The Board, in further pursuit of its unpleaded argument contradicting its pleadings, cites Owens J in **Pembroke Road**³⁵⁴ as upholding the Board’s reliance on SPPR3 for purposes of s.9(6) as opposed to s.9(3) of the 2016 Act. Owens J observed that *“The Board did not apply SPPR 3 in the ministerial guidelines as overriding and replacing contradictory provisions of the Dublin City development plan under s.9(3) of the 2016 Act. The Board chose instead to exercise its power under s.9(6) of the 2016 Act.”*

250. In one of the recent **Ballyboden** cases³⁵⁵ in considering an issue as to the application of SPPR3 in the decision impugned in that case, I considered the relationship between S.9(3) and S.9(6). I noted that the Board, with some reason, suggested that Owens J in **Pembroke** validated the Board’s use of an SPPR via S.9(6) instead of S.9(3). I continued: *“Yet Owens J did observe that “Strictly speaking, exercise of this power³⁵⁶ should not arise where a provision of a development plan touching on any issue is overridden by a specific planning policy requirement in ministerial guidelines. This is because the effect of s.9(3) of the 2016 Act is that where a specific planning policy*

³⁵³ Heather Hill Management Company CLG v An Bord Pleanála [2021] IECA 259

³⁵⁴ Pembroke Road Association v An Bord Pleanála [2021] IEHC 403 at paras.94-96.

³⁵⁵ Ballyboden Tidy Towns Group v An Bord Pleanála, et al, incl. Shannon Homes Construction ULC [2022] IEHC 7 (10 January 2022) §202 et seq.

³⁵⁶ i.e. S.9(6) as to material contravention

requirement must be applied, it replaces the relevant portion of the development plan. This is not a matter for exercise of discretion.” I concluded, inter alia, that:

- S.9(3)(a) has the effect that the application of an SPPR in a given case is not dependent upon misalignment between the SPPR and the Development Plan. Rather, where an SPPR is relevant to, it must be applied to, the decision of a planning application: applied whether the SPPR and the Development Plan align or misalign.
- Where an SPPR is relevant S.9(3) applies whether or not in material contravention of the Development Plan.
- While invoking S.9(3)(b) may also require invocation of s.9(6), given the imperative of S.9(3) it would not seem open to the Board to choose to apply S.9(6) instead of s.9(3).

251. It should be said that it is not apparent that Clonres was cited to Owens J in *Pembroke* – unsurprisingly in fairness to all concerned as Owens J was concerned with SPPR3 which is undoubtedly relevant to planning decisions, whereas Humphreys J in *Clonres* was concerned with finding that SPPR1 was irrelevant to planning decisions. However as it was not cited to him, Owens J cannot be understood as, at least overtly, disagreeing with Humphreys J.

O’Neill

252. The Board cites **O’Neill**³⁵⁷ also on this issue – though the basis of its reliance was not entirely clear to me. In *O’Neill*, McDonald J recorded³⁵⁸ that the Inspector took the view that, having regard to ministerial guidelines (in particular SPPR3 of the Height Guidelines), the Board was entitled under s.37(2)(b)(iii) PDA 2000 (and presumably s.9(6) of the 2016 Act) to grant permission notwithstanding that the development contravened the Development Plan³⁵⁹. In contrast, the Developer/Notice Party in that case submitted that the Board was obliged by s.28(1C) PDA 2000 and s.9(3)(b) of the 2016 Act to comply with SPPR3 such that there could be no material contravention of the Development Plan. By reference to the mandatory³⁶⁰ criteria for application of SPPR3, set out in §3.2 of the Height Guidelines³⁶¹, McDonald J analysed the evidence and the Inspector’s report at length³⁶² and so held³⁶³ that the criteria were not satisfied - such that SPPR3 could not form the basis of a permission in material contravention of the Development Plan or that inadequate reasons had been given for the Board’s view that those criteria had been satisfied. However it is not apparent to me that this decision assists the Board. McDonald J clearly did not consider it necessary in that case to address either the relationship between ss.9(6) and 9(3) of the 2016 Act – he simply viewed the issue through the lens of the Board’s view of matters - or the differences between SPPR1 and SPPR3 of the Height Guidelines.

³⁵⁷ *O’Neill v An Bord Pleanála et al, including & Ruirside Developments* [2020] IEHC 356 McDonald J, 22 June 2020

³⁵⁸ §151

³⁵⁹ Dublin City Development Plan 2016-2022

³⁶⁰ *O’Neill v An Bord Pleanála et al, including & Ruirside Developments* [2020] IEHC 356 §170 & 171 & 174

³⁶¹ See generally *O’Neill v An Bord Pleanála et al, including & Ruirside Developments* [2020] IEHC 356 §157 et seq

³⁶² See generally *O’Neill v An Bord Pleanála et al, including & Ruirside Developments* [2020] IEHC 356 §164 et seq

³⁶³ *O’Neill v An Bord Pleanála et al, including & Ruirside Developments* [2020] IEHC 356 §178

Conclusion on the Board's reliance on SPPR1

253. I respectfully reject the proposition that the Board may resile from its positively pleaded case and argue a case flatly inconsistent with those pleadings. It cannot argue that it did not apply SPPR1 via S.9(3) of the 2016 Act. In any event I find that I am bound by **Clonres** as on all fours with the present case and binding me to quash the impugned decision on this account. I therefore find that the Board erroneously relied on SPPR1 of the Height Guidelines and that the Impugned Permission must be quashed on that account.

The Board's reliance on SPPR3

Height Guidelines – SPPR 3, §3.1 “Development Management Principles” and §3.2 “Development Management Criteria”

254. SPPR3 of the Height Guidelines, as relevant, provides that:

“It is a specific planning policy requirement that where;

2(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.”

255. SPPR3 is in Chapter 3 of the Height Guidelines which is entitled “Building Height and the Development Management Process”. SPPR3 is preceded in Chapter 3 by two distinct sections.

256. §3.1 states “Development Management Principles” as follows:

“In relation to the assessment of individual planning applications and appeals, it is Government policy that building heights must be generally increased in appropriate urban locations. There is therefore a presumption in favour of buildings of increased height in our town/city cores and in other urban locations with good public transport accessibility. Planning authorities must apply the following broad principles in considering development proposals for buildings taller than prevailing building heights in urban areas in pursuit of these guidelines:

- *Does the proposal positively assist in securing National Planning Framework objectives of focusing development in key urban centres and in particular, fulfilling targets related to brownfield, infill development and in particular, effectively supporting the National Strategic Objective to deliver compact growth in our urban centres?*
- *Is the proposal in line with the requirements of the development plan in force and which plan has taken clear account of the requirements set out in Chapter 2 of these guidelines?*
- *Where the relevant development plan or local area plan pre-dates these guidelines, can it be demonstrated that implementation of the pre-existing policies and objectives of the relevant plan or planning scheme does not align with and support the objectives and policies of the National Planning Framework?"*

Unfortunately the three bulleted paragraphs are framed not as statements of principle but as questions. Nonetheless the first two are comprehensible as principles. The third is somewhat less so – though the general thrust is apparent. It addresses what has been termed the malalignment issue.

257. §3.2 states *“Development Management Criteria”* in terms too lengthy to set out here but, inter alia, requiring that:

- 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.

§3.2 states *“Where An Bord Pleanála considers that such criteria are appropriately incorporated into development proposals, [it] shall apply the following Strategic Planning Policy Requirement under Section 28 (1C) of the Planning and Development Act 2000 (as amended).”* SPPR3 follows.

Pleadings

258. The Applicants plead that the Board erred in the Impugned Permission in its interpretation of and reliance on SPPR3. Specifically, the Applicants plead that:

- The Board failed to apply the broad principles set out in §3.1 of the Height Guidelines
- More specifically with reference to §3.1 and given the Development Plan predated the Height Guidelines, the Board failed to consider whether it had been demonstrated that implementation of the policies and objectives of the plan does not align with and support the objectives and policies of the National Planning Framework to obtain additional housing in urban areas through denser development: the Board has not considered or determined whether the Council can meet its housing targets throughout the suburban areas of its functional area and support the objectives and policies of the framework within the existing height restrictions.

- The Board failed to consider that the Council had had opportunity and time to vary the Development Plan in accordance with SPPR1 after the Guidelines were published – so indicating that the Council was content with the Plan as it stood.
- The Board failed to have regard to Part 5 of the Urban Residential Guidelines 2009³⁶⁴ which requires that increased density developments should be stepped down as one moves away from public transport nodes.

The Applicants also challenge SPPR3 as unconstitutional but that is not for decision in this judgment.

259. The Board and Lulani traverse those Grounds, and plead that:

- The Inspector and the Board considered both the Development Plan and the NPF.
- The Inspector and the Board concluded that permission should be granted having regard to Government policies as set out in the NPF (in particular objectives 13³⁶⁵ and 35³⁶⁶) and the Height Guidelines, in particular SPPR1 and SPPR3.
- The Inspector and the Board properly considered that the site is within the MASP³⁶⁷ area. MASP seeks to focus development on large scale strategic sites and on the redevelopment of underutilised lands, based on key transport corridors that will deliver significant development in an integrated and sustainable manner. The Board properly considered that the Site is close to public transport and in line with s.28 guidance on residential density, and was satisfied that the density is applicable and that subject to detailed consideration of potential residential or visual impact, etc., that upward modifiers applied.
- That the planning authority has not varied the development plan does not preclude application of SPPR3.
- By S.9(3) of the 2016 Act, only where SPPRs differ from the development plan do their requirements, to the extent that they so differ, apply instead of the development plan.
- As to stepping down density as one moves away from public transport nodes, the Board are only required to have regard to the Sustainable Residential Development Guidelines 2009, whereas it is required to apply SPPR 3 of the Height Guidelines. And the Proposed Development complies with the Sustainable Residential Development Guidelines 2009 as the highest density will be at the north of the site closest to public transport with the density decreasing to the lowest density at the south of the site. I will refer to this as the “density gradient” issue and consider it discretely below.

³⁶⁴ Sustainable Residential Development in Urban Areas Guidelines 2009 (Department of Housing, Local Government And Heritage)

³⁶⁵ In urban areas, planning and related standards, including in particular building height and car parking will be based on performance criteria that seek to achieve well-designed high-quality outcomes in order to achieve targeted growth. These standards will be subject to a range of tolerance that enables alternative solutions to be proposed to achieve stated outcomes, provided public safety is not compromised and the environment is suitably protected.

³⁶⁶ Increase residential density in settlements, through a range of measures including reductions in vacancy, reuse of existing buildings, infill development schemes, area or site-based regeneration and increased building heights.

³⁶⁷ Dublin Metropolitan Area Strategic Plan adopted 3rd May 2019

Discussion

260. The Applicants cite McDonald J in **O’Neill**³⁶⁸ to the effect that “*SPPR 3(A) will not apply unless the requirements of para. 3.2 have been satisfied,*” and the Board had to explain why they were satisfied. However, the Applicants’ pleaded case does not relate to §3.2 (the criteria) of the Height Guidelines but to §3.1 (the principles). So O’Neill is not, at least in terms, applicable to the present case. But the Applicants seek to apply the logic of **O’Neill** to §3.1.

261. In one of the recent **Ballyboden** cases³⁶⁹ I considered, in terms I will not repeat here, the relationship between SPPR3 and each of §3.1 and §3.2. Inter alia, I agreed with Owens J in **Pembroke Road** that it was not necessary, in order to reach a decision under S.9(6) of the 2016 Act to allow a material contravention by reference to SPPR3, for the Board to come to the view, envisaged in §3.1 of the 2009 Guidelines, that the policies and objectives in a development plan in respect of building heights did not align with the policies and objectives of the NPF. I thought the imperative wording of §3.1 difficult in guidelines to which a decision-maker need only have regard – on reflection it seems appropriate to say that the imperative wording cannot in law have an imperative effect in guidelines to which a decision-maker need only have regard. I also thought “*principles*” different from “*criteria*” and noted that SPPR3 cited only the latter as a precondition to its application. Not without misgivings, I found that the Board did not err by not articulating in its decision its appliance of the broad principles set out in §3.1 and position as to misalignment of the Development Plan with the NPF. I must do likewise here and reject this ground of challenge.

