THE HIGH COURT
JUDICIAL REVIEW

Record No: 2021/562JR

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTIONS 50, 50A and 50B OF THE PLANNING AND DEVELOPMENT ACT 2000, AS AMENDED

BETWEEN:

CROFTON BUILDINGS MANAGEMENT CLG
and
STEPHANIE BOURKE

Applicants

And

AN BORD PLEANÁLA

Respondent

And

FITZWILLIAM DL LIMITED

Notice Party

Judgment delivered by Mr Justice Holland on 20 December 2022

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INTRODUCTION

1. The Respondent ("the Board") has conceded certiorari of its decision[1] (the "Impugned Decision" or the "Quashed Decision"[2]) dated 28 April 2021 to grant planning permission pursuant to the Planning and Development (Housing) Residential Tenancies Act 2016 ("the 2016 Act") to the Notice Party ("Fitzwilliam") for a strategic housing development ("SHD" and "the Proposed Development") comprising the demolition of a 2-storey dwelling and the construction of 102 build-to-rent apartments in 2 buildings, ancillary residential amenities and a publicly accessible café on a 0.42 hectare site at Saint Michael's Hospital Car Park, Crofton Road, Dun Laoghaire, County Dublin.

2. The First Applicant is the owners' management company for the Harbour View residential development, located adjacent to the site of the Proposed Development. The Second Applicant is owner of an apartment in Harbour View. Both participated in the planning process as objectors. For convenience I will refer to both Applicants as "Crofton".

1 ABP-309098-21
2 A convenient usage if somewhat anticipatory of certiorari yet to issue.

3. Fitzwilliam's mandatory[3] pre-application consultation with the Planning Authority[4] and the Board pursuant to the 2016 Act, and its SHD planning application[5] (including its Statement of Consistency, Material Contravention Statement and technical reports) which resulted in the Impugned Decision, and all consequent public and other participation in the planning process, and the Quashed Decision were all informed by and proceeded on the basis of the Dun Laoghaire-Rathdown Development Plan 2016-2022 ("the 2016 Development Plan").

4. Certiorari is conceded on the basis that the Board breached s.9(6)(c) of the 2016 Act in granting permission for the Proposed Development in material contravention of the objectives of the 2016 Development Plan as to building height[6]. The resultant form of order is agreed by the parties save for the question of remittal. This judgment concerns the questions whether, and if so on what terms, the Impugned Decision should be remitted to decision again by the Board. All parties have made lengthy written and oral submissions on the issue

5. A significant consequence of the decision whether to quash simpliciter or to remit is that remittal would preserve the planning application for decision – and for decision as an SHD planning application made pursuant to S.4 of the 2016 Act. Given the expiry of that Act, certiorari simpliciter would imply that a new planning application would be required and that any such application would not be an SHD application.

6. It is clear that the SHD process was lawful until the making of the Quashed Decision. It proceeded, correctly, on the basis that the 2016 Development Plan applied[7]. Its erroneous failure to identify the material contravention as to building height was informed by its inspector's erroneous view that the proposed development would not constitute a material contravention of the 2016 Development Plan as to building height. It is clear that remittal to a decision having regard to the 2016 Development Plan would be to the point of requiring a replacement inspector's report premised on the existence of a material contravention as to building height and the necessity of considering whether, despite that material contravention, permission could and should be justified by reference to the relevant statutory criteria[8]. As Fitzwilliam's SHD planning application proposed a justification for the grant of permission despite material contravention of the 2016 Development Plan as to height, and as public participation, including by Crofton, has already occurred on that basis, the precise difficulty which prevented remission in **Redmond**[9] would not arise if the 2016 Development Plan applies. In summary, if the 2016 Development Plan applies remittal poses no difficulty and will be ordered.

3 S.5(1)&(2) of the 2016 Act
4 Dun Laoghaire/Rathdown County Council
5 Made on 7th January 2021.
6 As pleaded at Core Legal Ground 1 of the Statement of Grounds
7 I will use "applied" and cognate words to signify the development plan to which the Board will have to have regard in making the decision if remitted.
8 Set by S.9(6) of the 2016 Act and S.37(2)(b) Planning & Development Act 2000
9 Infra

7. However, since the Impugned Decision was made, the 2016 Development Plan has been replaced by the Dún Laoghaire-Rathdown Development Plan 2022-2028 (the "2022 Development Plan"). It was adopted on 10th March 2021 and took effect on 21 April 2022. Certiorari simpliciter would imply that any future planning application would be made and decided having regard to the 2022 Development Plan. A question arises whether, on remittal, the remitted decision would be made having regard to the 2016 Development Plan or the 2022 Development Plan. Fitzwilliam say the 2016 Development Plan would apply. Crofton and the Board say the 2022 Development Plan would apply[10]. Crofton say also that the 2016 Act does not allow for fair procedures in consideration of the 2022 Development Plan in this case. As to that, the Board equivocates.

8. Surprisingly, the question has never been explicitly decided which development plan applies in deciding a planning application where the development plan has been replaced (or even varied in a relevant respect) while the planning permission application is pending. That issue can arise in any planning application but takes on particular features, it is argued, both in the context of remittal of a quashed planning decision for reconsideration and, as a separate matter, in an SHD planning application given the limited opportunity provided by the 2016 Act process for adaptation to changed circumstances. It is fair to say that conventional wisdom and practice has been that the development plan which applies is that current when the decision is made.

9. The parties agreed, and I assume though I do not decide, that the decision on this issue would likely have considerable implications for the application of policy generally – local area plans, ministerial guidelines under S.28 PDA 2000 and government policy generally – to planning decisions. Accordingly, it seems to me that I should assume that the application to the present decision of the 2022 Development Plan, by reason of differences between it and the 2016 Development Plan, could well make an appreciable difference to the decision on a remitted planning application as to its grant or refusal or as to the conditions on which it might be granted.

10. Though the issue of my doing so was canvassed, the parties have, save for one exception, not asked me to consider the content of either the 2016 Development Plan or the 2022 Development Plan or any differences between them. They have, however, agreed that such differences are likely to be material.

11. The exception is that, as Crofton point out that, whereas the 2016 Development Plan required for purposes of **Part V PDA 2000**[11] that agreement with the planning authority for provision of social housing be based on reservation of 10% of the site for social housing[12] in accordance with

10 I use the word "apply" here as a convenient shorthand for the obligation of the Board to "have regard to" the relevant development plan.
11 Planning & Development Act 2000
12 For present purposes I ignore the possibility of equivalent alternative arrangements,

the maximum percentage then allowed by **S.94(4)(c) PDA 2000**, on foot of later statutory amendment the equivalent requirement of the 2022 Development Plan is 20%. It is important to state that, whatever the percentage stipulated in the applicable development plan, if, as they do in this case, the relevant statutory criteria apply, **S.96 PDA 2000** renders mandatory the imposition of what is colloquially termed a "Part V" condition in the planning permission. Such a condition was imposed in the Quashed Decision and would be required in any decision on remittal. But, if the 2022 Development Plan applies on remittal, the resultant Part V condition would necessarily differ significantly from the Part V condition in the Quashed Decision by reason of the increased percentage.

12. For reasons which this judgment may illuminate, counsel for the Board, correctly it seems to me, suggested, and it is to be regretted, that there is no entirely satisfactory or entirely fair solution to the issue I must decide.

REMITTAL - ORDER 84, RULE 27(4) & S.50A(9A) PDA 2000

13. There is now an extensive caselaw on remittal[13]. I will consider it further in due course. Suffice it now to say that the Court has a wide discretion whether to remit and on what terms. The governing criteria in any decision whether to remit are fairness and justice with the "*ultimate touchstone*" and "*overall object of achieving a just result*."[14] There is a strong predisposition to remit where it can be justly done. The precise terms of the appropriate order will vary as between types of decision quashed and as between cases according to their varying circumstances.

Order 84, Rule 27(4)

14. Order 84, Rule 27(4) of the Rules of the Superior Courts ("O.84 R.27(4)"), as amended, provides as follows:

> *"Where the relief sought is an order of certiorari and the Court is satisfied that there are grounds for quashing the decision to which the application relates, the Court may, in addition to quashing it, remit the matter to the Court, tribunal or authority concerned with a direction to reconsider it and reach a decision in accordance with the findings of the Court."*

13 Including Usk & District Residents Association Limited v. An Bord Pleanála [2007] IEHC 86; O'Grianna v. An Bord Pleanála [2015] IEHC 248; Kells Quarry Products Ltd v Kerry County Council [2010] IEHC 69, Tristor Ltd v Minister for the Environment, Heritage and Local Government (No. 2) [2010] IEHC 454, Christian v. Dublin City Council [2012] IEHC 309; Clonres v. An Bord Pleanála [2018] IEHC 473, Fitzgerald v. Dun Laoghaire Rathdown County Council [2019] IEHC 890, Barna Wind Action Group v An Bord Pleanála [2020] IEHC 177, Cork Harbour Alliance for a Safe Environment v An Bord Pleanála [2021] IEHC 629 and Kemper v An Bord Pleanála [2021] IEHC 281.
14 Prendiville, infra & Fitzgerald, infra.

S.50A(9A) PDA 2000

15. **S.50A(9A[15]) PDA 2000**[16] has been commenced from 20 October 2022[17]. It reads as follows:

> *(9A) If, on an application for judicial review under the Order[18], the Court decides to quash a decision or other act to which section 50(2) applies, made or done on an application for permission or approval, the Court shall, if requested by the applicant for permission or approval, remit the matter to the planning authority, the local authority or the Board, as may be appropriate, for reconsideration, subject to such directions as the Court considers appropriate, unless the Court considers, having regard to the circumstances of the case, that it would not be lawful to do so.*

16. So, assuming the preconditions to its operation[19] apply, as the parties all but agree and I am happy they do, **S.50A(9A)** requires remittal *"unless the Court considers, having regard to the circumstances of the case, that it would not be lawful to do so".* It seems reasonable to regard this as a statutory expression and reinforcement of the principles and presumption in favour of remittal generally discernible in the cases. There was no real dispute in this regard - though the Board correctly emphasises that I must be positively satisfied that it would be unlawful to remit before I could refuse to remit.