262. The Ground in question must also be rejected on the simpler basis that there is no reason to infer that the Board failed to have regard to the assertion in Lulani’s Material Contravention Statement “*that the performance criteria under Section 3.1 and 3.2 have been satisfied in this regard by the development as proposed and that, accordingly, the Board can grant permission having regard to the terms of national policy and SPPR 3A of the Building Height Guidelines, in particular*”.

- The Material Contravention Statement failed in this observation to distinguish between criteria (§3.2) and principles (§3.1) but I do not think anything turns on that for present purposes - there is clear reference to §3.1.
- The Inspector records³⁷⁰ consideration of the Material Contravention Statement and that Lulani set out, in its justification therein of a material contravention how, in its view, the proposal complies with the NPF as to increased densities and increased heights.
- As to the question in §3.1 of the Height Guidelines of malalignment between the development plan and the NPF, that the two are contrasted in a Material Contravention Statement by way of

³⁶⁸ O’Neill v Bord Pleanála, [2020] IEHC 356 §186

³⁶⁹ Ballyboden Tidy Towns Group v An Bord Pleanála, et al, incl. Shannon Homes Construction ULC [2022] IEHC 7 (10 January 2022) §210 et seq

³⁷⁰ Report p18

reliance on the NPF to justify a material contravention of the Plan of itself speaks to such malalignment.

- Similarly, that the Impugned Decision justifies material contravention of the Building Height Strategy of the Plan with respect to building height limits by reference, inter alia, to the NPF (in particular objectives 13 and 35) speaks to such malalignment.

263. Even if the Board were required to explicitly articulate in its decision its appliance of the broad principles set out in §3.1,

- I see no basis for the Applicants' case that §3.1 requires the Board to first determine if the Planning Authority can meet housing targets within Development Plan height restrictions.
- I accept that the Board has done so in substance. It has identified that the Proposed Development, as to height, is in material contravention of the Development Plan and yet justifies permission by reference explicitly to, inter alia the NPF (in particular objectives 13 and 35). It follows that, in terms of §3.1:
 - the proposal positively assists in securing NPF objectives
 - the policies and objectives of the Development Plan do not align with and support the objectives and policies of the NPF.

264. Neither do I consider that there is anything in the argument that the Board failed to consider that the Council had had opportunity and time to vary the Development Plan in accordance with SPPR1 after the Guidelines were published – so indicating that the Council was content with the Plan as it stood. First, I was not addressed as to whether SPPR1 requires variation of existing Development Plans (and if so on what timescale) as opposed to informing the next-adopted Development Plan. Second, the proposition would introduce a highly indefinite criterion for inferring that a Council was satisfied that its Development Plan already conformed to SPPR1: there may be many reasons why a Council would or would not vary its plan or would expedite or delay doing so. And at what point in time would the inference for which the Applicants argue be drawn? Third, whether the Council is content with the Plan as it stood is neither here nor there as to the question whether, as a matter of interpretation of both, the Development Plan aligned with the policies and objectives of the NPF – see, as to the Council's view of the interpretation of a development plan, **Cicol**³⁷¹ and **Flannery**³⁷².

³⁷¹ Cicol Ltd. v An Bord Pleanála [2008] IEHC 146, [2008] 5 JIC 0810 (Unreported, High Court, Irvine J., 8th May, 2008).

³⁷² Flannery v An Bord Pleanála [2022] IEHC 83 (High Court (Judicial Review), Humphreys J, 25 February 2022 §155

Density Gradient Issue

265. The Impugned Permission recites that the Board had regard to the Sustainable Residential Development Guidelines 2009. These guidelines are concerned, inter alia but very considerably, with residential density. They identify³⁷³ the setting of appropriate density levels as a fundamental question. They update and revise the 1999 Guidelines for Planning Authorities on Residential Density. Chapter 5 carries forward policy from the 1999 guidelines relating to residential density in cities and larger towns. They devote Appendix A to the measurement of density.

266. The 2009 Guidelines provide – in Chapter 5 - that *“In general, minimum net densities of 50 dwellings per hectare, subject to appropriate design and amenity standards, should be applied within public transport corridors, with the highest densities being located at rail stations / bus stops, and decreasing with distance away from such nodes.”*³⁷⁴ Development Plan Policy RES3 appears to be informed by this Guideline: *“Residential Density - promote higher residential densities. Higher densities at a minimum of 50 units per hectare will be encouraged where a site is located within a 1km pedestrian catchment of a rail station, a priority QBC and/or 500 metres of a Bus Priority Route, and/or 1 km of a town or District Centre.”* The “density gradient”³⁷⁵ contemplated is clearly a statement of general principle relevant at a level of areas in general and unsuited to microscopic application. It is not a prescription that within every site there should – much less must – be a reduction in density as one recedes from public transport. For example, if a small site is entirely adjacent a rail station the imposition of a density gradient could be counterproductive. On a large site far distant from any transport node it could be pointless.

267. Here, the Inspector clearly considered the issue of Density in the context of proximity to public transport³⁷⁶. The RSES³⁷⁷, of which the MASP is part, identifies Monkstown as within the MASP Area and as a ‘strategic development corridor’ along the DART³⁷⁸. The Inspector noted observers’ density concerns and the DLRCC’s view that the proposed density of 82 units per hectare is acceptable on the Site, which is less than 1km from a high frequency rail service and near bus stops. The Inspector agrees, inter alia, citing *“s.28 guidance on residential density”*³⁷⁹. In referring to such guidance the Inspector must be taken as referring, at least inter alia, to the Sustainable Residential Development Guidelines 2009. In my view it has not been shown by the Applicant that the Board failed to have regard to the 2009 Guidelines and the Impugned Decision is not flawed in this regard.

268. If I am wrong in the foregoing, the Applicants fail on this ground for another reason. There is dispute on the pleadings whether, as a matter of fact, the density of the proposed development is

³⁷³ §2.2

³⁷⁴ §5.8

³⁷⁵ My phrase

³⁷⁶ Inspector’s report §12.1.2

³⁷⁷ Eastern & Midland Regional Assembly Regional Spatial & Economic Strategy (RSES) 2019-2031 - adopted on the 3rd of May 2019

³⁷⁸ Dublin Area Rapid Transport Commuter rail system

³⁷⁹ Inspector’s report p48

highest close to, and decreases as one moves away from, public transport nodes. The Applicant says no: Lulani says yes. There is a dearth of detailed evidence on the point. But the public transport clearly lies north of the site. On a merely impressionistic level, Figure 3 above suggests that the Applicants may not have the better of this argument on the facts. More importantly the Lulani Statement of Consistency says that “higher densities are located nearer the DART Station with lower densities to the south.”³⁸⁰ The Applicants bear the onus of laying a factual basis for this challenge to a permission presumed valid and they have failed to discharge it.

SPPR3 - Conclusion

269. For the reasons set out above I reject the challenge to the Board’s reliance on SPPR3.

MATERIAL CONTRAVENTION – “PRECAUTIONARY APPROACH” & PREJUDGMENT BIAS

270. In considering the question of “material contravention” the Inspector concludes:

“I would advise the Board, having regard to, inter alia, recent Court judgements in relation to decisions on SHD applications, to adopt the precautionary approach and invoke the provisions of s.37(2)(b) subsection (i), (iii) and (iv) of the 2000 Act³⁸¹ (as amended) if a grant of permission is forthcoming.”

271. The Board’s order is framed accordingly – but without reference to the “precautionary approach”.

272. The Applicant submits that:

- It is inappropriate that a public body should decide whether to invoke a particular reason on the basis that it may be more likely to survive a judicial review if it does so. The reasons should be the real reasons, not those most likely to stand up to scrutiny.
- Reasoning should not be “defensive,” citing **Balz**³⁸².
- This precautionary approach invokes an irrelevant consideration, in breach of S9(1)(a)(iii) of the 2016 Act³⁸³

³⁸⁰ §4.13

³⁸¹ (i) the proposed development is of strategic or national importance,
(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,
(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.

³⁸² Balz v Bord Pleanála [2019] IESC 90

³⁸³ 9. (1) The Board shall, before making a decision to which subsection (4) relates in respect of the proposed strategic housing development, consider —(iii) any other relevant information, in so far as they relate to—
(A) the likely consequences for proper planning and sustainable development in the area in which it is proposed to situate the development,

- This precautionary approach represents pre-judgment bias in the sense of deciding on a result before deciding on the reasons for the result.

273. The Board submits that the Inspector is not to be criticised: on a reading in full of the relevant part of the report³⁸⁴ it is clear the Inspector deals with the extent to which the proposed development materially contravenes the Development Plan and the extent to which the Inspector recommends that permission is justified under s.37(2). The Inspector is really saying no more than that the relevant provisions of §§(i), (iii) and (iv) in s.37(2) should be relied on having regard to the facts. Lulani points out that the Inspector's report says, *"It is therefore my opinion that the Bord is not precluded from granting permission in this instance, despite the material contravention of the operative development plan."*³⁸⁵ Lulani doesn't precisely make clear what the significance is of the underlined words but I take it as asserting that the Inspector positively and in terms recorded that there was indeed a material contravention of the Development Plan.

274. The Lulani Material Contravention Statement³⁸⁶ states: *"This statement provides a justification for the material contravention of the Dun Laoghaire Rathdown County Development Plan in relation to heights."* That is the full extent of the description of the material contravention. What follows is a lengthy justification of the material contravention. However that justification is placed in the context of Development Plan Policy UD6 adopting the Building Height Strategy set out in Appendix 9 of the Development Plan as setting a maximum of 3-4 storeys for apartment blocks in appropriate locations – subject to specified upwards and downwards modifiers.

275. It seems to me that before one justifies a material contravention, as a matter at very least of good practice, one should first clearly, separately and in reasonable detail both:

- describe the factual nature of the contravention by reference to the relevant specific content of the Development Plan
- explain why, and if possible to what extent or degree, it is material.

It is not apparent to me that Lulani in this case adhered to that good practice.

276. The Inspector's report in addressing Material Contravention³⁸⁷ refers to the Lulani Material Contravention Statement to the effect that *"The issue raised in the applicant's Material Contravention statement relates to building height and compliance with the Dun Laoghaire Rathdown Building Height Strategy."* Earlier in the Inspector's report an account is given of the Lulani Material Contravention Statement - inter alia to the effect that *"the proposed height, which ranges from 5 to 9 storeys ... materially the contravenes the Dun Laoghaire Rathdown County*

(B) the likely effects on the environment or the likely effects on a European site, as the case may be, of the proposed development, if carried out,

³⁸⁴ Page 77-80

³⁸⁵ Emphasis in Lulani written Submissions

³⁸⁶ §1.1

³⁸⁷ Inspector's report §12.11

*Development Plan 2016-2022.*³⁸⁸ And the Inspector cites the Lulani Material Contravention Statement's citation of the Development Plan Building Height Strategy as described above. I have referred above to the Inspector's explicit concerns as to height.

277. It is unfortunate that the Inspector's report does not explicitly record his conclusion as to the factual nature of the contravention by reference to the relevant specific content of the Development Plan and explain why, and if possible to what extent or degree, it is material. That would have provided the necessary logical and contextual basis for proceeding to express a view, as the Inspector does, whether and why permission should be granted despite the material contravention.

278. Such an expression of view would also, by directing the Inspector's mind to the necessity to clearly identify any material contravention before justifying permission despite it, have avoided the unfortunate reference to a "*precautionary approach*". That phrase suggests a failure to take a view whether or not there in fact was a material contravention and if there was, of what precisely it consists and why it was material. It is not open to the Board to apply S.9(6) of the 2016 Act, just in case, as it were, there might be a material contravention or, to put the same thing another way, just in case the court in judicial review might find a material contravention. Of course, whether there is a material contravention is ultimately a matter of law for the court but that does not absolve the Board from taking its own, clear, view of the issue. Hence it is in practice necessary that the Inspector should do so in seeking to assist the Board. In my view the Applicant's criticism, by reference to **Balz**, of defensive reasoning by the Inspector is justified.

279. The Board's Impugned Decision is no more informative - save for a clear, express and important finding that the Proposed Development "*would materially contravene the Building Height Strategy of the Plan with respect to building height limits.*" Though lacking the detail canvassed above, it is at least a clear finding that there was a material contravention. It is accordingly clear that to whatever extent the phrase "*precautionary approach*" implies that the Inspector may have been in doubt as to the presence or absence of a material contravention, the Board was in no such doubt. Accordingly, and whatever criticism may be made of the Inspector, the Board did not take an irrelevant consideration into account and was not defensive in the manner canvassed in **Balz**. I therefore take no view whether such defensiveness per se would ground certiorari.

280. However, even as to the Material Contravention Statement and the Inspector's report, while criticisms of the kind I have made could affect the outcome of a judicial review on different facts, in the present case on a conspectus of the evidence and indeed the general view of all participants who canvassed the issue, the material contravention is obvious enough where the proposed height ranges from 5 to 9 storeys and the maximum envisaged by the Development Plan, even if subject to possible upward modifiers, is 3-4 storeys. In that context, the Applicant's criticism, even if technically

³⁸⁸ Inspector's report p18

justified, lacks real substance. There is no real doubt here that there was a material contravention and once that is accepted it follows that if permission is to be granted that could only be done via s.9 of the 2016 Act.

281. Accordingly, I reject this ground as the Board did not adopt the Inspector's precautionary approach but explicitly found a material contravention and was correct in doing so.

MATERIAL CONTRAVENTION – FAILURE TO COMPLY WITH THE PROPER PLANNING LIMITATION

282. The Applicants plead³⁸⁹ that the Board misdirected itself in law in granting permission for a material contravention of the Development Plan pursuant to S.9(6) of the 2016 Act and S.37(2) PDA 2000 in that it failed to appreciate that the:

- power to permit a material contravention is limited by the obligation to have regard to the proper planning of the area,
- criteria for permitting a material contravention must be found in the Development Plan itself.

The Applicants plead³⁹⁰ that in so doing the Board usurped the function of the local authority under Part II Chapter 1 PDA.

283. Though not formally abandoned, this ground was not pursued or argued in written or oral submissions and is in any event insufficiently particularised. No evidential or other basis is proffered for the assertion that the Board failed to appreciate that the power to permit a material contravention is limited by the obligation to have regard to the proper planning of the area. No authority or argument is offered for the, at least to me, novel suggestion that the criteria for permitting a material contravention must be found in the Development Plan itself. I reject this ground.

AA SCREENING – RINGSEND WWTP OVERLOAD

284. The Board's Impugned Permission screened out AA as unnecessary – explicitly adopting its Inspector's report in this regard and not elaborating on its reasoning.

285. Without attempting here to recite the law as to AA screening, the tension inherent in AA screening is well-expressed by Barniville J in **Eoin Kelly**³⁹¹ and bear recollection in this case:

³⁸⁹ Grounds §E.1.10 & §E.2.13

³⁹⁰ Grounds §E.1.10 & §E.2.13

³⁹¹ Kelly v An Bord Pleanála & Aldi [2019] IEHC 84 (High Court, Barniville J, 8 February 2019) §68(11)

“While the threshold at the screening stage of Article 6(3) and s.177U is “very low”,³⁹² ... nonetheless it is a threshold which must be met before it is necessary to proceed to the stage 2 appropriate assessment stage.”

Pleadings

286. The Applicants plead error in screening out AA contrary to Article 6 of the Habitats Directive. This arises in relation to foreseen contribution of the foul water from the proposed development to the currently non-compliant effluent output of Ringsend WwTP to Dublin Bay³⁹³ and having regard to the European Sites in Dublin Bay. As addressed earlier in this judgment, this issue is complicated somewhat by the fact that the Applicants initially pleaded, but have not pursued, a claim to quash an Irish Water Statement of Design Acceptance dated 6 March 2020 recording no objection to the proposed development. The case against Irish Water was struck out. Nonetheless, remaining pleaded Grounds as to AA Screening were critical of Irish Water

287. I have recorded above that the Applicants may argue, without impugning Irish Water or its Statement of Design Acceptance letter of 6 March 2020, that in screening out AA the Board erroneously relied on the Irish Water Statement of Design Acceptance dated 6 March 2020 and absence of an Irish Water objection to the proposed development by reference to any lack of capacity of Ringsend WWTP such that the Board:

- erroneously concluded that Ringsend WWTP had adequate remaining treatment capacity - of 33,080 p.e. and
- failed to consider whether the plant can meet Urban Waste Water Treatment Directive³⁹⁴ effluent treatment standards.

288. In fact there is no dispute but that the Inspector and hence the Board were in error as to remaining treatment capacity. Ringsend WWTP is overloaded and has no remaining treatment capacity – in the sense of capacity to adequately treat foul water. It does treat all foul water coming to it and will treat the foul water of the Proposed Development – but inadequately such that its effluent is non-complaint as to nutrient content.

289. The Applicants plead error in screening out AA by way of failure to consider effects of the foul water discharge from the Proposed Development via Ringsend WwTP on Dublin Bay European Sites in-combination with discharge from Ringsend WwTP of foul effluent from all other existing and future projects served by Ringsend WwTP – essentially much, if not most, of Dublin city. The premise

³⁹² Citing Opinion of Advocate General Sharpston in *Sweetman & Others v An Bord Pleanála* (Case C-258/11) ECLI:EU:C:2012:743, §49; and Judgment of Finlay Geoghegan J. in *Kelly v An Bord Pleanála* [2014] IEHC 400 §30)

³⁹³ Using that descriptor in a broad sense as including the Liffey and Tolka estuaries

³⁹⁴ Council Directive of 21 May 1991 Concerning Urban Waste Water Treatment (91/271/EEC) (OJ L 135, 30.5.1991, P. 40)

of the plea is that the foul effluent from all other existing projects is treated at Ringsend WwTP – but in some degree inadequately. It seems clear on the facts that this premise is to be accepted.

290. But, the Board says, that Ringsend WWTP is overloaded and does not meet effluent standards as to nutrient content does not of itself invalidate the AA Screening. AA Screening is concerned not directly with effluent quality but with risk of significant effect on European sites. I accept that distinction.

291. It may assist to recapitulate the remaining pleaded Grounds alleging error in screening out AA by reference to Ringsend WwTP effluent. They are in some respects opaquely pleaded and I have edited them somewhat, without altering their content save to reflect the limits I placed on the Applicants having regard to the absence of Irish Water from the proceedings. They are as follows³⁹⁵:

- Failure to consider the effect of foul water discharges from the Proposed Development in combination with other foul water discharges from other developments currently overloading Ringsend WwTP and with other developments already authorised to discharge foul water to Ringsend WwTP where there was no evidence that Irish Water had conducted an assessment, obtained authorisation, or prepared an AA as to the project or projects overloading Ringsend WwTP.³⁹⁶
- Error in having regard to an Irish Water letter³⁹⁷ indicating no objection to the Proposed Development's connection to the overloaded Ringsend WwTP whereby the Board thereby failed to consider whether Ringsend WwTP can meet UWWTD³⁹⁸ treatment standards and whether, when not so meeting them, it is likely to have significant effect on Dublin Bay SPAs and SACs.³⁹⁹
- Error in noting that Ringsend WwTP is subject to emissions licensing and so had been considered by the EPA: no conclusion can be drawn from that licensing as the Plant is overloaded.

292. Notably, and the Board relies on the observation, the Applicants at trial cited only the Liffey and Tolka estuaries as possibly damaged by nutrients from the WwTP effluent. It is fair to say the Applicants adduced no evidence of risk posed by inadequately treated foul water from the Proposed Development beyond saying that these areas were already polluted by excessive nutrients and merely asserting that the Proposed Development will make them worse in that regard. The Applicants pleadings say nothing of any specific risk to European sites – much less having regard to their conservation objectives. Nor were these issues raised before the Board. In my view the Board's

³⁹⁵ From §E2.6 of the Statement of Grounds

³⁹⁶ §§6.1. & 6.5

³⁹⁷ Dated 6 March 2020

³⁹⁸ Council Directive of 21 May 1991 Concerning Urban Waste Water Treatment (91/271/EEC) (OJ L 135, 30.5.1991, P. 40)

³⁹⁹ §§6.2 & 6.4

points are well-made. The Applicants cannot raise these issues now. However, lest I am wrong in that regard, I will consider them.

Irish Water correspondence, HHQRA & AA Screening Report

293. I have already described above the history in this matter of Irish Water correspondence, Feasibility Confirmation and Design Acceptance and will not repeat it here.

294. Lulani's HHQRA, dated March 2020, was prepared by an expert in, inter alia, eco-hydrogeology and EIA.⁴⁰⁰ It does not purport to directly address AA issues but does consider the possible impact of sewage from the proposed development on water quality and overall water body status within Dublin Bay SAC/SPA⁴⁰¹/pNHA⁴⁰² habitats.⁴⁰³ The HHQRA records⁴⁰⁴ that the sewage discharge of the Proposed Development will be treated at Ringsend WWTP. It refers to breaches of the EPA licence for the WwTP, "*due to stormwater overflows etc*" but asserts that recent water quality assessment shows that these overflows have not been shown to have had a long-term detrimental impact on the water body status.

295. Notably, the HHQRA considered⁴⁰⁵, inter alia, the Ringsend WwTP Upgrade Project EIAR of June 2018 which, as we will see, informed the analysis in the **Dublin Cycling** case.

296. The HHQRA records the then most recent information as to the status of Dublin Bay waters as follows⁴⁰⁶:

- WFD status⁴⁰⁷ - '*Good*'.
- WFD risk score⁴⁰⁸ - '*Not at risk*'.
- Ecological status of transitional and coastal water bodies⁴⁰⁹ - '*good*'
- Trophic status of estuarine and coastal waters⁴¹⁰ - '*Unpolluted*'

The HHQRA records that '*Unpolluted*' means there have been no breaches of the EPA's threshold values for nutrient enrichment, accelerated plant growth, or disturbance of the level of dissolved oxygen normally present.

⁴⁰⁰ CC1 Tab 7 §2.1 Hydrological Catchment Description

⁴⁰¹ Special Protection Area under the Birds Directive

⁴⁰² Proposed Natural Heritage Area under the Wildlife (Amendment) Act 2000. pNHAs were published on a non-statutory basis in 1995, but have not since been statutorily proposed or designated.

⁴⁰³ See pp5

⁴⁰⁴ p12

⁴⁰⁵ See list of references at p15

⁴⁰⁶ p7 & 12 - Source is EPA

⁴⁰⁷ 2013 – 2018

⁴⁰⁸ 2013 – 2018

⁴⁰⁹ 2013 – 2018

⁴¹⁰ 2015 – 2017

297. The HHQRA records⁴¹¹ that Ringsend WWTP is required to operate under EPA licence and to meet legislative environmental requirements. It will be upgraded with increased treatment capacity over the next five years to bring it to a capacity of 2,400,000 p.e.⁴¹² on foot of a planning permission issued in 2019.⁴¹³

298. The HHQRA records⁴¹⁴ that even without treatment at the Ringsend WWTP, the peak effluent discharge of the proposed development, would equate to 0.096% and the average effluent discharge of the proposed development would equate to 0.023% of the licensed discharge⁴¹⁵ at Ringsend WWTP. These figures not disputed and, as will be seen, the Inspector clearly considered them significant. The HHQRA concludes that even if untreated this discharge would not impact on the overall water quality or WFD Water Body Status of Dublin Bay and will not result in any change to the current regime (water quality or quantity) in any of the Dublin Bay Natura 2000 Sites. In my view the Board's description of this as the assessment of a worst-case scenario was within the scope of their expertise and judgment.