THE CASES ON REMITTAL & SOME COMMENT ON THEIR APPLICATION TO THE PRESENT CASE

Usk -2007 & Kells Quarry Products - 2010

17. Crofton cite **Kells Quarry Products**[20] as an example of refusal to remit as, having regard to the constraints on the statutory scheme (in that case time limits), "*no purpose would be served by the remittal*". Kells related to the quarry registration scheme under S.261 PDA 2000 which was commenced in 2005. The quarry was registered on 23 March 2005, after which the Council had until 22 March 2007, to decide to impose conditions on that registration. The Council's correspondence gave the applicant too little time to respond to the Council's proposed conditions and so its imposition of conditions was quashed. The applicant opposed remittal on the basis that the statutory time limit for the imposition of conditions had passed. Dunne J referred to the clear jurisdiction and wide discretion to remit as established in **Usk**[21] and other cases – observing that "*the discretion must be exercised both judicially and judiciously with the overall object of achieving a just*

15 As inserted by s.22 of the Planning and Development, Maritime and Valuation (Amendment) Act 2022.
16 Planning and Development Act 2000 as amended
17 Planning and Development, Maritime and Valuation (Amendment) Act 2022 (Commencement of Certain Provisions) (No. 3) Order 2022
18 i.e. Order 84 RSC
19 In this case, a decision to quash a decision made in an application for permission and a request by the applicant for permission to remit.
20 Kells Quarry Products Ltd v Kerry County Council [2010] IEHC 69
21 Usk & District Residents Association Limited v. An Bord Pleanála [2007] IEHC 86

result.". She cited **Brown**[22] as establishing that the time limit set in S.261 for the imposition of conditions was mandatory and could not be extended. Dunne J continued:

> *"That being so, I cannot see any point in remitting this matter to the respondent for the purpose of going through the exercise of allowing the applicant to furnish submissions on the conditions to be imposed, given that the time for the imposition of conditions has now passed and that there is no provision in the legislative scheme of the Act for the extension of the two-year period. In other words, no purpose would be served by the remittal of the matter to the respondent."*

Tristor - 2010

18. The general approach to remittal was described as follows by Clarke J in **Tristor**[23], in which a development plan was quashed:

> *"There will, of course, be a whole range of circumstances in which the courts may have to consider the knock on effect of a finding that a particular decision in the planning process is invalid. Each such case is likely to turn both on its own facts and the precise statutory issue with which the court is concerned. However, it seems to me that the overriding principle ought to be that the court should do its best to ensure that parties do not inappropriately suffer or, indeed gain, by reason of invalid decision making and that, insofar as it may be possible so to do both on the facts and within the relevant statutory framework, the situation should be returned to where it would have been had the invalid decision not taken place. The extent to which it may be possible to achieve that overall principle is likely to vary significantly from case to case."*

This excerpt both identifies the aim in remittal and recognises that in a given case it may or may not be possible to achieve that aim in whole or in part.

19. Clarke J also cited another overriding principle – "*that the court should only interfere with the planning process to the minimum extent necessary to right the consequences of any invalid decision …".* A *"relatively straightforward and limited interference" "should be the port of first call"* – though *"It may not always prove possible".* Clarke J observed that *"The overriding principle .. should be to attempt, in as clinical a way as is possible, to undo the consequences of any wrongful or invalid act but to go no further."*

20. Clarke J also made what seems to me to be a generally applicable observation – at least in statutory processes characterised by regulation of matters of public interest and/or by public participation – that *"The legitimate interests of the public generally or third parties may come into*

22 Brown v. Kerry County Council (Unreported, 9th October, 2009), (Hedigan J.)
23 Tristor Ltd v Minister for the Environment, Heritage and Local Government (No. 2) [2010] IEHC 454

play." That was a weighty consideration in **Redmond**[24] and seems to me also relevant in the present case.

Christian #2 - 2012

21. Clarke J, in **Christian #2**[25], addressed a question how precisely a quashed element of a Development Plan (as to zoning of the Applicants' lands) should be remitted to the elected members of the planning authority for decision again having regard to the complex and iterative statutory procedures, including public consultation, which ordinarily lead to the adoption of a development plan[26]. Clarke J cited, as applicable at a general level, the principles he had identified in Tristor and observed that:

> *"It is not necessary for a court which quashes an order or measure made or taken at the end of a lengthy process to necessarily require that the process go back to the beginning. Where the process is conducted in a regular and lawful way up to a certain point in time, then the court should give consideration as to whether there is any good reason to start the process again. Active consideration should be given to the possibility of remitting the matter back to the decision-maker or decision-makers to continue the process from the point in time where it can be said to have gone wrong. There may, of course, on the facts of any individual case, be problems with doing that. However, in my view a court should lean in favour of standing over a properly conducted process and only require any part of the process which was invalid to be revisited in the context of a matter being referred back."*[27]

22. Importantly, Clarke J also observed that, on remittal:

> *"… the inherent jurisdiction of the court entitles the court to give directions as to the process to be followed by that decision-maker in reconsidering the matter. However, the court should, in giving such directions, attempt to replicate, insofar as it may be practicable, the legal requirements that would apply, whether under statute, rules or the like, to the making of decisions of that type. It will not always be possible to ensure exact compliance with the relevant regime, for it is in the nature of a decision having already*

24 infra
25 Christian v. Dublin City Council (No. 2) [2012] IEHC 309
26 Described by Clarke J in §4.4 as follows: "The first stage so described involves an issues paper which, after public consultation, leads to a meeting of the elected members for the purposes of issuing directions on the preparation of a draft development plan. The second stage involves a consideration by the elected members of a proposal to adopt that draft development plan including a consideration of such amendments to it as might be proposed by the elected members. The third stage involves public consultation on the draft development plan so adopted including the publication of an environmental report and appropriate assessments. A fourth stage involves a consideration of such public submissions as arise from the consultation to which I have referred and involves a further consideration of amending motions proposed by the elected members and a report prepared by the Manager on such matters. Any material amendments so proposed (with consequential addenda to the environmental report and assessments) are again the subject of public consultation which in turn leads to further submissions and a further opportunity for the elected members to bring motions. It is in the light of those final submissions and proposed amendments that the fifth stage involving the ultimate decision to adopt the development plan is taken."
27 §4.8

> *been made and having been subsequently quashed, that some variation on the normal procedure may be necessitated."*[28]

23. In remitting to the Council the question of how to zone the lands effectively deprived of any zoning by his order of certiorari, Clarke J in **Christian #2**, though seeking "*to replicate, insofar as practicable, the statutory process",* directed *"by analogy with the public consultation provisions contained within s.12 of the 2000 Act, … that there be some opportunity for public consultation".*[29] It seems reasonable – even obvious - to infer that this direction was informed by *"The legitimate interests of the public generally or third parties"* as cited in **Tristor** and the governing criteria of fairness and justice - **Barna Wind Action**[30].

Prendiville - 2017

24. Kelly J in **Prendiville**[31] emphasised the width of the court's discretion whether to remit and on what terms and considered the caselaw "*merely illustrative of the wide discretion vested in the Court and some of the factors which ought to be taken into account*." He repeated his view stated in **Usk**:

> *"I think the best that can be said is that the exercise of the discretion is a wide one and it would be both impossible and unwise to attempt to set out in a comprehensive fashion all the factors which the court ought to take into consideration. That will have to be developed on a case by case basis. The one thing that can be said is that the discretion must be exercised both judicially and judiciously with the overall object of achieving a just result."*

25. **Prendiville**[32] is a useful reminder that the subsequent, rightly influential and highly useful **Clonres/Barna** list of principles (which I set out below), should not be elevated into a quasi-statutory test. Nor were those principles presented as such in **Clonres** and **Barna**: the list is a non-exhaustive menu of often-relevant factors and leaves to the court in a particular case the fact-sensitive task of identifying those factors relevant to the facts before it and assigning relative weights as between them – and this, since 20 October 2021, by reference to the criterion of lawfulness set in S.50A(9A).

Clonres - 2018

28 §4.17
29 The two phrases cited here appear separately in the judgment of Clarke J at §§4.21 & 4.19 respectively but seem to me complementary.
30 infra
31 Prendiville v The Medical Council [2007] IEHC 427
32 Prendiville v The Medical Council [2007] IEHC 427

26. **Clonres 2018**[33] is an important case in which Barniville J distilled the applicable principles. As they were slightly further distilled by McDonald J in **Barna Wind Action**[34] I will list them below when addressing that case.

27. Here I will note that Fitzwilliam emphasises Barniville J's judgment in its following elements:

- *"The 'overriding principle' behind any remedy in civil proceedings including in considering whether to remit 'should be to attempt, in as clinical a way as is possible, to undo the consequences of any wrongful or invalid act but to go no further"*[35]
- *"the sole function of the Court is to fashion an order which puts matters back into a position in which they were immediately before the wrongful exercise of a ministerial discretion occurred."*[36]

28. Crofton emphasises the rider applied by Barniville J in citing Christian - to the effect that the court "*should attempt to replicate, insofar as may be practicable, the legal requirements which would apply under statute in respect of the making of the decision by the Board (subject, of course, to there being no statutory impediment to such directions)*."[37] In the same vein, the Board characterises the views of Barniville J and Clarke J as being that any directions made must be consistent with the statutory scheme and cannot confer powers on the Board which it has not otherwise been granted by the Oireachtas.

29. **Clonres** was an SHD permission under the 2016 Act quashed by consent of the Board for error on the face of the record[38]. Remittal was ordered despite a submission that the court had no power to alter or tamper with the time periods in the 2016 Act, and specifically no power to enlarge the 16-week period, referred to in s.9(9) of the 2016 Act, within which the Board must make its decision.

30. Barniville J remitted to the point in time at which the Board's planning inspector had signed her report to the Board and deemed that the 16-week time limit would expire six weeks from the perfection of the Order, saying:

> *"…… it is appropriate in the interest of certainty and in the interest of fairness for all parties (including the applicants and the developer) that I should give directions in relation to the timing of the Board's decision. I am satisfied that it is open to me to do so and that I am not precluded by virtue of any provision in the 2016 Act or otherwise from giving such directions. In that regard, I accept the Board's submission in relation to the provisions of ss. 9(9)(a) and 9(13) of the 2016 Act. Section 9(9)(a) does not provide, in the event that the*

33 Clonres v. An Bord Pleanála [2018] IEHC 473
34 Barna Wind Action Group v An Bord Pleanála [2020] IEHC 177
35 citing Clarke J. in Christian at §4.6 referring to his earlier judgment in Tristor
36 citing Christian §4.6 quoting Tristor §4.4
37 Rider underlined.
38 the error being a mis-recording of the test applied by the Board in reaching its conclusion on appropriate assessment under the Habitats Directive 92/43/EEC.

Board fails to make a decision within the 16 week period referred to therein, that the application is to lapse. Nor does it specify any other consequence for the validity of the application in the event that the Board fails to make its decision within the 16 week period. The only consequence appears to be that contained in s. 9(13) which is that the Board must proceed to make its decision notwithstanding that the period has expired and will be subject to an obligation to make a payment to the developer in such circumstances. I am satisfied, therefore, that there is no statutory impediment to me giving a direction that the time set out in s. 9(9)(a) of the 2016 Act should expire at a particular point in time in respect of the application remitted to the Board."

Fitzgerald - 2019

31. In **Fitzgerald**[39], the applicant for judicial review argued that the court had no jurisdiction to remit where relevant statutory time periods applicable in the decision-making process had expired and, it was submitted, could not be re-opened or reset for purposes of remittal. Barniville J referred, inter alia, to the principle identified in **Christian #2** and in particular to the *"overall objective of achieving a "just result" which is the ultimate touchstone for the exercise by the court of its discretion to remit."* Inter alia, he observed that minimising delay was appropriate where the particular planning regime in play prioritised expedition in decision-making. He was satisfied to remit despite the time limits issue.

32. In that case the planning regime in play which prioritised expedition related to housing development in an SDZ[40]. The SHD regime also prioritises expedition.

33. Barniville J held that, in principle, he should remit *"as close as possible to the point at which the infirmity in the Council's decision started to creep into the process (based on the conceded defect). I appreciate that it is difficult to pinpoint that point in time with absolute precision."* That point in the process should represent *"a fair and reasonable balance between the respective interests of the applicant and those of the notice party …"*

Barna Wind Action – April 2020

34. In **Barna Wind Action,** the principles stated by Barniville J in Clonres were described by McDonald J as representing a careful and comprehensive distillation of pre-existing case law, and were summarised by McDonald J. At expense of some repetition of principles set out above, I set out, with three amendments, that helpful summary as follows:

39 Fitzgerald v Dun Laoghaire-Rathdown County Council [2019] IEHC 890
40 A strategic development zone under Part IX PDA

"(a) The court has an express power to remit under O.84 …

(b) The court has a wide discretion to remit - to be exercised judicially and judiciously[41]. The governing criteria in any decision to remit are fairness and justice.