299. The HHQRA also concludes that the cumulative or in-combination effects of effluent arising from the Proposed Development with that of other developments discharging to Ringsend WwTP will not be significant having regard to the size of the calculated discharge from the proposal.⁴¹⁶ It was a matter for the Inspector to decide whether to accept or reject these expert assertions but it is difficult to see that the Inspector was not entitled at law to accept them. On the basis of the foregoing and by reference to "Dublin Bay (SAC/ SPA/pNHA)", the HHQRA tabulates⁴¹⁷ a Pollutant Linkage Assessment (without mitigation) as "No perceptible risk". While the HHQRA addressed water quality rather than ecological issues, the Applicant did not suggest that it was inappropriate that such a report would inform an AA screening report – as it in fact did.

300. Lulani's AA Screening Report, by an ecological expert⁴¹⁸ describes in some detail each relevant European Site and its qualifying interests and conservation objectives. It refers to the HHQRA. Importantly, it explicitly notes that Ringsend WwTP effluent is "*currently not in compliance with the Urban Wastewater Treatment Directive*"⁴¹⁹ and "*is having an observable effect in the 'near field' of the discharge including the inner Liffey Estuary and the Tolka Estuary, but not the coastal waters of Dublin Bay.*"⁴²⁰ I note that WwTP discharges north into the Liffey and Tolka estuaries in an area between the South Great Wall and the Bull Wall - as opposed to south into south Dublin Bay. The AA Screening Report refers⁴²¹ to the EPA's designation of the Tolka Estuary as 'potentially eutrophic' in 2014 implying moderate pollution either from point or diffuse and as, in 2015 having

⁴¹¹ p12

⁴¹² Population Equivalent

⁴¹³ ABP-301798-18 - Exhibit PF2

⁴¹⁴ p12

⁴¹⁵ Peak hydraulic capacity

⁴¹⁶ p12

⁴¹⁷ p13

⁴¹⁸ Pádraic Fogarty of Openfield Ecological Services holds an MSc in Ecological Impact Assessment

⁴¹⁹ p10

⁴²⁰ p30

⁴²¹ p34

‘moderate’ (and hence insufficient) WFD water quality, requiring that measures be taken - including that new development must not contribute to the pollution loading.

301. The AA Screening Report refers⁴²² to the intended upgrades of the WwTP on foot of a 2019 planning permission to increase network capacity by 50% as resulting in greater compliance with quality standards of effluent and so an expected improvement in water quality in Dublin Bay⁴²³.

302. The AA Screening Report concludes⁴²⁴ that the possibility of any significant impacts on any European Sites, whether arising from the project itself or in combination with other plans and projects, can be excluded beyond a reasonable scientific doubt on the basis of the best scientific knowledge available.

303. I should address one textual issue as to the AA Screening Report, in which the following appears:⁴²⁵

“Additional loading to this plant arising from the operation of this project are not considered to be significant based as evidence suggests that pollution through nutrient input is affecting the conservation objectives of the South Dublin Bay and River Tolka Estuary SPA.”

Leaving aside the grammatical error of *“loading are ...”*, this sentence is internally inconsistent: the conclusion that nutrient input is affecting SPAs is inconsistent with the assertion that additional loading is not significant. And the word “based” fits ill. Whatever else may be said it is clear, and must have been clear to the Board and Inspector, that this sentence is erroneous in some respect. On reading it, and as I mentioned at hearing, I considered that it would make sense to take it that the word “no” had been omitted before the word “evidence”. That would make sense of the sentence and also make sense in the context of the overall conclusion of the screening report. It would further make sense in the context of the immediately preceding sentence to the effect that *“evidence supports the view that suggests that some nutrient enrichment is benefiting wintering birds for which SPAs have been designated in Dublin Bay (Nairn & O’Halloran eds, 2012)”*. Reading the paragraph in question as a whole, it seems to me clear, first that that there is textual error and second that, despite its regrettable textual error, it is intended to be reassuring rather than the contrary. I drew this conclusion based on the text in its own terms.

304. I consider that such a reading conforms to the general principle of interpreting any document as a whole. It also conforms to the view of Barniville J in **Eoin Kelly**⁴²⁶, albeit in a slightly different context, that:

⁴²² p10

⁴²³ Pp 10, 30, 35, 38

⁴²⁴ p39

⁴²⁵ p35

⁴²⁶ Eoin Kelly v An Bord Pleanála [2019] IEHC 84 (High Court, Barniville J, 8 February 2019) §99 §20 see also §104 & 105; see also Dunne v Offaly County Council [2019] IEHC 328 (High Court, O’Regan J, 21 May 2019)

“ in considering the screening report and the inspector’s report, the court does not read or construe the contents of the reports as if they were statutory provisions. It is not appropriate to read those reports as if they were statutes or even contractual provisions. In my view, the correct approach for the court to take is to consider the substance of the reports and not to approach what is said in the reports with an excessive degree of formalism. I

..... it is necessary to consider the substance of the screening report and the inspector’s report rather than to focus on the particular use or rather non-use of certain words,”

305. While the foregoing is my view in any event, as it happens, a striking extraneous factor tends to confirm my reading. The screening report was compiled by Pádraic Fogarty of Openfield Ecological Services. He was also the author of the screening report considered by McDonald J in **Dublin Cycling**⁴²⁷. McDonald J cites that report as including the following:

“Additional loading to this plant arising from the operation of this project are not considered to be significant based on two points:

- 1. There is no evidence that pollution through nutrient input is affecting the conservation objectives of the south Dublin Bay and River Tolka Estuary SPA.”*

The grammatical error of *“loading are ...”* is seen again and the correlation of the rest of the text will be apparent. The planning permission application considered in Dublin Cycling was made on 18th May, 2020. It seems safe to infer that Mr Fogarty completed his AA Screening report in that case some time earlier in 2020. His AA Screening report in the present case is dated March 2020. It seems inconceivable that his two roughly contemporaneous screening reports could have presented directly contradictory views as to whether *“nutrient input is affecting the conservation objectives of the south Dublin Bay and River Tolka Estuary SPA”*.

306. But even assuming, contrary to my reading of the AA Screening report, that at present the *“nutrient input is affecting the conservation objectives of the south Dublin Bay and River Tolka Estuary SPA”*, the question would remain whether the presumptively inadequately treated foul water of the Proposed Development will make it any worse: or more accurately, whether the conclusion of the AA Screening that it will not make it any worse is safe.

307. The DAU⁴²⁸ accepted the conclusions of the HHQRA and the AA Screening Report.

⁴²⁷ Dublin Cycling Campaign CLG v An Bord Pleanála [2020] IEHC 587 (High Court (Judicial Review), McDonald J, 19 November 2020)

⁴²⁸ Development Applications Unit of the Department of Culture, Heritage and the Gaeltacht. Its submission is in Exhibit CC1 Tab 16 and exhibit PD1 tab 11 – see p6

The Inspector's Report, the Board's Decision on AA Screening & comment thereon

308. The Inspector screened out AA⁴²⁹. The Inspector summarises the content of the Lulani AA Screening report and the accompanying HHQRA and the former's conclusion that AA is unnecessary. Though not explicitly stated, it is clearly to be inferred that the Inspector accepts the content of both the AA Screening report and the HHQRA. They had explicitly drawn attention to Ringsend WwTP effluent non-compliances and the observable effect of such effluent in the Liffey and the Tolka estuaries. The Inspector records – incorrectly - that the WwTP has 33,080 p.e. capacity remaining to be taken up and records that Irish Water has confirmed that this system “can facilitate” the proposed development. Given the plant is overloaded, it is not clear on exactly what basis feasibility was confirmed.

309. Of some significance, the Inspector explicitly records his awareness that Ringsend WwTP got planning permission in 2019 to increase treatment capacity⁴³⁰. He also records that in performing AA Assessment he had regard not merely to the AA Screening Report but to “*the data used by the Applicant to carry out screening assessment*”. As we know from the AA Screening Report, that included the HQRRR, which in turn cited the 2018 Ringsend WwTP upgrade EIAR.

310. **Article 6(3) of the Habitats Directive** requires AA of projects likely to have a significant effect on a European Site “*either individually or in combination with other .. projects*” – see generally **Case C-142/16 Commission v Germany**⁴³¹. The AA Screening requirement of Article 6(3) was implemented by **S.177U PDA 2000**. No-one has suggested that the treated (if inadequately) foul water of the 300 proposed units could, by itself, significantly affect the Dublin Bay Natura 2000 sites. All that can possibly have been in issue is In Combination or Cumulative effects on the quality of Ringsend WwTP effluent and in turn effects of that effluent on Dublin Bay Natura 2000 sites.

311. In his AA Screening the Inspector concludes⁴³², as relevant to the pleaded case, that:

“The potential for significant effects on the qualifying interests of the European sites ... as a result of ... foul waters generated during the construction and operational stage can be excluded. This conclusion is based on the fact that:

-
- *Foul .. waters will ... will travel to Ringsend WWTP for treatment prior to discharge to Dublin Bay; the Ringsend WWTP is required to operate under EPA licence and meet environmental standards, further upgrade is planned and the foul discharge from the proposed development would equate to a very small percentage of the overall licenced discharge at Ringsend WWTP, and thus would not impact on the overall water quality within Dublin Bay.*

⁴²⁹ Inspector's report §12.12

⁴³⁰ Inspector's report p85

⁴³¹ Moorberg power plant case

⁴³² Inspector's report p88

- *The EPA in 2018 classified water quality in Dublin Bay as ‘unpolluted’.*”

In Combination or Cumulative Effects

The potential for in combination impacts can also be excluded. I base my judgement on the following:

- *Coastal waters in Dublin Bay are classed as ‘Unpolluted’ by the EPA;*
- *Sustainable development including SUDs for all new development is inherent in objectives of all development plans within the catchment of Ringsend WWTP;*
- *The Ringsend WWTP extension is likely to be completed in the short – medium term to ensure statutory compliance with the WFD. This is likely to maintain the ‘Unpolluted’ water quality status of coastal waters despite potential pressures from future development;*
- *At the time of writing there was no proven link between WWTP discharges and nutrient enrichment of sediments in Dublin Bay based on previous analyses of dissolved and particulate Nitrogen signatures; and*
- *Enriched water entering Dublin Bay has been shown to rapidly mix and become diluted such that the plume is often indistinguishable from the rest of bay water.”*

312. The foregoing is interesting for its display of knowledge of the Ringsend WwTP extension and of the “plume” of discharge from the WwTP. The plume and plume dispersal were not addressed in the HHQRA or in the AA Screening report. McDonald J in **Dublin Cycling**, considering precisely the same text in the Inspector’s report in that case, considered that extracts from the 2018 Ringsend WwTP upgrade EIAR “*very clearly establish the origin of the statement made by the inspector in his report in relation to the dispersal of the plume*”.⁴³³ The EIAR states that “*The water quality model predicts that the plume will disperse away from the site and dilution will occur within short distances of the outfall.*”⁴³⁴

313. There can be no question but that the Inspector and the Board were alive to their obligation to screen for in-combination effects and explicitly concluded that there would be none of significance – indeed explicitly “*despite potential pressures from future development*”. The Board observes that, as will become apparent below, the Inspector’s conclusion as to the potential for in-combination impacts is identical to that upheld by McDonald J in **Dublin Cycling**⁴³⁵.

314. Later, after his conclusion that AA can be screened out, the Inspector, considering “Infrastructure”⁴³⁶ states:

⁴³³ §128 - and also §135

⁴³⁴ 2018 EIAR Ringsend WwTP Upgrade §5.7.3.3

⁴³⁵ Dublin Cycling Campaign CLG v An Bord Pleanála [2020] IEHC 587 (McDonald J, 19 November 2020) §107

⁴³⁶ Inspector’s Report §12.6

“Some observers raised concerns relation to the capacity of the existing infrastructure that results in no bathing notices a regular occurrence. Irish Water identifies no issues with foul water connection and treatment.