(c) In considering the question of remittal, the court, as a matter of 'overriding principle'[42], should aim to undo the consequences of any wrongful or invalid act but should go no further. The aim is to put matters back into a position in which they were immediately before the wrongful decision.[43]

(d) Where the process undertaken by the Board has been conducted in a regular and lawful way up to a certain point in time, active consideration should be given by the court as to whether there is any good reason to start the process from the outset again. The court should endeavour to avoid an unnecessary reproduction of a legitimate process.

(e) Among the factors to be weighed in the balance are the expense and inconvenience which may arise by sending the matter back to the drawing board;

(f) The court should treat the Board as a disinterested party which has no stake in the commercial venture being pursued by a developer. In cases where the Board, as the statutory decision maker, has taken the view that it can carry out its statutory function in light of the findings of the court if the matter is remitted to it, the court should not lightly override that view.

(g) By remitting the matter, the court is not giving any advance imprimatur to the approach subsequently taken by the Board following remittal;

(h) Thus, any applicant who is not satisfied with the decision taken by the Board following remittal, will be entitled again to seek leave to challenge that decision.

(i) If the court decides to remit the matter to the Board, the court has an inherent power to give directions to the Board as to the process to be undertaken following remittal. Such directions should attempt to replicate, insofar as practicable, the legal requirements that would apply, whether under statute, rules or the like, to the making of decisions of that type - recognising that exact compliance with the relevant regime may not always be possible and subject to there being no statutory impediment to such directions.[44]

(j) It is also open to the court, if it is minded to remit the matter, to make non-binding recommendations which do not interfere or trespass upon the discretion vested in the Board."

41 I have added the words "to be exercised judicially and judiciously" as used in the summary in Clonres.
42 I have added the words "overriding principle' as derived from Tristor and used in the summary in Clonres.
43 I have added this sentence as reflecting Clonres, though I appreciate it may be tautologous.
44 I have added this sentence reflecting Christian #2 and the summary in Clonres. The "no statutory impediment" criterion seems to have been canvassed also in FitzGerald.

I would respectfully add that, in my view, the extent to which, on remittal, departure from the statutory scheme or other legal requirements would be required, whether to ensure fair procedures or otherwise, may be, not merely a consideration after a remittal decision has been made and directions are being considered, but of weight in the decision whether it would be lawful to remit. The greater the nature and extent of departure which would be required on remittal, then, ceteris paribus, the lesser the likelihood of remittal.

Protect East Meath – June 2020

35. This[45] judgment addressed a dispute whether the notice party/developer could defend the judicial review despite the Board's decision to concede certiorari of the impugned SHD permission on the grounds that it had erroneously screened out AA[46] under the Habitats Directive. Permission to do so was refused and the decision was quashed. It is not apparent from the judgment that the decision was remitted, or even that the issue was argued. The developer had initially taken the position that the decision should be remitted with a view to repetition of the AA screening on foot of further information which it would submit. PEM[47] opposed remittal. It is of interest that the Board took the position that, on any remittal, it would not seek additional information because the 2016 Act did not contain a provision similar to ss. 131 to 133 PDA 2000, thus giving rise to concern about the ability of the Board to fairly and effectively manage the submission of additional information and its consequences. This is consistent with the view later taken by Simons J in **Redmond**.

Redmond – 1 July 2020

36. In **Redmond**[48] Simons J refused to remit a quashed SHD permission which he considered had been flawed from the outset in respects incapable of remedy on remittal. The flaw consisted in the developer in its SHD planning application, the Inspector and the Board, all failing to recognise that an "institutional lands" designation in the development plan applied to the site and consequently failing to recognise that the proposed development represented a material contravention of the development plan as to housing density, and public open space on institutional lands. Hence the Board had not invoked s.9(6)(c) of 2016 Act to grant planning permission in material contravention of the development plan.

37. Simons J reviewed the law as to remittal in terms similar to those set out above. He concluded that a court should not lightly reject an application to remit. In considering remittal, the first task was to identify the point at which the decision-making process went awry. This is because

45 Protect East Meath Limited v. An Bord Pleanála [2020 No. 44 JR] (High Court (Judicial Review), McDonald J, 19 June 2020)
46 Appropriate Assessment
47 Protect East Meath
48 Redmond v. An Bord Pleanála [2020] IEHC 322 (High Court (General), Simons J, 1 July 2020)

the objective of remittal is to reset the clock, and to allow the decision-making process to resume from a point prior to the happening of the error which prompted certiorari. In some cases, that will not be possible - the decision-making process may have been flawed from the outset or the error of law may be subsisting.

38. In **Redmond**, the Board opposed remittal on the basis that the error had frustrated the public participation required by S.8(1)(a)(iv)(II) as to publication of a material contravention statement[49] so the public had not been notified that a planning application was being made for a development that would materially contravene the development plan, nor were they given opportunity to make submissions or observations on the developer's case that permission should be granted despite that material contravention. Simons J agreed - the application was fatally flawed from the outset in failing to recognise and give public notice that the development would materially contravene the development plan. Simons J said that:

> *"The resolution of this issue turns largely on the legal significance to be attached to public participation rights in the planning process. The principal judgment had found that the proposed development project represents a material contravention of the development plan. The legislation envisages that where a planning application involves a material contravention, express public notice of this fact must be given at the time of the making of the application. This did not happen on the facts of the present case where the developer and the board—mistakenly—considered that there was no material contravention. The question now arises as to whether this absence of public notice, and of a statement of the justification for seeking a material contravention, is fatal to the remittal of the planning application."*[50]
>
> *"……. the public notice must indicate that the proposed development is in material contravention of the development plan, and that the planning application contains a statement indicating why permission should, nonetheless, be granted, having regard to one or more of the statutory considerations specified in section 37(2)(b) of the PDA 2000. The planning application must be accompanied by such a statement ("statement of justification")"*[51]
>
> *"All of this is intended to ensure that members of the public are, in the first instance, put on notice that An Bord Pleanála is being invited to grant planning permission in material contravention of the development plan; and, secondly, informed of the basis on which the developer says that such a contravention is justified by reference to section 37(2)(b). This will then allow members of the public to make meaningful submissions to An Bord Pleanála and to engage with the justification advanced on behalf of the developer. This ensures effective public participation. Moreover, it reflects the <u>especial importance</u>[52] attached to the development plan under the PD(H)A 2016. There are statutory restrictions on the*

49 A.k.a. a statement of justification
50 §3
51 §19
52 Emphasis added

> *board's jurisdiction to grant planning permission for proposed development in material contravention of the development plan. These statutory restrictions are stricter in the case of a "strategic housing development" application under the PD(H)A 2016 than they are in the case of a conventional planning application."*[53]

An argument, made in favour of remittal, that Mr Redmond had adverted to and made submissions on the material contravention in question

> *"……..overlooks the fact that the purpose of giving public notice of a proposed material contravention is to allow all members of the public concerned an opportunity to make submissions or observations on the planning application. The fact that one member of the public, namely, Mr Redmond, correctly identified that the development involved a material contravention does not absolve the breach of the statutory requirements."*[54]

39. Simons J took the view that even Mr Redmond's participation had been frustrated in that, as the developer had failed to state a basis on which permission could be granted despite the material contravention, Mr Redmond had not had a proper opportunity to consider and respond on that issue. Simons J agreed with the Board that it lacked jurisdiction to grant permission on foot of the non-compliant planning application and, were the matter remitted, it would have to dismiss the application as invalid.

40. Simons J had observed in his earlier judgment deciding to quash the permission[55] that *"There is no provision for the submission of further information once the planning application has been made, and hence the importance of ensuring that all relevant issues have been addressed in advance."*

41. Simons J concluded that the deficiencies identified *"are not capable of being remedied by the form of remittal sought by the developer. In particular, the absence of any allowance for further public participation would mean that the making of an order for remittal would result in a risk that planning permission would be granted in material contravention in circumstances where the public were not properly notified nor given an opportunity to make submissions or observations on the developer's case as to why planning permission should be granted notwithstanding the material contravention"*

42. Simons J also refused on discretionary grounds to remit as:

- First, that the Board opposed remittal had weight.
- Second, the prejudice in refusing remittal was less in the case of an SHD application than in an ordinary planning application given that the "delay" caused is far shorter - by reason of the fast-

53 §§20 & 21
54 §30
55 Redmond v An Bord Pleanála [2020] IEHC 151

track provided by the 2016 Act. The benefit to the developer in terms of a saving of time was greatly outweighed by the prejudice of remittal to public participation rights.

43. It seems to me that the present case differs from Redmond in that:

a. Here the Board does not oppose remittal: despite its nominal diffidence, in reality it seems to favour it. However, that the criterion under S.50A(9A) now emphasises lawfulness throws into starker relief that the Board's opinion on an issue of lawfulness of remittal, as opposed for example, on an issue of practicality, can be no more weighty, by reason that it emanates from the Board, than anyone else's view of lawfulness.

b. The SHD fast track is no longer available to Fitzwilliam as to this site unless the matter is remitted, as the SHD system has been replaced by the LRD[56] system introduced by the 2021 LRD Act[57]. That Act restores the traditional two-stage planning process: first instance decision by the local planning authority, with appeal to the Board. Very broadly and assuming an appeal to the Board (which may or may not occur) the LRD process will take longer than the SHD process by about the 8 weeks generally allowed for the Planning Authority to decide the LRD application. While 8 weeks is not inconsiderable, I do not think any issue of delay should make a crucial difference to my decision. It is important to note also that, insofar as that consideration affected Simons J's view, it was supplemental – a discretionary ground.

c. Fitzwilliam says that its SHD planning application papers did address the issue of material contravention as to height, such that the public was made aware of the issue and of Fitzwilliam's view that permission could be justified despite any such material contravention, and the basis for it, from the start of the planning application. That is true - but only if remittal is to a decision having regard to the 2016 Development Plan. As will be seen, remittal to a decision having regard to the 2022 Development Plan would, at least in principle, pose very similar difficulties to those encountered in Redmond.

d. It is not apparent whether the possibility of an oral hearing in the remitted process was canvassed in Redmond.

Crekav – 31 July 2020

44. In **Crekav**[58] Barniville J considered an application to quash a grant of SHD planning permission made in a process which had been remitted to the Board after an earlier decision in the same SHD planning application had been quashed. Accordingly, Crekav concerns the powers of the Board when dealing with a remitted matter. I will return to Crekav later in this judgment. For now,

56 Large-scale Residential Development
57 Planning and Development (Amendment) (Large-scale Residential Development) Act 2021. The relevant commencement order (SI 715 of 2021) commenced all sections of the Act save s.17(6) on 17 December 2021. s.17(6) provides for the repeal of Chapter 1 of Part 2 of the Act of 2016 (other than s.4(1)). S.17(1) repeals s.4(1) but S.17(2) makes consequential transitional arrangements.
58 Crekav Trading GP Limited v An Bord Pleanála [2020] IEHC 400

my primary purpose is to record its gloss on the observation in **Christian** that the court should, in giving such directions, attempt to replicate, insofar as it may be practicable, the legal requirements that should apply, while recognising that it will not always be possible to ensure exact compliance and that some variation on the normal procedure may be needed. One might take a wider or narrower view of the scope that observation may afford a court to fashion a process to be applied to remitted decision-making.

45. In Crekav, Barniville J agreed with the Board that *"that the Board is a "creature of statute" and is required to act within the four walls of the statutory regime which applies to it"* and agreed with Charleton J. in **Wexele**[59] *"that it would not be appropriate for the Court to reformulate the statutory procedures, insofar as they apply to the Board".* It should be said that Barniville J was considering a remitted process retrospectively and as to the interpretation of the SHD Regulations 2017 rather than prospectively formulating directions in a remittal. The cases he cited, including Wexele, were not decisions as to terms of remittal. But his view does seem at least consistent with the narrower view of the scope to remit on foot of directions departing from the statutory scheme. And that would seem to be an issue of lawfulness.

46. Of some note also is that Barniville J accepted that the 2016 Act SHD process was intended as a fast track, streamlined, process in which much of the work is frontloaded. This considerably, and for good reason, benefits prospective developers. But part of the quid pro quo of this streamlined facility is that a prospective developer is expected to ensure that its documentation is as complete as possible when first making its SHD planning application.

47. In fairness to Fitzwilliam I should note that it made a planning application on foot of the then-current 2016 Development Plan in good time, as events proved, to obtain a decision in a fast-track process by April 2021, within the currency of the 2016 Development Plan. It had no apparent need to canvass in its SHD application the then draft 2022 Development Plan – indeed it would have been technically futile to do so as the Board could not have regard to it[60]. Though I understand some developers do so to guard against the very event which occurred here – a change of development plan.

Kemper - 2021

48. In **Kemper**[61] the court quashed and remitted a Board decision under s.37G PDA 2000 permitting Irish Water to develop a strategic infrastructure project - the Greater Dublin Drainage Project - by reason of a failure to seek the observations of the Environmental Protection Agency on the likely impact of the proposed development on waste water discharges. Allen J listed the

59 Wexele v. An Bord Pleanála [2010] IEHC 21
60 Ebonwood & Element – infra.
61 Joyce-Kemper v. An Bord Pleanála [2021] IEHC 281

principles identified in **Clonres**. He considered that *"The core issue on this application is whether there is any good reason that the entire process should start again, or whether the flaw in the process identified in my judgment can be isolated from the rest of the process and dealt with."*

49. Irish Water submitted, inter alia and citing **FitzGerald**, that the principle focussed on the expense and inconvenience to the developer of having to start again was particularly important in the case of *"fast track"* applications. Irish Water pointed to a "*panoply*" of specific statutory powers whereby the Board might ensure public participation in a remitted process, to the extent that the Board might consider that necessary or appropriate. The Board submitted, inter alia, that in deciding on remittal the court should consider not only what had gone wrong in the process but what had gone right and what remained of value but would be set at naught if the application were not remitted.

50. Ms Kemper opposed remittal on the basis that the regulations, deficient in EU Law, which gave rise to the ground for *certiorari*[62] had been amended[63] since the impugned decision was made so as to significantly alter the legislative landscape to which a remitted application would be returned - *"to the extent that a planning decision made in circumstances where the Agency has yet to receive an application from Irish Water for a wastewater discharge licence would be contrary to Irish and EU law."* Allen J pointed out that the allegation that the earlier regulations were deficient in EU Law had been lost at the substantive hearing and he rejected the attempt to re-run the rejected argument. And, as between the old and new regulations, the relevant consultation obligations were the same.

51. Allen J also considered that the question of inconvenience and expense to Irish Water was especially relevant as it did not bear or share responsibility for the mistake made by the Board. So too was the delay factor given the public interest in a solution to what was recognised on all sides to be a serious, growing and urgent problem of drainage capacity for the Greater Dublin Area. It seems to me that this view of Allen J broadly applies in the present case, *mutatis mutandis*, to a statutory SHD regime created in an attempt to urgently address a housing crisis and in which the error was the Board's not Fitzwilliam's.

CHASE - 2022

52. In **CHASE**[64] Barniville J rejected a submission that the court should refuse to remit Indaver's planning application on the basis that, as does not seem to have been in dispute in that case, the Board would, on remittal, be considering and determining an application made by Indaver in 2016

62 the Waste Water Discharge (Authorisation) Regulations, 2007, as amended by the 2016 Regulations –
63 by the European Union (Waste Water Discharge) Regulations, 2020
64 Cork Harbour Alliance for a Safe Environment v. An Bord Pleanála [2022] IEHC 231 (High Court (Judicial Review), Barniville J, 26 April 2022) §122

on foot of the 2011 EIA Directive, despite its having been amended, with effect from 2017 by the 2014 EU Directive.

53. Barniville J noted that that point had been made in **Barna** and McDonald J had noted that, while it might be weighty in other cases, he did not believe it of sufficient weight in that case to outweigh the other factors in favour of remittal. As in **Barna**, **CHASE** did not point to any specific aspect of the changes made to the 2011 EIA Directive which might materially affect the Board's consideration of the remitted application or the outcome of its consideration of the application. Barniville J did not consider it a sufficiently weighty factor to outweigh the factors pointing towards remittal.

54. I bear in mind that in **Connolly**[65], the Supreme Court, speaking of leave to appeal to it, said that *"It will not, save in the rarest of circumstances, be appropriate to rely on a refusal of leave as having a precedential value in relation to the substantive issues in the context of a different case."* Nonetheless, and perhaps regarding it as a species of, or akin to obiter, or an extra-judicial writing by a judge, it is difficult not to be struck at least to some degree by the terms in which **CHASE** were refused leapfrog leave to appeal the remittal decision to the Supreme Court[66]. The Court noted that "*the exact scope and parameters of the remittal power provided by Ord. 86, r. 24(7) awaits judicial resolution. It is also true to say that in the 36 years or so since the power to remit was first expressly provided for by the Rules of the Superior Courts 1986, the number of reported cases in which the exercise of that power has been judicially considered remains (relatively) small."* But the Court continued:

> *"Yet if this is so, it is because the principles governing the exercise of this power in a case of this nature are clear and uncomplicated. The remittal power is essentially designed to ensure that the appropriate response and remedy is provided to an applicant following the quashing of an ultra vires administrative decision. In most cases, the appropriate remedy will be to quash the decision and to remit the decision to the decision maker so that the administrative power can be fairly exercised in the light of the court's judgment. The existence of a power to remit seeks to minimise the extent of the disruption and inconvenience to the administrative process, while at the same time ensuring that the applicant enjoys an effective remedy.*
>
> *Absent such a power there would be a risk that the relief afforded to a successful applicant might be disproportionate, since in such circumstances the administrative process would have to start again, often with needless expense and delay. Such expense and delay might well be very significant. There may be, of course, particular cases where it would not be appropriate to remit. This might be especially true in respect of criminal cases where slightly different considerations may apply following the quashing of a criminal conviction.*

65 [2017] IESCDET 57
66 [2022] IESCDET 108

> *It is, at all events, unnecessary to explore these wider questions for the purposes of this Determination. It is perhaps sufficient to say that these issues could not realistically arise in this appeal in the event that leave were to be granted. This is because it is difficult to envisage circumstances in which an order for remittal would not be made in a case of this kind. Here the Board clearly fell into error in the manner as found by Barniville J. and the order for remittal simply gives the Board a fresh opportunity to make a determination in accordance with law in circumstances where the facts giving rise to the objective bias will simply not be present.*
>
> *Any other conclusion would simply hand the applicant, what would, on these facts, amount to a form of a windfall bonus by obliging Indaver to recommence its application from the very beginning, with all the attendant costs and delays. The necessary correction of the legal errors which tainted the original grant of planning permission does not require that the Indaver go back to the very start: it will suffice if the process re-commences at the moment just before Mr. Boland's involvement. In these circumstances the exercise of the power to remit would seem to have been appropriate in the wake of the grant of an order of certiorari quashing the permission."*

The Supreme Court's determination in **CHASE** characterises remittal as the norm – though not inevitable or universal. Though not of formal precedential value it seems to me to express a view of the law consistent with the cases which do have precedential value. And that norm is now established in statute by S.50A(9A) PDA 2000.

A BRIEF ACCOUNT OF THE ARGUMENTS

55. Fitzwilliam strongly urge remittal to a decision having regard to the 2016 Development Plan. They argue that:

- Their constitutional right to fair procedures, and their right to an effective remedy and to rectification of the error by the Board, requires that the application be returned, as precisely as possible, to its condition before the error.
- Remittal to decision having regard to the 2022 Development Plan would have put them not just on the usual hazard of a change in the development plan but on the specific and unjustified hazard of error by the Board for which it bears no responsibility.
- Putting the same point a different way, Fitzwilliam was entitled, both generally and on remittal, to a lawful decision on its planning application. Though Fitzwilliam didn't put it quite that way, the point necessarily goes further – it argues in effect that it is entitled not merely to a lawful decision on its planning application but a lawful decision as if at the date of the quashed unlawful decision – when the 2016 Development Plan was still in force.

56. In the alternative, Fitzwilliam argues for remittal to a decision having regard to the 2022 Development Plan:

- with directions framed to maximise the extent to which the remitted process can reflect the process stipulated by the 2016 Act but in any event permitting all parties to make submissions having regard to the 2022 Development Plan.

And/or

- having regard to the 2022 Development Plan and following an oral hearing in which all parties to the planning process could express their views having regard to the 2022 Development Plan.

57. Crofton argue against remittal and for certiorari simpliciter, on the basis that:

- Statute requires that planning decisions be based on the development plan current at the date of the decision.
- The 2016 Development Plan no longer exists.
- Fitzwilliam's assertion of its private interests in the "justice" of the remitted decision proceeding on the basis of the 2016 Development Plan ignores, or is outweighed by, the wider public interest in proper planning and sustainable development, which requires that regard be had to the current 2022 Development Plan and not to a 2016 Plan now over six years out-of-date.
- The 2022 Development Plan is the only possibly applicable plan but to remit on that basis would require, effectively, the rewriting of the entire planning application to reflect the application of the 2022 Development Plan and the constraints of the 2016 Act make a fair and lawful disposal of the planning application on that basis impossible. In particular, it would undermine Crofton's and the public's rights of public participation on the SHD planning process, all of which proceeded on the basis of the 2016 Development Plan.
- Specifically, an oral hearing would not meet the need for a fair and lawful disposal of the planning application on the basis of regard to the 2022 Development Plan.
- In reality, Crofton asserts simply that if the development plan is replaced – or even varied in a relevant respect - during an SHD Planning application, the application must fail. It agrees that this is a somewhat alarming proposition, but argues that such rigidity of the SHD system – inability to accommodate a replacement development plan in a pending SHD planning application - is part of the price paid by developers for the fast-track which the SHD process affords and that developers generally and ordinarily can take account of the prospect of a changed development plan in arranging and timing their SHD Applications. That their calculations may be upset by judicial review will be a consequence only of error in the decision and success of that judicial review. While that may prove hard on the developer, it is a function of the fast-track which required such a trade-off of risk. More generally, a planning applicant is always on the hazard of successful judicial review. Indeed that is so even in a case of remittal in which certiorari will have resulted in delay and expense. Such a hazard is necessitated by the necessity that planning decisions be lawful.

58. The Board affects general neutrality as to remittal. But the substantive thrust of its written submissions all but favours remittal. It says that:

- A remitted decision would be made having regard to the 2022 Development Plan and remittal on that basis is not legally impermissible.