While reference to capacity at Ringsend Treatment Plant was raised and the local pumping station at Monkstown⁴³⁷, it is noted that IW are subject to EPA licencing requirements, and submit a report on this annually, as well as being subject to ongoing monitoring to ensure all licencing obligations are met, a number of which relate to protection of Dublin Bay.⁴³⁸ Having regard to this, I am satisfied that this matter can and has been considered by the relevant competent authority and that there is no significant impact on Dublin Bay or any other European Site as a result of foul water drainage.”

315. The Inspector’s report must be read as a whole. The foregoing excerpt is not found in the AA Screening section of the report but its terms are such that it must be considered relevant to the crucial question in AA Screening in this case – that of significant impact by foul water effluent from the Site on the integrity of a European Site having regard to its conservation objectives. It seems to me that it is correct to state both that:

- the Board cannot abdicate to other competent authorities or other regulatory regimes or other public bodies its competence and responsibility as to AA screening (all parties accept that), and
- the application of other regulatory regimes to the putatively pollutant activities and the views of the authorities competent in those regimes and the public body charged with operating the WwTP are relevant considerations in the Board’s exercise of its competence and fulfilment of its responsibility as to AA screening.

These are not contradictory propositions.

316. Nonetheless, to my mind the foregoing excerpt is unfortunate as, taken by itself, capable of conveying the impression for which the Applicant contends - unlawful abdication of decision-making responsibility to the EPA and/or Irish Water. Were that excerpt in the AA Screening section of the report and its only content, the Applicants might be better – even well - placed to argue that the Board had abdicated its responsibility as to AA screening. But that is not so. The excerpt is by no means all the Inspector had to say as to AA screening. It is not even primarily what the Inspector had to say in that regard. The excerpt must be read with the AA Screening section of the report – which makes clear that the Inspector, in forming a view in AA Screening, not merely had regard to the views of Irish Water as to WwTP capacity and the EPA licensing regime but considered and accepted the content of the AA Screening report and the HHQRA and drew conclusions as to In Combination or Cumulative Effects not apparently based on the views of Irish Water as to WwTP capacity and the

⁴³⁷ sic

⁴³⁸ Minor typo corrected.

EPA licensing regime and in precise terms which McDonald J considered acceptable in **Dublin Cycling**.

Dublin Cycling

317. In **Dublin Cycling**⁴³⁹ McDonald J quashed, on a ground not here relevant, an SHD permission for 741 “build-to-rent” apartments, retail space and associated site works on lands at Sheriff Street Lower, Dublin. Dublin Cycling argued that the Board erred in screening out, for AA purposes, the possibility of significant effects on Natura 2000 sites in Dublin Bay by reason of the effect of the foul water from the proposed development on the effluent from Ringsend WwTP. The allegation, as in this case, was of risk of nutrient enrichment of habitats by excessively nutrient rich WwTP effluent.

318. McDonald J reviewed the law on the issue – noting, inter alia, that:

- *“Under s.177U(4)⁴⁴⁰, a competent authority is required to proceed with an appropriate assessment if “it cannot be excluded, on the basis of objective information, that the ... proposed development, individually or in combination with other plans or projects, will have a significant effect on a European site”. Conversely, under s.177U(5) a competent authority is not required to carry out such an assessment where it “can be excluded, on the basis of objective information”, that the proposed development, will have such an effect.”⁴⁴¹*
- *“Projects that have no appreciable effect on the relevant European site are excluded” from the need for AA.⁴⁴²*
- *“... the competent authority under the 2016 Act for carrying out a screening exercise is the Board and these judicial review proceedings are in no sense an appeal from the decision of the Board on that issue. In contrast to the court, the Board is a body with significant expertise and experience of carrying out such assessments. If the applicant is to succeed in relation to this element of its case, it will have to establish an identifiable failure on the part of the Board in the manner in which it carried out the screening exercise in this case and that such a failure constitutes either a breach of the Board’s obligations under s. 177U⁴⁴³ or under the underlying provisions of the Habitats Directive.”*

319. McDonald J noted⁴⁴⁴ that the Inspector in the Dublin Cycling case had based his conclusions as to both direct and in-combination effects on the following:

- *“Foul and surface waters will discharge to the existing combined foul and surface water network and will travel to Ringsend WwTP for treatment prior to discharge to Dublin Bay; the Ringsend*

⁴³⁹ Dublin Cycling Campaign CLG v An Bord Pleanála [2020] IEHC 587 (McDonald J, 19 November 2020)

⁴⁴⁰ PDA 2000

⁴⁴¹ §103

⁴⁴² §103

⁴⁴³ S_177U PDA 2000 governs screening for appropriate assessment

⁴⁴⁴ §106 et seq

WWTP is required to operate under EPA licence and meet environmental standards, further upgrade is planned and the foul discharge from the proposed development would equate to a very small percentage of the overall licenced discharge at Ringsend WWTP and thus would not impact on the overall water quality within Dublin Bay ...

- *I would also note that the EPA in 2018 classified water quality in Dublin Bay as ‘unpolluted’.*

The Inspector in Dublin Cycling also stated:

- *Coastal waters in Dublin Bay are classified as ‘Unpolluted’ by the EPA;*
- *Sustainable development including SUDS for all new development is inherent in objectives of all development plans within the catchment of Ringsend WWTP;*
- *The Ringsend WWTP extension is likely to be completed in the short-medium term to ensure statutory compliance with the [Water Framework Directive]. This is likely to maintain the ‘Unpolluted’ water quality status of coastal waters despite potential pressures from future development;*
- *At the time of writing there was no proven link between WWTP discharges and nutrient enrichment of sediments in Dublin Bay based on previous analyses of dissolved and particulate nitrogen signatures; and*
- *Enriched water entering Dublin Bay has been shown to rapidly mix and become diluted such that the plume is often indistinguishable from the rest of bay water.”*

Notably, the Inspector’s Report in the present case predated the judgment of McDonald J, but is in terms all but identical to the foregoing⁴⁴⁵.

320. McDonald J cited in some detail the Inspector’s citation in turn of the developer’s AA Screening report. I will not repeat that detail here. It suffices to note that the AA Screening report:

- Acknowledged that Ringsend WwTP is not compliant with its emission limit standards.
- Acknowledged that Ringsend WwTP discharge has an observable negative impact on the water quality in the near field of the discharge and in the Liffey and Tolka Estuaries.
- Acknowledged that the proposed development would add to the load on the Ringsend WwTP.
- Noted that works were underway to increase WwTP treatment capacity. Their completion will see greater compliance with quality standards of effluent and so an expected improvement in water quality in Dublin Bay.
- Noted other sources of pollution from riverine inputs, sewerage overflows, misconnections and unsewered properties.
- Asserted that there is no evidence to suggest that effects on the conservation objectives of Natura 2000 sites are occurring.

321. McDonald J noted⁴⁴⁶ that Dublin Cycling had submitted materials⁴⁴⁷ including a report of the Dublin City Council Parks Superintendent purporting to contradict those conclusions – including the

⁴⁴⁵ Inspector’s report p88

⁴⁴⁶ §113 et seq

⁴⁴⁷ Notably a report from the Senior Executive Parks Superintendent in Dublin City Council as to nutrient enrichment, the Dublin City Council EIA dated March 2020 with a view to upgrading the WWTP,

assertion that the WwTP would have adequate capacity once Ringsend WwTP was upgraded and effluent diverted also to a new WwTP proposed for North County Dublin. McDonald J rejected⁴⁴⁸ Dublin Cycling's position in that respect as based on a misunderstanding. He also considered, for reasons he set out, that the materials Dublin Cycling submitted (including as to nutrient damage to eelgrass due to effluent) did not constitute an element of best scientific knowledge for AA Screening purposes⁴⁴⁹. Mr Craig made a similarly unsubstantiated assertion in these proceedings⁴⁵⁰. Indeed there was evidence that nutrient enrichment had proved beneficial to protected birds including the Light-bellied Brent Goose.⁴⁵¹

322. McDonald J considered⁴⁵² the 2018 Ringsend WwTP upgrade EIAR in some detail - as justifying the Inspector's conclusion that WwTP effluent has been shown to "*rapidly mix and become diluted such that the plume is often indistinguishable from the rest of the bay water*" and as predicting that the improvement in effluent quality due to the upgrade will compensate for the increase in flow through the plant. This conclusion clearly encompassed nutrient quality. Indeed nutrient issues in the Liffey and Tolka estuaries are not only – or even primarily – due to WwTP effluent as both the Liffey and the Tolka are significant sources of nutrient- laden waters. The Upper Liffey and Tolka Estuaries are chiefly influenced by riverine outputs as the major sources of nutrient loads - both the Liffey and the Tolka are the principal source of enriched nutrients in this area. McDonald J also considered⁴⁵³ extracts from the March 2020 EIAR as to a Ringsend WWTP upgrade to similar effect.

323. McDonald J says:

*"What is clear from the 2018 EIAR is that the situation will be significantly improved by the upgrade. Furthermore, the 2018 EIAR demonstrates that, notwithstanding the increased flow through the Ringsend WWTP in the future, the upgrade will compensate for this increase in flow. In the circumstances, the most up to date scientific information in the material before the court strongly supports the view taken by the inspector that the proposed development (insofar as it will increase the flow of foul water to the Ringsend WWTP) would not be likely to have any significant effects on any Natura 2000 site, either directly or indirectly or in combination with other plans and projects."*⁴⁵⁴

"For all of the reasons discussed in paras. 100 to 138 above, I have come to the conclusion that the applicant has failed to demonstrate that there was a failure on the part of the Board to carry out a screening exercise in accordance with the best scientific information available and that the applicant has likewise failed to establish any other failure in the screening

⁴⁴⁸ §118 et seq

⁴⁴⁹ §124

⁴⁵⁰ Craig Affidavit 14 October 2020 §16

⁴⁵¹ McDonald J §124

⁴⁵² §127 et seq

⁴⁵³ §115

⁴⁵⁴ §133

exercise undertaken by the Board in this case for the purposes of s.177U of the 2000 Act and the Habitats Directive.”⁴⁵⁵

Evidence

324. The present Applicants exhibit⁴⁵⁶ EPA Site visit reports of July and August 2019 which confirm that the WwTP effluent on those occasions formed a brown plume in the waters to which it discharged. That plume was attributed to the overloaded plant not being capable of consistently treating the waste water to the required standards - though all foul water was being treated. It is clear that these were further instances of a well-known issue which the EPA had repeatedly highlighted and which was to be addressed by ongoing and further scheduled upgrade and extension works to bring the plant up to treatment standards. Both reports said Irish Water was “*not required to respond directly to items contained in this EPA site visit report*” – though I hasten to infer that this was not because the issue was not of concern but was because the issue was well-understood and the solution was in train. Notably, these EPA Site visit reports preceded the March 2020 EIS cited by McDonald J. The Applicants exhibit⁴⁵⁷ also a 2016 EPA report on the ecological effect of nutrients on estuarine waters⁴⁵⁸. It predates both EIAs considered by McDonald J. It refers to nutrient issues in the Liffey and Tolka Estuaries related to the Ringsend WwTP but not in terms not related to effect on European Sites. The Applicants assert⁴⁵⁹ that it records nutrient damage, via algal growth, to eelgrass feed for Light-bellied Brent Geese but I was not referred to and have failed to find any such assertion – or indeed any content related to effect on European Sites in Dublin Bay – in that report. Beyond those observations, it is a highly technical report which I am not competent to interpret. However I do not see that any of these exhibits are in any way inconsistent with the circumstances described in, or the analysis made by McDonald J in, **Dublin Cycling**.