- In oral argument that argument was refined to an argument that I should not take the view, having regard to the circumstances of the case, that it would not be lawful to remit and I should adopt that approach on the basis that
  - I can let it to the Board to try to find a means of ensuring fair procedures within the statutory framework
  - If it failed to do so it would either refuse the application or be successfully judicially reviewed for not doing so.
- Directions on remittal cannot confer powers on the Board which it has not otherwise been granted by the Oireachtas and that, as the 2016 Act does not provide for further information to be requested[67] from Fitzwilliam or for submissions to be circulated to the public/prescribed bodies, directions to that effect would be inconsistent with the scheme of the 2016 Act.
- The 2016 Act does not preclude an oral hearing at which parties can make submissions on the remitted application.
- Crofton's argument against remittal relates primarily to the manner in which the remitted application would be considered by the Board and inappropriately requires me to presuppose and pre-empt the manner in which the Board would exercise its statutory powers. Those powers include exercise of the Board's discretion to convene an oral hearing and as to the issues to be addressed at such an oral hearing – which powers it would exercise subject to potential subsequent judicial review.
- If the Court takes the view that, on remittal, an oral hearing is not consistent with S.18 of the 2016 Act (which governs oral hearings in SHD Applications) then remittal would serve no purpose and the Impugned Decision should be quashed *simpliciter.*

IMPORTANCE OF DEVELOPMENT PLANS IN PLANNING DECISIONS

59. It is necessary to say a little of the importance of development plans – both generally and in the SHD planning process. The development plan, whether or not materially contravened, inevitably looms very large indeed in any planning application. Generally, **Browne** says *"The development plan lies at the heart of the planning legislation."* [68] and it "*occupies a pivotal role in the determination of any application for planning permission*"[69]. As was said in **Ebonwood**:[70]

> *"It is of the utmost importance that the public at large and in particular those persons seeking to develop their lands or property should have certainty and precision as to the relevant criteria by which any application for permission will be judged... The first reference point in their consideration will be the provisions of the development plan."*

67 Citing Crekav Trading GP Limited v. An Board Pleanála [2020] IEHC 400 and Redmond v. An Bord Pleanála [2020] IEHC 151
68 Simons on Planning Law, 3rd Ed'n (Browne) §§1-11
69 Simons on Planning Law, 3rd Ed'n (Browne) §§1-40
70 Ebonwood Ltd v Meath County Council [2004] 1 I.L.R.M. 305 (High Court, Peart J, 30 April 2003),

In **Element Power**[71], Haughton J described as the "four corners" within which the planning decisions must be made as *"the 2000 Act, existing government policy and objectives, existing ministerial guidelines, and existing county development plans."*

60. The importance of the Development Plan is attested in **McGarry**[72], as a statement of objectives - an "*environmental contract*" between the planning authority and the community, "*embodying a promise*" by the planning authority that it will regulate private development in a manner consistent with the objectives stated in the plan. In **Byrne**[73] McKechnie J described it "*a representation in solemn form, binding on all affected or touched by it*", that the planning authority will discharge its statutory functions strictly in accordance with the published plan. This implementation will be carried out openly and transparently, without preference or favour, discrimination or prejudice. He said that it is "*founded upon and justified by the common good and answerable to public confidence*".[74] **Browne**[75], cites Lord Reed in **Tesco v Dundee**[76] as noting that the development plan is a carefully drafted and considered statement of policy, published to inform the public of the approach which will be followed by planning authorities in decision-making unless there is good reason to depart from it. It is intended to guide the behaviour of developers and planning authorities. As in other areas of administrative law, the policies which it sets out are designed to secure consistency and direction in the exercise of discretionary powers, while allowing a measure of flexibility.

61. Counsel for Fitzwilliam cited **Killegland Estates**[77] in which Humphreys J in turn cited **McGarry**[78] and **Byrne**[79], in identifying as a "*consideration*" "*the inherently policy-related and political nature of decisions such as the adoption of a development plan*". While undoubtedly correct and perhaps cited to me more as a useful vehicle for citing **McGarry**[80] and **Byrne**[81], Humphreys J was in fact identifying considerations relevant to his consideration of an application to stay, pending judicial review, the operation of a development plan. In the following paragraph he noted that a "*court must be very slow to interfere with the democratic decision of the local elected representatives entrusted with making such decisions by the legislature.*"[82] It seems to me that Killegland further emphasises the importance of development plans.

71 Element Power Ireland Ltd v An Bord Pleanála [2017] IEHC 550
72 AG(McGarry) v Sligo County Council [1991] 1 I.R. 99, [1989] I.L.R.M. 768
73 Byrne v Fingal County Council [2015] IEHC 433
74 See also Killegland Estates Limited v. Meath County Council [2022] IEHC 393
75 Simons on Planning Law, 3rd Ed'n (Browne) §§1-03
76 Tesco Stores Ltd v Dundee City Council [2012] UKSC 13
77 Killegland Estates Limited v. Meath County Council [2022] IEHC 393
78 Attorney General (McGarry) v. Sligo County Council [1991] 1 I.R. 99 at 101. In Byrne v. Fingal County Council [2001] IEHC 141, [2001] 4 I.R. 565 at 580
79 Byrne v. Fingal County Council [2001] IEHC 141, [2001] 4 I.R. 565 at 580
80 Attorney General (McGarry) v. Sligo County Council [1991] 1 I.R. 99 at 101. In Byrne v. Fingal County Council [2001] IEHC 141, [2001] 4 I.R. 565 at 580
81 Byrne v. Fingal County Council [2001] IEHC 141, [2001] 4 I.R. 565 at 580
82 Citing Lynch J. in Malahide Community Council Ltd. v. Fingal County Council [1997] 3 I.R. 383 at 398

62. Charleton J in **Wexele**[83] said that "*The inter-relationship between the development plan and the function of the planning authority …. and on appeal An Bord Pleanála, can give rise to complex issues of law. Proper and sustainable planning remains paramount*." He adopted **Browne**[84] as follows:

> *"In practice consideration of the proper planning and sustainable development of an area, and of the development plan, are often inextricably linked; development objectives may be characterised as an attempt to articulate in general terms the proper planning and sustainable development of the area. Whereas in the context of many applications the subject-matter of these twin considerations will coincide, the key distinction is that the consideration of the proper planning and sustainable development of an area underpins the discretionary nature of the planning process. Each application must be considered on its own merits, …. The terms of the development plan are not conclusive: the overriding consideration must be the proper planning and sustainable development of the area."*

63. In that light, the importance of the statutory provisions[85] obliging planning decisionmakers to have regard to the development plan - will be understood. As will be the importance of S.9(6) of the 2016 Act allowing the Board to grant permission "even where" in material contravention of a development plan but "only" on compliance with certain statutory requirements.

WHICH DEVELOPMENT PLAN APPLIES? – THE GENERAL RULE IN PLANNING APPLICATIONS

64. In considering and deciding an "ordinary" planning application, the planning authority, by **S.34(2)(a) PDA 2000**, is "*restricted to considering the proper planning and sustainable development of the area, regard being had to*" inter alia, "*the provisions of the development plan*". The Board is likewise bound on appeal as by S.47(1)(b) it must decide the appeal as if the planning application had been made to the Board in the first instance – i.e. de novo. In the SHD planning process, in which the planning application is made in the first instance directly to the Board, and by S.9(2) of the 2016 Act, the Board, in deciding an SHD planning application, and in particular in "*considering the likely consequences for proper planning and sustainable development in the area*", must have regard to "*the development plan … for the area*"[86]. I accept that, as counsel for the Board put it: "*there's only ever one development plan and that the making of a new development plan causes the old development plan to cease to be."*

65. On any remittal, the identification of and the determination of an issues of material contravention – both as to its presence and as to whether permission may issue despite it - may differ according to which of the 2016 and 2022 Development Plans apply. For example, they may

83 Wexele v An Bord Pleanála (No. 1) [2010] IEHC 21.
84 Charleton J cited Simons - Planning and Development Law (2nd Ed., 2007) at para. 1.23. I update the reference to Simons on Planning Law, 3rd Ed'n (Browne) §1-45 & 1-47
85 Cited infra
86 S.9(2)(a)

differ as to building height. There may be elements of the 2022 Plan, other than as to height and in terms not taken from the 2016 Plan, as to which questions of material contravention may arise in respects in which none arose under the 2016 Plan. The 2022 Plan may articulate new relevant considerations other than as to material contravention. It may be arguable and in turn disputable, that the 2022 Plan favours the planning application in ways or in a degree not apparent in the 2016 Plan.

66. Notably, all parties agreed that in "ordinary" planning applications and despite the absence of authority, the practice has always been, and is correct in law, that planning decisions are made by reference to the development plan current at the date of the decision, even if it that is not the development plan current at an earlier stage of the process – most obviously, the time at which the planning application was lodged. **Browne**[87] states:

> *"Occasionally, a development plan will be varied, or an entirely new plan made, during the currency of a planning application. The question then arises as to whether the decision-maker should determine the application by reference to the plan in force on the date the planning application was initially made, or to the plan in force on the date the planning application/appeal falls to be decided.*
>
> *It is submitted that the planning application/appeal must be determined by reference to the plan in force on the date of the decision."*

Jefferson, Bickenhall Parish Council & Price Bros

67. **Browne** states that there does not appear to be any Irish judgment directly on point but cites **Jefferson**[88] - a case in which a new development plan was made between the decision at first instance and the decision on appeal. Jefferson is cited in **Halsbury**[89] for the proposition that *"In dealing with appeals from planning decisions, an inspector is bound to take into account changes in any material consideration, including any change to the development plan, that has occurred between the date of the local authority's decision and the date of the inspector's own decision"*[90].

68. In Jefferson, Hickinbottom J held that the ordinary words used in the statutory provisions, principle, policy and precedent all indicated that an appellate body, when considering a planning appeal, must do so on the basis of material considerations as they stand at the date of its own decision. In part, he took that view as the decision on appeal is taken de novo – as is the case in Ireland, although we are not dealing with an appeal in this case. The statutory context in Jefferson was somewhat different but, in my view, not decisively so for present purposes. Primarily, in the

87 Simons on Planning Law, 3rd Ed'n (Browne) §§1-42&43 & 4-146-148
88 Jefferson v National Assembly for Wales [2007] EWHC 3351 (Admin), [2008] 1 WLR 2193, [2007] All ER (D) 447 (Oct)
89 Halsbury's Laws of England Vol 82 §459 fn 15 & §460 fn 5
90 In the English system the inspector makes the decision.

judge's view, it consisted of S.38(6) of the 2004 Act[91] to the effect that "*If regard is to be had to the development plan for the purpose of any determination to be made under the Planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise".* That formulation is not unlike S.34(2)(a) PDA 2000 and S.9(2) of the 2016 Act in their references to *"the development plan".*

69. Interestingly, Mr Jefferson's concentration being on the comparison between the decisions at first instance and on appeal, he conceded that S.38(6) of the 2004 Act required that the decision at first instance must be made in accordance with the development plan current at the time of that decision. Therefore, he accepted that, if the development plan changed between the lodging of an application for planning permission and the planning authority decision on that application, the planning authority must take into account the plan as changed. The judge agreed and considered the concession properly made as in accordance with both policy and case law. The judge considered S.38(6) fatal to Mr Jefferson's submission as to the manner of dealing with an appeal

70. **Browne** suggests that the following passage from the judgment in Jefferson, which addresses the issue of policy, is equally applicable in this jurisdiction:

> *"With regard to policy, the intention of the legislative scheme is to control developments to ensure that developments not in accordance with current policy are not permitted. Of course, that policy is ever evolving and ever changing, as the result of political change and the constant reviewing of weight given to the wide range of factors that are politically relevant to the planning of developments. That current policy is that to be taken into account is reflected in Section 38(5) of the 2004 Act, which provides that, where there is conflict between two policies, then the latter policy prevails. However, the paramountcy of the current policy is perhaps best reflected in Section 27A of the 1990 Act, which provides that the development plan is the plan 'for the time being in force' and 'any alteration' … The submissions of Mr Lewis on this issue had considerable force. The general intention of the statutory scheme is that planning applications are determined and permission granted or refused by reference to the currently applicable policy and other material considerations as at the time of the decision. The intention is not to freeze the planning framework as at the time of the application for permission, or create a situation where permission has to be granted for a development which, on current policy at the time of that decision, is unacceptable in planning terms[92]."*

71. In Jefferson Hickinbottom J cited in particular **Bickenhall Parish Council**[93] in which it was held, on earlier but apparently identical statutory provisions, that an appeal was correctly decided on the basis of a new development plan which had been adopted since the decision at first instance. It was held that the statutory provisions *"… plainly require the Secretary of State, when dealing with*

91 Planning and Compulsory Purchase Act 2004
92 Emphasis added
93 R v Secretary of State for the Environment ex parte Bickenhall Parish Council [1987] JPL 773.

an application, to have regard to the provision of the development plan. … That had to mean the .. Plan as it stood at the time of the decision. Therefore the Secretary of State could not be faulted for having regard to it, but on the contrary was bound to do so". Hickinbottom J observed that **Bickenhall Parish Council** *"directly supports the construction suggested …. it does not appear to have been disapproved or even questioned during the course of the last 20 years, and is of considerable persuasive value; and, in my respectful view, it is correct."* Hickinbottom J thought likewise of other cases cited to him.