325. McDonald J in **Dublin Cycling** rejected assertions of nutrient damage to eelgrass. The 2018 Ringsend WWTP Upgrade EIAR says that the main area of dispersal of the treated effluent from Ringsend WwTP is in the Tolka Estuary and around the North Bull Island. South Dublin Bay is unaffected by the effluent. It locates the eelgrass (on which Light-bellied Brent Geese feed) in South Dublin Bay near the Merrion Gates.⁴⁶⁰ Indeed it appeared to McDonald J to be clear from material generated in the Board’s consideration of an upgrade to the Ringsend WWTP, that the light-bellied Brent goose is now found in increasing numbers in the Tolka Estuary where eelgrass does not feature.

⁴⁵⁵ §139

⁴⁵⁶ Affidavit of Christopher Craig 14 October 2020 Exhibit CC1 Tab 44

⁴⁵⁷ Affidavit of Christopher Craig 14 October 2020 Exhibit CC1 Tab 44

⁴⁵⁸ Assessing Recent Trends in Nutrient Inputs to Estuarine Waters and Their Ecological Effect (2012-W-FS-9) EPA Final Report - S. Ni Longphuirt and D.B. Stengel September 2016

⁴⁵⁹ Affidavit of Christopher Craig 14 October 2020 §16

⁴⁶⁰ 2018 EIAR Ringsend WwTP Upgrade Vol 3A §6.3.4, 6.3.6.2 & Figure 6-3: Intertidal habitats in Dublin Bay

326. Lulani in this case exhibit⁴⁶¹ the same extracts⁴⁶² from the 2018 EIAR for the WwTP upgrade which had been exhibited in **Dublin Cycling**. They include the following:

“In summary, the change in the future final effluent discharge arising from the proposed WwTP component will be positive and will ensure that the upgraded plant will be consistent with the Urban Wastewater Treatment Directive. In addition, the changes will help protect the status of the receiving waters in respect of the Water Framework Directive⁴⁶³ (“WFD”) and the Bathing Water Directive.”⁴⁶⁴

327. Inter alia, and relevant also to the institutional knowledge of the Board and its Inspectors, McDonald J in **Dublin Cycling** said the following:

“For the reasons already explained, the EIAR prepared in respect of the 2018/2019 application for a further upgrade of the Ringsend WWTP demonstrates that, contrary to the suggestion made by the superintendent, eelgrass is not situated in an area adversely affected by effluent from the plant. In this context, counsel for the applicant very properly accepted that a person in the position of an inspector appointed by the Board must be entitled, in the context of carrying out a screening exercise, to have regard to the corporate or institutional knowledge of the Board derived from its review of other relevant applications. Clearly, the application in respect of the upgrade of the Ringsend WWTP is highly material in the context of this aspect of the applicant’s case and it would be absurd to conclude that the Board and its inspectors would not be entitled to have regard to the scientific information made available in the course of the Board’s consideration of that application.”⁴⁶⁵

328. Having upheld the Board’s entitlement to rely on its institutional memory of the position regarding Ringsend WwTP and its permitted upgrade and the EIAR informing that permission, McDonald J later addressed the question whether actual reliance on that institutional memory was apparent:

“136. Counsel for the applicant acknowledged that it was entirely plausible that the inspector’s view, as expressed in his report in the present case, may well have been derived from the institutional knowledge of the Board arising from its consideration of the 2018 EIAR in the context of its review of the application in respect of the Ringsend upgrade. However, he submitted that, while it was a plausible explanation, the inspector had not explained his conclusion in those terms in his report. He also highlighted, in this context, the absence of any affidavit from the inspector explaining herself.

137. In my view, this submission on the part of counsel for the applicant is misplaced. the applicant did not raise an issue before the Board in relation to the screening report

⁴⁶¹ Affidavit of Padraic Fogarty 1 April 2021 Exhibit PF1

⁴⁶² See Day 3 14:46

⁴⁶³ Directive 2000/60/EC - which commits EU member states to achieve good qualitative and quantitative status of all water bodies.

⁴⁶⁴ 2018 Ringsend WwTP Upgrade EIAR Vol 3A §4.14

⁴⁶⁵ §125

it is inappropriate for the applicant to criticise the lack of any explanation by the inspector in circumstances where no one had raised any issue in relation to plume dispersal in the course of the proceedings before the Board. As counsel for the Board submitted, no one suggested that the plume from the WWTP “would travel as an entity rather than dispersing over the greater area ...”. [T]his is part of the problem ... the Applicant comes not having made any point to the Board, not having introduced any of this material and is then critical of the Inspector’s Report for not treating of the concerns now being made but not raised at the time. If the Applicant wanted to raise an issue about plume dispersal, ... then there may have been an obligation on the Inspector to expressly treat of that in more detail. But in circumstances where it wasn’t raised and where the Board has a recent and detailed⁴⁶⁶ institutional knowledge of the Ringsend Wastewater Treatment Plant, deriving from the applications for upgrade ... [the applicant] can’t criticise the Board’s decision for not referencing the particular source of knowledge for that point. If it was a point in dispute or a point on which the Applicant had taken issue, I accept that the position might be different. But it’s manifestly unfair to remain silent on something, allow it be treated of in the decision and then come to court saying: ‘I can’t specifically identify why you said that’.

138. *In circumstances where the applicant did not raise the issue in the course of the proceedings before the Board in this case and in circumstances where there is a plausible explanation in the materials available to the Board (in particular in the 2018 EIAR in respect of the Ringsend WWTP) I do not believe that it is open to the applicant to call into question this conclusion on the part of the inspector that enriched water entering Dublin Bay was shown to rapidly mix and become diluted such that the plume is often indistinguishable from the rest of the water in the Bay. It should also be noted, in this context that the only attack advanced in the statement of grounds on this aspect of the inspector’s findings is (as pleaded in para. E57) that the information available from the modelling submitted in respect of the 2018/2019 proposed upgrade of the Ringsend WWTP “demonstrates as a matter of fact that the Inspector was wrong to state that enriched water rapidly mixes and ‘is often indistinguishable from the rest of the bay water’. In fact, the opposite is the case.” That allegation is not borne out by reference to the terms of the 2018 EIAR as analysed in the submissions of counsel for Oxley and summarised above.”*

While the Applicant in the present case did not focus on the plume, (perhaps aware of McDonald J’s view) the general reasoning of McDonald J set out above seems to me applicable to the present case.

329. I am not convinced that the principle can be taken too far that the Board can be presumed to have relied on institutional knowledge of other planning applications and the materials on which they were based. And it is clear from the underlined words above that McDonald J was of the same view. Institutional knowledge of minor planning applications or planning applications long ago may be theoretical only. The issue may have to be considered on a case by case basis. But I respectfully follow McDonald J as to the Board’s institutional knowledge of such a major issue as the permitted

⁴⁶⁶ Emphasis added

and pending upgrade of Ringsend WwTP – well- and widely-known to be overloaded - to improve the quality of its discharge into Dublin Bay, very much of which is in one or more European sites - all in the context of significant planning applications, including the present one, to which its capacity and effluent quality is relevant and in which applications it is explicitly considered.

330. The Applicants relied on **Haverty**⁴⁶⁷ for a fair procedures point that they had not been informed in the planning process of any reliance by the Board on its institutional knowledge of the 2018 Ringsend WwTP Upgrade EIAR. I reject that point. The planning application had clearly apprised potential objectors of the intended discharge of the foul water of the Proposed Development to Ringsend WwTP, had recorded that breaches of its Waste Water Discharge Licence had occurred and had considered the question of effect on European Sites. The HHQRA had recorded consideration⁴⁶⁸ of the Ringsend WwTP Upgrade Project EIAR of June 2018. The Applicants were on notice of these matters and yet did not agitate before the Board the Ringsend WwTP capacity issue or alleged risk to European Sites in consequence.

331. That the Applicants did not agitate this issue is relevant not merely to the fair procedures point but also to the substantive issue of the adequacy of the AA Screening. The following observations of Barniville J in **Eoin Kelly** seem applicable:

“105. In considering whether, in substance, the screening report, and the inspector in his report, have complied with those requirements, it is relevant again to bear in mind that nobody, including the applicant or the NPWS, expressed any concern for the River Nanny Estuary and Shore SPA, or any of the other European sites within the zone of influence of the development or raised any other ecological concerns, either before the planning authority or an appeal before the Board. The Board, and its inspector, were not provided with any evidence to contradict or challenge the evidence and objective information contained in the screening report. Nor was any such evidence provided by or on behalf of the applicant in the proceedings.

I believe that this is relevant in assessing whether the screening exercise carried out by the Board, through its inspector, complied with the requirements of Article 6(3) of the Habitats Directive and s.177 U of the 2000 Act. Indeed, the stark absence of any countervailing evidence sets this case apart from many of the cases in this area in which significant ecological concerns arising in relation to the Habitats Directive have been raised both in the planning process and in proceedings before the court, some of which were mentioned in submissions at the hearing of these proceedings.

106. Bearing all of this in mind, I am satisfied that the screening report did provide a valid basis on which the inspector could screen the proposed development for appropriate assessment and that it provided a valid basis for the inspector to conclude that the proposed

⁴⁶⁷ The State (Haverty) v An Bord Pleanála, & Monarch Properties Limited, [1987] 1 IR 485

⁴⁶⁸ See list of references at p15

development, individually or in combination with other plans or projects, would not be likely to have a significant effect on any of the European sites within the zone of influence of the development.”

332. Mr Craig in his affidavit in these proceedings asserted an issue of impacts on nutrients in water causing algal growth, in turn causing impact on eelgrass, thereby impacting on Light-bellied Brent Geese. That argument failed in **Dublin Cycling** and for that supposed risk no evidence beyond mere assertion was tendered in these proceedings. I should say that I am looking at this not as to an issue of standing but as to the question of the substantive adequacy of the Board’s screening decision.

333. Collecting the foregoing, it is clear that McDonald J in **Dublin Cycling** upheld the AA Screening on evidence not materially distinguishable from the evidence before me and considered by the Board in this case.

Meaning of In-Combination Effects

334. I should say something of another argument made by the Applicants. There is no doubt as to the obligation, in EIA and AA, to assess in-combination effects of the proposed project and others. This can arise for example where two projects, neither of which would alone cause significant effect, may combine to do so or where an existing project is already causing significant effect and the proposed project will exacerbate the position.

335. The uncontroverted evidence before the Board was that the peak effluent discharge of the Proposed Development, would equate to 0.096%, and the average effluent discharge of the proposed development would equate to 0.023%, of the licensed discharge⁴⁶⁹ at Ringsend WwTP. Given the WwTP is overloaded, the effluent discharge of the Proposed Development must in fact represent an even smaller percentage of the actual loading on the WwTP and so an even smaller percentage contribution to any in-combination risk – but I will leave that aside. The question which arises is whether AA screening of the Proposed Development must consider the significance of the entire combined discharge as a single entity – the entire 100.096%/100.023%? Or is what is required a consideration of the incremental effect of the 0.096%/0.023%. The Applicants argued for the former proposition as necessary to avoid significant effect on European sites by “a thousand cuts” – i.e. multiple small developments. The Applicants accepted that their argument implied consideration, in AA Screening of even a planning application for a single dwelling whose foul water was to go to Ringsend WwTP, of the entire non-compliant output of Ringsend WwTP. The Applicants say that to say that a proposed development is not going to make an effect noticeably worse doesn't

⁴⁶⁹ peak hydraulic capacity

actually adequately resolve the question of significant effect in combination with other projects. I respectfully disagree.

336. While not without a logic, the Applicants' argument is in the end highly unconvincing – not least as it serves no purpose of environmental protection. In this regard, I bear in mind AG Sharpston's question in **Sweetman**⁴⁷⁰ - "*Should we bother to check?*" by doing AA – remembering that the question implies a very low threshold for doing AA. But if the proposed development will make the existing situation no worse, why indeed would one bother? The fundamental flaw in the Applicants' argument seems to me to be a failure to recognise that consideration of in-combination effects is generally consideration of effects in combination with other projects already in existence or permitted. For purposes of the analysis, the effects of those projects is assumed as inevitable - a given - a baseline. Those effects cannot be prevented, decreased or remediated by the project approval procedure in which the AA screening is being done. To so burden an applicant for permission would be entirely wrong.