72. Fitzwilliam agreed from its point of view though, depending on the nature and effect of any differences between the plans (which could favour either "side"), the same point could be pressed on objectors, that the developer making a planning application is generally "*on the hazard*" of a change in development plan between the making and decision of his planning application – that is to say Fitzwilliam accepted as a general proposition planning applications are to be decided having regard to the development plan in being at the date of the decision.

73. All parties agreed that in such circumstances the statutory powers of planning decision-makers in "ordinary" planning applications were such that fair procedures could be ensured such that the planning permission applicant, the public and all relevant stakeholders could be heard as to the implications of the change in the Development Plan for the planning application under consideration.

74. Despite that agreement, it seems to me worth briefly dwelling on the view of Hickinbottom J that:

- The intention of the legislative scheme is to ensure that developments not in accordance with current policy are not permitted.
- That policy is ever-evolving and ever-changing.
- That change is the result of political change and the constant reviewing of weight given to the wide range of factors that are politically relevant to the planning of developments. (Though perhaps unnecessary, I would add reference to the democratic imprimatur of those changes.)
- The intention is not to create a situation where permission has to be granted for a development which, on current policy at the time of that decision, is unacceptable in planning terms.

75. It seems to me that policy is ever-evolving and ever-changing because it must do so to meet ever-evolving and ever-changing social, economic, environmental and other circumstances. In addition, public, democratic and political views of those circumstances change significantly over time, as do those views of how those circumstances should both inform and be affected by decisions bearing on planning how development should be managed, regulated and prioritised. At times, the need for roads will be acute, at others housing needs may loom larger, and at others again job creation may do so. At certain times and places, low-rise and low-density residential development will be considered appropriate. At other times and places, higher density and higher buildings will be favoured. The development plan is the contemporary statutory expression of the democratic

political will as to where the public interest lies as concerns planning policy for the area to which it relates. This is why it must be replaced every six years[94] and that via a complex and lengthy process (at least two years) involving considerable public consultation. As a result, it is necessarily presumed that each development plan is significantly better suited, politically, democratically and for purposes of proper planning and sustainable development, to the circumstances of its time than was the plan it replaces.

76. In that light it is, at very least generally, highly desirable that the up-to-date and current development plan be that which informs planning decisions. From that perspective of the public interest, it is very easy to see that, as to a planning decision to be made, as I presume a remitted decision would be, in early 2023, it is highly desirable that it be made having regard to the development plan adopted in 2022 rather than that adopted in 2016. I would be highly reluctant to interpret the relevant legislation to any contrary effect and see no need to do so.

Clifford #3

77. To Browne's observation that there is no Irish authority on the issue which development plan applies where it has been replaced between the making of the application and the making of the decision on that application, there is one, subsequent, obiter, exception. It favours application of the development plan current at the date of the decision. **Clifford #3**[95] concerned a question what law applied where the law had changed between the making of the application and the making of the decision on that application. The Board argued for the law as it was at the making of the application. Humphreys J disagreed and cited what he considered were incongruities in the Board's position:

> *"For example, the board bridled at the suggestion that they would or should disregard new ministerial guidelines merely because they were published after a planning application was made, and immediately shied away from that consequence of their argument.*
>
> *Similarly, where a development plan changes, the board also seemed to resist the point that it was a necessary consequence of their argument that such a change should be disregarded as well. I agree with that reluctance ….."*

<u>WHICH DEVELOPMENT PLAN APPLIES ON REMITTAL?</u>

94 S.9(1) PDA 2000 states: Every planning authority shall every 6 years make a development plan. S.12(17) PDA 2000 states: A development plan made under this section shall have effect 6 weeks from the day that it is made.
95 Clifford v An Bord Pleanála [2022] IEHC 474

78. The first question seems to me to be to identify which development plan applies on remittal: if the 2016 Development Plan, little difficulty thereafter arises; but if the 2022 Development Plan the position is appreciably more complex.

79. For reasons set out above, it seems to me that the default position is that the development plan in force at the time the decision is made applies – if so on a remitted decision, that would be the 2022 Development Plan in this case.

80. However, as I have said, the parties have differing views on the question whether, why and how the position described above, in which the development plan current at the date of the decision is that to which the decision-maker must have regard in making the decision, may be affected by each of, and/or the combination of, two circumstances which arise in the present case:

- First, that Fitzwilliam has secured a grant of permission by a decision which had regard to the 2016 Development Plan, which was current at the date of that decision, such that the difficulty in the present case derives, not just from the "usual" hazard described above (which hazard Fitzwilliam accepts), but from the error of the Board which will result in certiorari quashing that decision.

- Second, that in an SHD process such as the present, in which the Board has very limited possibility of canvassing further information, fair application of the principle audi alteram partem may be frustrated by the scheme of the 2016 Act, even allowing for such scope as may exist for adapting that scheme to the circumstances of any remittal.

81. While I will elaborate, a brief summary may set the scene as to the SHD planning process:
- First, by S.9(2) of the 2016 Act, the Board, in deciding an SHD planning application, must have regard to the development plan.
- Second, and no doubt in anticipation of the first, the SHD planning applicant and the planning authority, in their respective contributions, must opine whether and in what respect and degree a proposed SHD development conforms to and/or contravenes the development plan[96].
- Third, the Board is prohibited from granting an SHD permission which contravenes materially the development plan as to the zoning of the land[97].
- Fourth, the Board may grant an SHD permission "even" if it materially contravenes the development plan in a respect other than as to zoning[98] - but "only" by reference to specified criteria[99]. While in practice permissions in material contravention are not unusual, this statutory structure amply demonstrates that, legally, in SHD, they are no small thing.

96 Ss. 8(1)(a)(iv) and 8(5) of the 2016 Act
97 S.9(6) of the 2016 Act
98 S.9(6) of the 2016 Act
99 Set out in S.37(2)(b) PDA 2000

Price Bros & Material Considerations

82. Crofton cite **Price Bros**[100] by analogy. One must always be careful in considering decisions in planning matters by the UK courts – an observation also applicable to the UYK cases I have just considered – as the statutory context, though similar, can differ appreciably. So to may considerations as to constitutional rights. Nonetheless I find Price Bros helpful as a decision on how a remitted decision should be considered where the equivalent of a development plan has changed.

83. In that case, the facts were complex but, simplified, they were that Price had bought land at a price reflecting its favourable treatment in a "structure plan" – the equivalent for present purposes of a development plan. Its planning application was refused and that refusal was quashed later refusal of planning permission was quashed. The decision is a little unclear as to whether the matter was formally remitted but is clear that *"once the decision is quashed it must be treated as not having been made. Therefore the Secretary of State has, as it were, a blank sheet and he has to make another decision …."*. Meanwhile, the structure plan had been replaced in terms such the land "*to all intents and purposes ceased to be, a realistically developable piece of land*".

84. In the declaratory proceedings before Forbes J Price said, much as Fitzwilliam now does, that the decision-maker "*is entitled to take into consideration every material matter which has occurred up to the time of that decision (but) if that decision is quashed the Secretary of State has to go back to the circumstances that existed at the time he made the decision which had been quashed."*

85. While Forbes J's decision is inevitably grounded in the then-applicable statutes and rules, he decision nonetheless illuminates for present purposes. He said, inter alia:

> *"… we have got to the stage where the decision of the court to quash the decision of the Secretary of State means that the Secretary of State must look at the matter again. What is he to do? Is he to put his mind in blinkers at that stage, despite the fact that he may know of a whole series of highly material considerations which have arisen since the date of his first decision, and decide it only on those matters which were before him at that time? Or is he to be able to say: "As my first decision is wiped out, I now have to come to a fresh decision, and in doing that I am entitled to look at every material consideration which exists at present"? I have no doubt at all about the answer to that question. …….. If his initial decision is quashed, that decision is wiped out as if no decision had been made. In coming to a fresh decision he must, it seems to me, be entitled to take into account any material consideration which has arisen whether before his original decision or after it. He must, it seems to me, necessarily take into account any material consideration which affects the matter up to the very moment of his own decision. I think that there can be no doubt that*

100 Price Bros (Rode Heath) Ltd v Department of the Environment [1979] 38 P. & C.R. 579 QBD).

> *that is the situation, and that the Secretary of State must be entitled to take into account every material consideration then known to him."*

And later:

> *"He is entitled to take into account every material consideration which arises until he makes his final decision, and the argument to the contrary has no real foundation."*

86. Incidentally, counsel for Fitzwilliam accepted that the logic of its argument that the 2016 development Plan should apply, if correct, would apply to all remittals of quashed permissions – not just of SHD permissions. It would also apply to all relevant planning policy documents, including S.28 guidelines and the like. It seems to me that it would also have wider implications in judicial review generally - to the general effect that material considerations to which a decision-maker may have regard in making a decision following remittal in judicial review would be frozen in time at the date of the quashed decision. As a matter of good public administration, that would be an undesirable position and a decision to which I would only very reluctantly come.

Constitutional Rights

87. Counsel for Fitzwilliam argues that,

> While a planning applicant is ordinarily on the hazard of a change in the development plan between making his application and its decision, he should not be on that hazard where it eventuates due to the quashing of a decision as unlawful where that unlawfulness is not his fault, and is the fault of the decision-maker, given in particular his entitlement to a lawful decision on his planning application. **Kemper** provides some support to that argument as to fault.

- Fitzwilliam's rights are engaged as follows:
  - Its constitutional property right to develop its land subject to its getting planning permission.
  - Its right to have its planning application determined in accordance with law and its right to fair procedures under Article 40.3.1 of the constitution.
  - Its right to effective remedy. Though I wasn't entirely clear, the thrust appeared to be that, though Fitzwilliam had not challenged the planning decision as unlawful, it was entitled to a remedy for the unlawful decision effective to put it in the same position as if the decision had been made lawfully. Counsel's associated point, in citing **Killegland,** was that the court should supply an effective remedy to enforce the environmental contract that is a development plan. However, that does not appear to me to address the question: which environmental contract, that of 2016 or that of 2022?