337. It follows that, from a purposive point of view of protection of European Sites, the question must be whether the inadequately treated effluent of the incremental foul load of the proposed development will either

- tip the situation into one of significant risk of effect on European Sites where no such risk subsisted before or
- significantly exacerbate such a risk already existing.

Collecting both questions, one may ask in AA Screening whether in combination with other projects, existing and permitted, the proposed development is capable of making things worse.

338. The fear of "a thousand cuts" is not without substance. But its deployment in **Sweetman**⁴⁷¹ was in a case of destruction – "*lasting and irreparable loss*"- of protected priority natural habitat by the proposed development. In the present case there is nothing similar – indeed no evidence of any effect on any European site by reason of the Proposed Development or risk of such effect.

339. In **Fitzpatrick**⁴⁷² McDermott J, cited **Bowen-West**⁴⁷³ as addressing an argument that there was a rule of law that where it is intended later to continue or supplant a currently proposed limited scheme with a larger one, the effects of the latter are to be treated as the cumulative effects of the former. The court said "*There is in my judgment nothing in the Regulations nor indeed the Directive to suggest that the European legislature or domestic legislature implementing the Directive contemplated an approach that could be categorised by so rigid a rule. It seems to me that the texts are all consistent with the proposition that what are and what are not indirect, secondary or*

⁴⁷⁰ Sweetman & Others v An Bord Pleanála (Case C-258/11) ECLI:EU:C:2012:743; cited in Eoin Kelly v An Bord Pleanála & Aldi [2019] IEHC 84 (High Court, Barniville J, 8 February 2019)

⁴⁷¹ Sweetman and Others v An Bord Pleanála (C-258/11) EU:C:2012:743, opinion of Advocate General Sharpston of 22 November 2012

⁴⁷² Fitzpatrick -v- An Bord Pleanála [2017] IEHC 585 (High Court, McDermott J, 12 October 2017)

⁴⁷³ Bowen-West v Secretary of State [2012] EWCA Civ 321, [2012] Env L.R. 22. cited also by the Supreme Court in Fitzpatrick v An Bord Pleanála [2019] IESC 23 (Supreme Court, Finlay Geoghegan J, 11 April 2019)

cumulative effects is a matter of degree and judgment.” While the factual situation of in-combination effect considered here is not the same as that in **Fitzpatrick** and **Bowen-West**, the observation that what are cumulative effects is a matter of degree and judgment seems to me useful in the present case.

340. It seems to me also that the focus, in considering in-combination effects, on considering the incremental effect of the proposed development is consistent with the principle stated in **Eoin Kelly**⁴⁷⁴ that

“Plans or projects or applications for developments which have “no appreciable effect” on the protected site are excluded from the requirement to proceed to appropriate assessment. If all applications for permission for proposed developments capable of having “any effect whatsoever “on the protected site were to be caught by Article 6(3) (or s.177U) “activities on or near the site would risk being impossible by reason of legislative overkill”⁴⁷⁵.

Indeed, while it is an expert judgment for the Inspector, I confess to having great difficulty seeing how a 0.096%/0.023% increment to the effluent volume (and this, for reasons stated above, an over-estimate) can be characterised as implying the absence of certainty that there will be “no appreciable effect” on protected sites.

AA Screening - Conclusion

341. The Applicant’s challenge as to AA Screening referable to risk posed by Ringsend WwTP effluent to European Sites by reference to the foul water of the Proposed Development must be rejected. The plea of failure to consider in-combination effects clearly fails – they were considered.

342. While this failure was not alleged by reference to rationality criteria, if it had been it would have failed. The AA Screening is rebuttably presumed valid⁴⁷⁶ and the Applicants have not rebutted that 127resumption. I respectfully adopt mutatis mutandis to AA Screening, as opposed to AA which was in issue in that case, the observation of Barniville J in **Rushe**:⁴⁷⁷

“ ... there was ample evidence before the Board to enable it to reach the conclusions which it did in relation to in-combination effects. It is not for the court to assess the correctness or otherwise of the conclusions reached by the Board, provided that the Board approached its assessment of the in-combination effects in accordance with the correct legal test (and I am satisfied that it did) and provided that there was material to support the Board’s conclusions (and I am satisfied that there was). The Board’s conclusions in relation to in-combination

⁴⁷⁴ Eoin Kelly v An Bord Pleanála [2019] IEHC 84 (High Court, Barniville J, 8 February 2019) §68(10)

⁴⁷⁵ Citing the opinion of Advocate General Sharpston in Sweetman, §48

⁴⁷⁶ Eoin Kelly v An Bord Pleanála [2019] IEHC 84 (High Court, Barniville J, 8 February 2019)

⁴⁷⁷ Rushe & anor -v- An Bord Pleanála [2020] IEHC 122 (High Court (Judicial Review), Barniville J, 5 March 2020) §220

effects were not unreasonable or irrational in the O’Keeffe sense. Accordingly, I reject the submissions ... that the Board’s decision was invalid and should be quashed by reason of its alleged failure to consider the in-combination effects of the proposed development with other plans and projects.”

BATHING WATERS

Pleadings & Submissions

343. The Applicants plead⁴⁷⁸ that the Board:

- Failed properly to apply the Bathing Water Directive⁴⁷⁹.
- Failed to consider whether the Proposed Development would
 - exacerbate overflows from the West Pier pumping station in Dun Laoghaire which regularly lead to prohibition of bathing at Seapoint,
 - prejudice the achievement of measures to prevent, reduce or eliminate pollution pursuant to Annex II of that Directive,
 - whether there were any measures in place for that purpose.
- In so doing, failed to consider and determine a relevant matter and give adequate reasons for its decision, contrary to Ss.9 and 10 of the 2016 Act.

344. Notably, this ground was not pleaded as an issue of EIA Screening or AA Screening. It was pleaded as a stand-alone obligation of the Board on foot of the Bathing Waters Directive and the obligation imposed on the Board by Ss.9 and 10 of the 2016 Act to consider likely effects on the environment and provided a reasoned conclusion in relation to significant effects on the environment.

345. The Applicants cite the EU Law duty of sincere cooperation between Member States and the EU⁴⁸⁰ and cite the Bathing Water Directive as to:

- Its purpose⁴⁸¹ to preserve, protect and improve the quality of the environment and to protect human health by complementing the WFD,
- Its purpose to identify bathing waters and classify their water quality as poor, sufficient, good or excellent⁴⁸².

⁴⁷⁸ Grounds §7

⁴⁷⁹ Directive 2006/7/EC of the European Parliament And of the Council of 15 February 2006 Concerning the Management of Bathing Water Quality

²⁷⁶ Article 4(3) TEU

3. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives.

⁴⁸¹ Article 1(2)

⁴⁸² Article 5(1)

- Its requirement⁴⁸³ that the quality of all bathing waters be “at least ‘sufficient’” and that States “take such realistic and proportionate measures as they consider appropriate with a view to increasing the number of bathing waters classified as ‘excellent’ or ‘good’.”
- Annex II(4) which states that, “Bathing waters are to be classified as ‘excellent’... 2. if the bathing water is subject to short-term pollution, on condition that:... (ii) adequate management measures are being taken to prevent, reduce or eliminate the causes of pollution...”
- Implementation of that content of Annex II(4) by equivalent wording in the Bathing Water Quality Regulations 2008.⁴⁸⁴

346. The Applicants cite **Adeneler**⁴⁸⁵ for the rule that Member States must “refrain from taking any measures liable seriously to compromise the attainment of the result prescribed” – an obligation applicable to national courts – but, as will be seen, there is no evidence of risk of serious compromise by reason of the Proposed Development. The Applicants and cite **Workplace Relations Commission**⁴⁸⁶ for the rule that the primacy of EU law requires that courts and all bodies of Member States give full effect to EU rules – such, indeed, that Member States may not by law establish body to ensure enforcement of EU law in a particular area but deprive it of power to disapply a rule of national law that is contrary to EU law.

347. The Applicant cites:

- A 2018 EPA Seapoint Bathing Water Profile⁴⁸⁷ to the effect that an overflow from the West Pier Sewage Pump Station, about 250m south of the Seapoint designated bathing area, “*might be considered a risk to bathing water quality.*”
- The exhibited Greater Dublin Strategic Drainage Study⁴⁸⁸ says Dun Laoghaire has a combined drainage system⁴⁸⁹ in which storage is provided to limit overflows at West Pier and Bullock Harbour to three per Bathing Season⁴⁹⁰ to ensure compliance with the Bathing Water Regulations and “*connections of additional surface water flows to the system would lead to increased spills at the CSOs⁴⁹¹ and water quality at the bathing beaches in the area would be compromised.*” The Applicant says that, in essence, when too much rain falls, the system overflows 250m from the bathing area.

348. The Applicant says:

- Bathing waters are part of the environment.
- S.9(1)(a)(iii) of the 2016 Act requires the Board to consider “*likely effects on the environment*”.

⁴⁸³ Article 5(3)

⁴⁸⁴ S.I. 79/2008, Schedule 6(4)

⁴⁸⁵ Case C-314/08 – a case about the framework agreement on fixed-term work annexed to Council Directive 1999/70/EC of 28 June 1999.

⁴⁸⁶ Case C-378/17 Garda v WRC - §39 - EU law, in particular the principle of primacy of EU law,

⁴⁸⁷ Exhibit CC1 Tab 43 - EPA Seapoint Bathing Water Profile2018

⁴⁸⁸ Exhibit CC1 Tab 42 §7.3.6

⁴⁸⁹ Sewage and stormwater are drained and so mix in the same sewers

⁴⁹⁰ Prescribed by the Bathing Water Quality Regulations 2008 Article 2(2)

⁴⁹¹ Combined sewer overflows

- The issue of pumping station overflows was raised⁴⁹² but not determined.
- The Board failed to consider the Bathing Waters Directive at all.
- By authorising additional sewage flow to the West Pier pump station, the Board has
 - rendered less likely to be adequate the management measures taken to prevent, reduce or eliminate pollution from pumping station overflows,
 - increased the risk of an overflow,
 - thereby jeopardised the current excellent status of the bathing area.
- Thereby the Board failed to fulfil its duty under S.9(1)(a)(iii) of the 2016 Act and Article 4(3) TEU.

349. The Board and Lulani, inter alia,

- say the allegation is insufficiently particularised;
- say that in its proposal the existing and proposed foul and storm sewers are separate⁴⁹³ so there is *“no potential for sewage-laden water from the proposed development to enter into the local stormwater network and ultimately discharge to Seapoint at Dublin Bay.”*
- refer to the HHQRA consideration of these matters (It concluded that the ‘excellent quality’ bathing water status (issued by the EPA) at Seapoint will be unchanged by the proposed development.)
- refer to consideration of these matters in the Inspector’s Report⁴⁹⁴

350. The Applicants reply, inter alia, that:

- where the allegation is of failure to consider an entire Directive, it is sufficiently particularised by identifying the Directive as a whole.
- Lulani’s proposition is contradicted by the Greater Dublin Strategic Drainage Study and the Inspector’s statement⁴⁹⁵ that foul water *“will be separate from surface water within the site,”* with *“connection proposed to the combined⁴⁹⁶ sewer at Drayton”* outside the site.
- the Inspector merely recites that the issue of overflows was raised but does not consider or determine the issue.

351. I have recited above the Inspector’s report on this issue⁴⁹⁷

⁴⁹² Inspector’s report p26: Observer Submissions - No bathing notices due to capacity issues and overflows. Electronic notice board erected to keep bathers informed.

⁴⁹³ In compliance with the Building Regulations and Dublin City’s code of practice

⁴⁹⁴ Pages 26-27, 70, 137 and 146

⁴⁹⁵ At p69

⁴⁹⁶ Emphasis added

⁴⁹⁷ Pp70, see also pp 26-27, 137 and 146

“Some observers raised concerns relation to the capacity of the existing infrastructure that results in no bathing notices a regular occurrence. Irish Water identifies no issues with foul water connection and treatment.

While reference to capacity at Ringsend Treatment Plant was raised and the local pumping station at Monkstown, it is noted that IW are subject to EPA licencing requirements, and submit a report on this annually, as well as being subject to ongoing monitoring to ensure all licencing obligations are met, a number of which relate to protection of Dublin Bay. Having regard to this, I am satisfied that this matter can and has been considered by the relevant competent authority and that there is no significant impact on Dublin Bay or any other European Site as a result of foul water drainage.”

Discussion & Conclusion

352. It is not at all clear to me what legal obligation on the Board the Applicant invoked in this Ground. It was pleaded explicitly on the basis of the Bathing Waters Directive. The Board is not the competent authority as to the Bathing Waters Directive. Pleading it as to EIA or AA Screening may have provided a route to consideration of the Bathing Waters Directive but it was not so pleaded. Nonetheless, I will consider the issue further.

353. I should clarify an issue which caused confusion at the hearing. As to effect on the Seapoint bathing area, what is in issue is overflows from the West Pier Pumping Station – which has a storm water holding tank. That Pumping Station is fed by a combined drainage system containing both foul and storm water and, the Applicants say, “*pumps all the sewage from the Monkstown and Dun Laoghaire area across Dublin Bay to the Ringsend WwTP*”⁴⁹⁸. While the foul water provides the most pollutant content, the storm water, at least as causative of overflows, provides the volume⁴⁹⁹. As the Applicants say, “*In essence, when too much rain falls, the system overflows ...*”⁵⁰⁰ Overflows occur due to heavy rain and, as to the foul content, are very diluted. That is not at all to say their pollutant content is insignificant.

354. The West Pier Pumping Station overflows are a little complex in that there are two storm overflow outfalls⁵⁰¹. In heavy rain, the overflow initially is via a long sea outfall to Dublin Bay at some distance from Seapoint. Only in “*very heavy rain*”, when the overflow volumes defeat the long sea outfall, does the short sea outfall discharge – “*typically*” 14 times per year. It is closer to Seapoint and poses its bathing waters a higher risk. But even long sea outfall overflows result in public notices advising against swimming at Seapoint. As all short sea outfall overflows necessarily coincide with long sea outfall overflows, the total number of bathing water warnings is determined by the number of long sea outfall overflows. So, to add the number of short sea outfall overflows to the number of long sea outfall overflows, as the Applicants did⁵⁰², is to overstate the problem. The Applicants say a warning notice at Seapoint may close it for a week at a time. Each notice ends 12 hours after the long sea outfall overflow ends but that tells us little as the duration of the notice is primarily determined by the duration of the overflow and that is, at least largely, determined by the rainfall pattern. The Applicants will also say that notices are confined to the Bathing Season whereas swimmers swim all year round. I need not determine these matters.

355. However I note that the Bathing Waters Directive, which is the basis of this challenge, explicitly envisages a “*Bathing Season*” as the “*period during which large numbers of bathers can be expected*” - thereby excluding periods during which lesser numbers of bathers can be expected. The

⁴⁹⁸ Exhibit CC1 Tab 48 – e-mail From: Douglas Barry imra@iol.ie Subject: Fwd: Monitoring sea water quality at Seapoint, Co. Dublin Date: 13 October 2020 at 18:08:26 IST

⁴⁹⁹ The absolute volumes of storm water and the relative volumes of foul and storm water in the combined stream will vary very significantly with levels of rainfall.

⁵⁰⁰ Submissions §11

⁵⁰¹ This following description is taken in considerable part from Exhibit CC1 Tab 43 - EPA Seapoint Bathing Water Profile 2018

⁵⁰² Affidavit of Christopher Craig 14 October 2020 §15

definition of the season is left to Member States and Ireland's definition⁵⁰³ is not challenged in these proceedings.

356. The present situation at Seapoint, as concerns its closure to bathers due to storm water overflows from the West Pier Pumping Station, is obviously not due to the Proposed Development. So, assuming any question to arise under the Bathing Waters Directive it must, again, be one of in-combination effect (albeit not in an AA or EIA context) and the question for the Inspector was: is it likely that the Proposed Development would make the present situation at Seapoint worse?

357. More recent information from the EPA⁵⁰⁴ post-dates the Board's decision and Lulani, in my view correctly, object to the Applicants' reliance on it for present purposes. For all that, it does not seem to me generally inconsistent with the information which was before the Board. It records 3 incidents requiring swimming warning notices and notices to the EPA in the Bathing Season in 2019 and 5 in 2020.

358. Whereas, for historic reasons, much of Dun Laoghaire and other urban areas have a combined drainage system, modern practice in new developments is to drain foul and storm waters separately if possible. The Proposed Development, as to the drainage system internal to the site, will have separate foul and storm drains⁵⁰⁵. The storm drains will discharge via a SUDS⁵⁰⁶ system to the Stradbroom Stream. So stormwater from the Site will never reach the West Pier Pumping Station. Accordingly, the risk cited by the Applicants that "*connections of additional surface water flows to the system would lead to increased spills at the CSOs*" simply does not arise. I asked the Applicants to clarify if, despite their assertion that "*overflows will become more frequent*"⁵⁰⁷, they accepted that the proposed development will not increase the frequency of overflows at the West Pier Pumping Station⁵⁰⁸. They were unable to point to any reason why it would, I have seen no evidence beyond mere assertion that it would and I consider it clear that it would not.

359. The foul water from the Proposed Development will be discharged to the Irish Water combined sewers to the West Pier Pumping Station for pumping onward to Ringsend WWTP. While the discharge will be from the Site to a combined sewer (serving the area and its combined drainage systems generally) it is important to understand that the Site's discharge to that combined sewer will be foul only. So it is clear that the Applicants' response to Lulani on this issue, cited above, is misconceived.

⁵⁰³ Prescribed by the Bathing Water Quality Regulations 2008 Article 2(2)

⁵⁰⁴ See Exhibit CC1 Tab 48 Freedom of Information Reply October 2000

⁵⁰⁵ See generally Lulani's Hydrological & Hydrogeological Qualitative Risk Assessment by AWN 19/3/20 – Exhibit CC1 Tab 7 §1.3 Description of Drainage

⁵⁰⁶ Sustainable Urban Drainage System

⁵⁰⁷ Affidavit of Christopher Craig 14 October 2020 §15

⁵⁰⁸ See transcript day 2 p139 et seq

360. Lulani's HHQRA⁵⁰⁹ records the most recent information⁵¹⁰ as to the Seapoint bathing water quality. It has been 'excellent' since 2015 on a bacteriological assessment scale of: Excellent, Good, Sufficient and Poor and the 2019 monthly data has continued to indicate excellent status.

361. Though it is not explicitly stated in either the 2018 EPA Seapoint Bathing Water Profile or the HHQRA, and could helpfully have been stated, it is clear from the authorship (EPA), the subject-matter (Bathing Water Quality) and the classification scale used - which is that prescribed by the Bathing Water Directive⁵¹¹ and Article 12 of the Bathing Water Quality Regulations 2008 - that the Bathing Water Quality assessments described are done by reference to Bathing Waters Directive standards. And by those standards and despite the number of overflows exceeding 14 per year and despite their identification by the EPA as generating high microbial pollution potential, Seapoint bathing water quality has been excellent every year. In my view there is no reason to believe that the Inspector and the Board, as experts, did not understand that the information provided related to Bathing Water Quality assessments done by reference to Bathing Waters Directive standards. The Inspector was also clearly aware and recorded that "no bathing notices" were alleged to be a regular occurrence.

362. Inevitably, Counsel for the Applicants agreed that the proposed development will increase the sewage intake at the West Pier Pumping Station "*by a minor degree*"⁵¹². I have failed to find that there was before the Board any evidence or reason to believe that the volume of the foul water from 300 residential units from the Proposed Development, when added to that already passing through the West Pier Pumping Station from all or most of Dun Laoghaire and Monkstown, will increase either by its volume the frequency of overflows at the West Pier Pumping Station or by its foul content the pollutant effect of such overflows. On the contrary, the HHQRA concludes that Seapoint's 'excellent quality' bathing water status will be unchanged by the proposed development. There was no contrary evidence before the Board and is none before me. The DAU accepted⁵¹³ the HHQRA conclusion that "*the impact of storm water runoff and foul effluent from the proposed development will not result in any change to the current regime (water quality or quantity)*". While that was by reference to Dublin Bay Natura 2000 Sites, I note that Seapoint Bathing Area is in a Natura 2000 Site⁵¹⁴.

363. The HHQRA conclusion is uncontradicted by any evidence beyond mere assertion and the proposal that any addition to the foul load at West Pier Pumping Station "must" by reason of overflows be detrimental to Seapoint's bathing water status⁵¹⁵ or detrimental to measures to prevent, reduce or eliminate the pollution. There is no evidence that it will or event of a real risk that

⁵⁰⁹ Exhibit CC1 Tab 7 §2.1 Hydrological Catchment Description

⁵¹⁰ EPA 2019 – data 2016-2018 - water quality ratings are generally calculated using monitoring results over a four-year period

⁵¹¹ See above

⁵¹² Day 2 p140

⁵¹³ Submission 17 June 2020 - Exhibit PD1 Tab 11

⁵¹⁴ Exhibit CC1 Tab 48 – e-mail From: Douglas Barry imra@iol.ie Subject: Fwd: Monitoring sea water quality at Seapoint, Co. Dublin Date: 13 October 2020 at 18:08:26 IST

⁵¹⁵ Transcript Day 2 – Counsel for the Applicants: p143 "If you are putting more in then you are exacerbating the situation." p152 "... the point is, there's too many already and it's going to make it worse."

it will. And I have seen no attempt by objectors or the Applicants to distinguish in the planning process the question of the historic and present occurrence of bathing water problems at Seapoint from the question whether the Proposed Development will exacerbate any such problems – either as to frequency of overflows or their pollutant content. Even if the Applicant’s characterisation of the West Pier PS as pumping “*all the sewage from the Monkstown and Dun Laoghaire area*” is not precisely accurate, if it is merely reasonably indicative of the situation, it will be clear that the Board could reasonably have expected objectors, alleging that an increment of 300 units’ foul water would discernibly exacerbate the effect of storm water overflows on Seapoint Bathing Area, to have done more than say, as in effect they have, that it’s obvious. It is not obvious. If anything is obvious it is the contrary.

364. The Inspector’s report on this issue is perhaps sub-optimal. But he explicitly recorded the issue and I see no reason to see a failure to consider the question of effect of overflows on Seapoint Bathing Area or to do so by reference to the requirements of the Bathing Waters Directive. The only evidence before the Inspector, and it was in the form of an expert report citing some years of EPA water quality data, was that, by reference to those requirements, water quality at the Seapoint Bathing Area is, and has for many years been, excellent and, *ceteris paribus*, will remain so if the Proposed Development proceeds. There was no contradictory evidence. The Inspector did consider the relevant matters, must be understood as having preferred the only evidence before him to the no doubt genuine but evidentially unsupported concerns of the objectors and was entitled to reach the conclusion drawn.

365. For the foregoing reasons I reject the challenge based on the Bathing Waters Directive.

CONCLUSIONS

366. For the reasons set out above and as to the Impugned Permission I will quash it as:

- a. erroneous by reason of the Board’s finding that Lulani’s EIA Screening Report identified and described adequately the effects of the proposed development on the environment and so adopting a report which did not describe those effects adequately and could not of itself, in law, provide an adequate basis for or reasons for an EIA screening determination that EIA was not required,
- b. failing to give adequate reasons for its EIA Screening decision as to insignificance of effect on Cultural Heritage,
- c. in law erroneously reliant on SPPR1 of the Height Guidelines.

I reject all other grounds of challenge.

367. As this judgment is delivered electronically, I will list this case for mention on 15 June 2022 with a view to final orders.

David Holland
31 May 2022