88. As to constitutional property rights, Counsel for Fitzwilliam cites **Haverty**[101]

101 The State (Haverty) v An Bord Pleanála, Respondent, and Monarch Properties Limited [1987] IR 485

> *"The essence of natural justice is that it requires the application of broad principles of commonsense and fair play to a given set of circumstances in which a person is acting judicially. What will be required must vary with the circumstances of the case. At one end of the spectrum it will be sufficient to afford a party the right to make informal observations and at the other constitutional justice may dictate that a party concerned should have the right to be provided with legal aid and to cross-examine witnesses supporting the case against him. I have no doubt that on an appeal to the planning board the rights of an objector – as distinct from a developer exercising property rights[102] – the requirements of natural justice fall within the former rather than the latter range of the spectrum.*

I respectfully observe that this is a slender and very general reference on which to build a case for specific and reasonably precisely identifiable constitutional property rights in a planning applicant.

89. As to constitutional property rights, counsel for Fitzwilliam cites **Kelly**[103] extensively. Kelly[104] records that the Courts' view of the relationship between planning law and constitutional property rights has oscillated over time between a view of the requirement to get planning permission as a legitimate and proportionate restriction on the property rights of owners and a view of grants of planning permission (and hence the right to develop land) as benefits conferred by the State. Kelly suggests that a final view is awaited[105].

90. No doubt the largely unregulated right of landowners, historically and to the mid-1960s, to develop their lands more or less as they pleased informed a view that a right to do so was inherent in constitutional property rights. Accordingly, the initial reaction to the novelty[106] of the 1963 Act[107] was to view planning regulation, and in particular the requirement to obtain planning permission to develop land, as a restriction, albeit legitimate, on private property rights. Hence Kelly[108] cites Henchy J in **Frescati**[109] as describing the 1963 Act as making "*substantial inroads on pre-existing rights*."[110] Kelly[111] cites also **In re Viscount Securities Ltd**[112], in which Finlay P cited a "*major question of principle*" to the effect that refusal of planning permission under the 1963 Act *"is an invasion or restriction of the full property rights of an owner of land"* requiring strict construction of the Planning Acts and compensation unless statute excludes it. Indeed, that would seem to be the underlying rationale behind the theoretically general right to compensation for refusal of a planning permission, though now the exclusions from that right in practice predominate[113]. In 1999, in **Butler v Dublin**

102 Fitzwilliam's emphasis.
103 Kelly: The Irish Constitution; Hogan, Whyte, et al; 5th Ed'n 2018, Bloomsbury Professional,
104 §7.8.20 et seq
105 §7.8.24
106 Leaving aside the Town and Regional Planning Act, 1934 which was of limited application and may have inspired the archaic and inadequate, but persistently resilient phrase, "Town Planning" to describe the entire discipline of development planning.
107 Local Government (Planning and Development) Act, 1963
108 §7.8.20 fn43
109 Frescati Estates v Walker [1975] IR 177
110 Kelly cites also: Grange Developments Ltd v Dublin County Council [1986] 1 IR 246 at 256, Waterford County Council v John A Wood. [1999] 1 IR 556 at 561, McDonagh & Sons Ltd v Galway Corporation, [1995] 1 IR 191 at 202; Butler v Dublin Corporation [1999] 1 IR 565.
111 §7.8.20 fn44 & §7.8.202
112 (1978) 112 ILTR 17 at 20
113 The Constitutionality of these exceptions was upheld in The Central Dublin Development Association v Attorney General (1969) 109 ILTR 69; see also Re The Planning Bill 1999[2000] 2 IR 321 @ 347

City[114]**,** Keane and O'Flaherty JJ described the 1963 Act as *"the most radical abridgement ever effected in our law of the rights of private property recognised and protected, not merely by the Constitution, but also by the common law."* O'Flaherty J recalled that at common law, *prima facie*, an owner was entitled to use his property in any way he thought fit[115]. He observed that planning legislation *"has led some to believe that a landowner must now hold his or her land for the public good. Certainly landowners have to have regard to the common good which is a concept that finds expression in the Constitution. But that is not to say that they do not retain their entitlements as landowners, subject to statute and common law."* This subtle evolution of view had been prefigured in 1987 in a case cited by counsel for Fitzwilliam. In **Pine Valley**[116], cited by Kelly[117], the facts were complex. Essentially the plaintiff bought development land which had an outline planning permission which later proved invalid. Prior to the permission, the lands were zoned for agricultural use and open space/amenity and had only agricultural value. The outline permission immediately enhanced, and its quashing immediately reduced, their value. The Plaintiff's action, for damages against the State for failure to vindicate their constitutionally protected property rights and for failure in its laws to respect and as far as practicable to defend and vindicate those rights, failed. Of present interest is that Finlay CJ and Lardner J described planning permissions, not as a delimitation or invasion of constitutionally protected property rights, but as an enlargement and enhancement of those rights. It seems to me that on that logic, if the grant of permission enlarged and enhanced those rights, its refusal left them unaffected.

91. Crofton cites **Re The Planning Bill 1999**[118] - also cited by Kelly[119]. Keane CJ cited **Pine Valley** in observing that *"Every person who acquires or inherits land takes it subject to any restrictions which the general law of planning imposes on the use of the property in the public interest."* In that case what became Part V of the PDA 2000 survived challenge.

92. **Kelly**[120] cites Clarke J in **Christian**[121] in 2012 as stating, obiter, that he preferred the view, but declined to rule, that the requirement to obtain planning permission, and any limitations on the ability to obtain such permission, were legitimate and proportionate restrictions on the rights of owners, rather than conceiving of grants of planning permission as benefits conferred by the State.

93. Post-dating **Kelly, Clonres 2021**[122], **Hickwell**[123] and **Killegland**[124] may represent the leading edge of the other view. In **Hickwell**, Humphreys J quashed an element of a development plan which indicatively located the route of a road to be built as running through the applicant's lands. As

114 Butler et al v The Right Honourable the Lord Mayor, Aldermen and Burgesses of the City of Dublin, Defendant - [1999] 1 IR 565 – cited by Kelly §7.8.20 fn43
115 Subject to rights of others such as rights of way, the rights of tenants and the rights of mortgagees. In addition, at common law, he was not entitled to use his land so as to be a nuisance to others.
116 Pine Valley Developments Limited, et al, v The Minister for the Environment, Ireland and The Attorney General, [1987] IR 23
117 §7.8.21
118 In the matter of Article 26 of the Constitution and in the matter of Part V of the Planning and Development Bill, 1999 - [2000] 2 IR 321
119 §7.8.22 & §7.8.24
120 §7.8.23
121 Sister Mary Christian v Dublin City Council [2012] 2 IR 506 at 561
122 Clonres CLG v. An Bord Pleanála [2021] IEHC 303 (High Court (Judicial Review), Humphreys J, 7 May 2021)
123 Hickwell Ltd v. Meath County Council [2022] IEHC 418 (High Court (General), Humphreys J, 12 July 2022)
124 Killegland Estates v An Bord Pleanála [2022] IEHC 393

regards property rights, Humphreys J accepted that "*the mere presence of the current road route alignment directly across the Applicants' lands as contained in the said County Development Plan has had a significant adverse ... effect on the value of the Applicants' property"* However, he held that the devaluation of particular lands by a public law measure *"is not automatically the sort of effect that requires compensation, or that amounts to an unjust attack".* Humphreys J rejected a submission that the designation of the indicative road route in the development plan constituted an interference with constitutional and ECHR[125] property rights which must pass a proportionality test. He said in **Hickwell**:

> *"Proper planning and sustainable development is the prior and superior concept. There is no constitutional right to do anything that is not in accordance with proper planning and sustainable development. So, if the act that a landowner is prevented from carrying out is one that would not be in accordance with proper planning and sustainable development as determined by the relevant statutory decision-maker, no constitutional right is engaged and axiomatically the question of interference, still less disproportionate interference, with constitutional rights simply does not arise."*

And in **Killegland** Humphreys J said:

> *"……. there is no constitutional right to carry out developments and certainly not to do so in a way that is contrary to proper planning and sustainable development as determined by the relevant planning decision-makers, one of whom is the relevant local authority when adopting the development plan"[126].*

Humphreys J said in **Clonres 2021[127]** as follows:

> *"While the right to private property is essential of course, it does not include a right to develop; or in particular to develop in a way that is not in accordance with proper planning and sustainable development. … …What society asks in return is, among other things, that there should be no development other than that which is proper, sustainable and lawful. ….. Insofar as law in general and development plans in particular are part of the People's benefit under that contract, they are terms for the welfare of all, not penal clauses to be read contra proferentem…"*

94. While, as I say, this may represent the leading edge of the evolution, it is certainly characteristic of a move towards acceptance that the requirement to get planning permission to develop land is not so much an invasion of the constitutionally protected right of property as a reflection of the proper scope of that right as it is understood in today's Ireland. One may suggest that what over half a century ago was an invasion of rights has long-since been constitutionally internalised by Irish society. I doubt any thoughtful citizen now could imagine a modern Ireland

125 European Convention on Human Rights
126 citing O'Mahony Developments Ltd. v. An Bord Pleanála [2015] IEHC 757, [2015] 11 JIC 2706 (Unreported, High Court, 27th November, 2015), Clonres CLG v. An Bord Pleanála [2021] IEHC 303, [2021] 5 JIC 0706 (Unreported, High Court, 7th May, 2021) at para. 81
127 Clonres CLG v. An Bord Pleanála [2021] IEHC 303 (High Court (Judicial Review), Humphreys J, 7 May 2021)

without planning regulation. However, it is arguable that this is mere revisionism and risks elevation of legislative changes into constitutional norms when in truth we have merely been habituated to them over the last 60-odd years. It also raises significant issues of constitutional interpretation and the principles on which such interpretation proceeds. The issue, though raised, was not argued in any detail, and I do not find it necessary to form a concluded view. It suffices, I think, to say that, even viewing planning law as trenching on property rights, the constitutionality of its doing so for the common good has been repeatedly upheld, such that it will not avail to raise the spectre of constitutional rights of property as a panacea to all and any, even if real and genuine, disadvantages imposed on landowners by the planning system, save on foot of close analysis. Short of that close analysis, it is a form of crying wolf.

De-Zoning

95. I have no idea what the zoning of Fitzwilliam lands is under the 2022 Development Plan or whether it differs from that in the 2016 Plan. But the issue of so-called de-zoning usefully illustrates the significance of differences between development plans[128]. As so often, I am indebted to Humphreys J. In **McGarrell**[129] he said that "*There can be no legitimate expectation that lands will not be downzoned …*"

> *"Zoning is not some kind of private arrangement between a council and a landowner. It is fundamental to protection of the environment in a way that engages and affects the whole community, not just in the present generation, but for however long any development thereby permitted continues in place - possibly indefinitely. One cannot sacrifice any aspect of that community interest on the altar of some sort of private law transactional model of legitimate expectations with its conceptual and intellectual roots in the enclosed, privatised, economic logic of 19th century contract law or its more modern evolutions."*

96. In **Killegland** Humphreys J said, citing **S.10(8) PDA 2000**[130],

> *"….. there is no presumption in law that any land zoned in a particular way in one development plan will remain zoned in that way in any subsequent development plan."*
>
> *"Therefore, in principle a council is free in law to change the zoning of any particular piece of land regardless of the land uses permitted in any existing or previous development plan. Thus, there can be no form of fettering the council's discretion or legitimate expectation that a zoning will not be changed. The guiding context is that zoning is not a private matter as between a landowner and the council. It affects all citizens. If in an exceptional case a council's actions go beyond merely changing a zoning and in some way create a legally*

128 See also S.10(8) PDA 2000
129 McGarrell Reilly Homes Ltd v Meath County Council [2022] IEHC 394
130 "(8) There shall be no presumption in law that any land zoned in a particular development plan (including a development plan that has been varied) shall remain so zoned in any subsequent development plan."

enforceable injustice against a particular landowner, some remedy such as damages would have to be found other than requiring the council to effect or consider a change in the zoning or any other order that has the net effect of overriding or otherwise impinging upon a council's judgment as to what zoning is required by the overarching principles of proper planning and sustainable development."

39. In Killegland Humphreys J cited **Mahon**[131], in which Dunne J had said:

"…… the effect of zoning of land can be to benefit the owner of land, for example, in circumstances where agricultural land is zoned for development. The zoning in a Development Plan does not have to be maintained in successive Development Plans and accordingly such land can be de-zoned. That naturally enough will have the effect of de-valuing the land. No complaint can be made about that by the landowner. In those circumstances can it be said that the applicant in these proceedings is in a position to make the case that the zoning of land in these circumstances has resulted in an unjust attack on his property rights within the meaning of Article 40.1 of the Constitution, in circumstances where no compensation has been provided to him? The answer to that question must be in the negative. A change in zoning does not entitle the applicant to compensation even though the value of his land may have been reduced as a result."

97. The issue would seem to be whether to remit for a decision applying the 2022 Development Plan would represent an unjust attack on those rights within the meaning of Article 40 of the Constitution. Though referring to the necessity of protection of Fitzwilliam's constitutional property rights, in arguing for remittal for a decision applying the 2016 Development Plan and in objecting to remittal for a decision applying the 2022 Development Plan, counsel for Fitzwilliam didn't really articulate how those rights were relevant to that issue.

98. It does not seem to me that there is a constitutional right of property entitling a planning applicant to immunity, not from the general hazard of a change in development plan during a planning application (which hazard Fitzwilliam accepts), but from the specific version of that hazard which may arise due to delay in getting a lawful decision (to which it is entitled) on its application where such delay occurs by reason of the quashing of an unlawful decision on that application. The unspoken premise of this submission was, in truth, that at the date of and by reason of the decision now to be quashed, Fitzwilliam acquired a right to a lawful decision on the planning application as at that date. And it is asserted, in reality, that such is not merely a legal but a constitutionally protected right. I cannot see on what legal basis or constitutional basis it is asserted – as it is in effect asserted - that an order of the Board, though invalid, was nonetheless effective to crystallise a right of the kind asserted which right Fitzwilliam did not, until that order was made, possess.

131 Mahon v. An Bord Pleanála [2010] IEHC 495, [2010] 12 JIC 2109 (Unreported, High Court, 21st December, 2010)

99. Finally in this regard I refer to the observation of Humphreys J in **Clifford #3** that "*The hope of anticipating the possibility of getting permission for a particular development is not a legally cognisable vested right*". I would be prepared to shorten that to "*The hope of getting permission for a particular development is not a legally cognisable vested right*". As Humphreys J said: *"it is qualitatively different from a permission that has actually been granted."* And while one can readily sympathise with Fitzwilliam and the present situation is not its fault, nonetheless the Quashed Decision has proved illusory - it vested no rights in Fitzwilliam. Accordingly, I cannot see, with reference to Article 40, that Fitzwilliam has a substantive constitutional right which could be under unjust attack.

Effective Remedy & Fair Procedures

100. As to effective remedy, Counsel for Fitzwilliam cites **Kelly**[132] which cites **Brownfield Restoration**[133]. They were plenary proceedings in which the issue was the scope of works to be required of Wicklow County Council to remediate an illegal landfill of which it had been a major polluter. Humphreys J said that declaratory relief would not suffice as *"Remedies must be effective, in accordance with art. 13 of the European Convention on Human Rights and art. 47 of the EU Charter of Fundamental Rights (reinforced at international level by art. 2 of the International Covenant on Civil and Political Rights), and is also a right which is so essential to the rule of law that it should be regarded as an unenumerated right under Article 40.3 of the Constitution. To grant a mere declaration in the face of a vast and illegal body of waste causing environmental pollution would be a failure to afford an effective remedy."* However, Kelly suggests that any guarantee by Article 40.3 is of a right to an effective legal remedy in justiciable controversies "*insofar as this is practicable*" and, as counsel for Fitzwilliam observed, Kelly cites **YY**[134] for the Supreme Court, per O'Donnell J, reserving for a future occasion the question whether there is an unenumerated right to an effective remedy. It must also be said that the factual context in Brownfield was very different to the present and one may readily imagine that the same result – in injunction to remediate the illegal landfill - would have ensued in Brownfield without recourse to constitutional considerations as to effective remedy.

101. As to fair procedures, Fitzwilliam cites Kelly[135] to the effect that that the courts have powers "*as ample as the defence of the Constitution requires*" to fashion new remedies to protect constitutional rights "of substance".[136] Fitzwilliam cites Kelly[137], as to **Byrne v Ireland**[138] and **Meskell v CIÉ**[139], to essentially that effect.

102. Fitzwilliam also cites **The State (IPU) v EAT**[140] as cited by Kelly[141]. In that case, the EAT ordered that an unfairly dismissed employee be re-engaged. The hearings had been confined to the circumstances of dismissal and financial loss resulting. Neither side had raised any issue as to re-engagement. The Supreme Court quashed the order for re-engagement as in breach of natural and constitutional justice. McCarthy J said:

> *"Whether it be identified as a principle of natural justice derived from the common law and known as audi alteram partem or, preferably, as the right to fair procedures under the Constitution in all judicial or quasi-judicial proceedings, it is a fundamental requirement of justice that person or property should not be at risk without the party charged being given an adequate opportunity of meeting the claim, as identified and pursued. If the proceedings*

132 §7.3.191
133 Brownfield Restoration Ireland Ltd. V Wicklow County Council And The Environmental Protection Agency [2017] IEHC 456
134 YY v Minister for Justice [2017] IESC 61, [2018] 1 ILRM 109.
135 §7.1.145
136 Citing State (Quinn) v Ryan [1965] IR 70
137 §7.1.145 fn 487
138 [1972] IR 241, at 264
139 [1973] IR 121
140 The State (Irish Pharmaceutical Union) v Employment Appeals Tribunal (Notice Party: Maria Dalton) [1987] I.L.R.M. 36
141 §6.1.65

> *derive from statute, then, in the absence of any set of fixed procedures, the relevant authority must create and carry out the necessary procedures; if the set or fixed procedure is not comprehensive, the authority must supplement it in such a fashion as to ensure compliance with constitutional justice"*[142]*.*

103. I am unsure that the question of effective remedy really arises from Fitzwilliam's point of view. It is not the victim of a wrong. It did not impugn the permission now to be quashed. It would have been happy to see it survive. Any enhancement of land value or development potential by a grant of permission is not something to which Fitzwilliam was, before that permission was granted, entitled. And, albeit belatedly, it is now apparent that such enhancement was, at least for now, an illusion as the permission was invalid - or at least it was highly contingent on that permission not being challenged and quashed. That view is perhaps amplified by the reality that all planning permissions are, notoriously and as reflected in detailed and often-changing regulation and political controversy, on the hazard of judicial review. That judicial review should be and is the exception as to the vast majority of planning permissions does not undermine the identification of that hazard.

104. In substance, and as to enhancement of its land value or development potential by a grant of permission, Fitzwilliam seeks an effective remedy for the loss of something it never had.

105. I am unsure what fair procedures Fitzwilliam had in mind. Clearly, they did not impugn as unfair to them, the proceedings which lead to the Impugned Decision. I did not understand them to suggest that they would be at risk of unfair procedures on remittal. The question which development plan to apply on remittal is a question of fairness – but a substantive question of law not a procedural question. The question of fairness does arise on remittal to apply the 2022 Development Plan. However, Fitzwilliam seems happy, if only in the alternative, that fairness to it can be achieved in such a process. Indeed, failing application of the 2016 Development Plan, it actively seeks remittal to apply the 2022 Development Plan.

106. The remaining question of fairness of procedure, therefore, seems to relate to fairness to Crofton. The relevance of The State (IPU) v EAT seems therefore to be as a reassurance that the Board on remittal will fashion procedures fair to Crofton.

107. Accepting The State (IPU) v EAT as the law, it seems to me to have limited application in a situation which is not a case of "*absence of any set of fixed procedures*" or "*set or fixed procedure is not comprehensive*". The authorities are replete with the view of planning law as a self-contained administrative code[143] and many of its procedures as strict and mandatory. That is especially so of

142 for which proposition McCarthy J cited "a wealth of authority": O'Brien v Bord na Móna [1983] IR 255; Loftus v The Attorney General [1979] IR 221; East Donegal Co-Operative Livestock Marts Ltd v Attorney General [1970] IR 317

143 E.g. State (Abenglen Properties Ltd.) v. Dublin Corporation [1984] I.R. 381; Spencer Place Development Company Ltd v. Dublin City Council [2019] IEHC 384 (High Court, Simons J, 30 May 2019)

the 2016 Act by reason of its basis in the urgency of addressing the housing crisis. Nor is The State (IPU) v EAT a mandate to act *contra legem* - especially where lawful alternatives are available.

108. Neither is The State (IPU) v EAT, as applied to S.50A(9A) PDA 2000, a mandate to a Court to remit to the Board on the basis that the Board will work out something, as yet unspecified, to afford fair procedures within the particular restrictions imposed by the 2016 Act. And if, as the case law establishes, I am entitled to consider the prospect of delay, or lack of it, in putting Fitzwilliam to the trouble of a new planning application (as I accept is generally undesirable), it follows that I can lend at least some weight to the appreciation that fair procedures will be accommodated within the procedures applicable in any such new planning application. The present problem is particular to the rigidity of the 2016 Act in excluding, in the cause of expedition, the possibility of processes to put further information before the Board and circulate it for public comment. That expedition came at a price in rigidity of process and, it seems to me, in particular a price as to the capacity of the process under the 2016 Act, as compared to the PDA 2000, to adapt to a change in the applicable Development Plan. Indeed, it may be that that is not so much a price on which the Oireachtas decided as a lacuna in the 2016 Act – but I need speculate no further on that.

Restoration of the Position Immediately Prior to the Quashed Decision.

109. **Clonres** establishes that the '*overriding principle'* is to attempt to undo the consequences of the invalid act by putting matters back into the position in which they were immediately before the invalid order was made. Establishing what Fitzwilliam's position was immediately before the invalid order made is in part a matter of framing – of deciding at what level of generality or particularity to describe that position. One could frame that position, as Fitzwilliam does, as one in which it was entitled to a valid planning decision to which the 2016 Development Plan applied. However, that paradoxically views an order, though invalid, as nonetheless crystallising Fitzwilliam's entitlement to have its application so considered.

110. In my view the proper framing of Fitzwilliam's position immediately before the invalid order was made, is one of an entitlement to a valid planning decision to which the development plan current at the date of such valid decision applied. I do not see that it now has, or ever had, a right to a valid planning decision to which the development plan current at the date of an earlier invalid planning decision applied. I take this view for a number of reasons:

- First, as Fitzwilliam accepts, it was generally on the hazard of a change in the development plan before the planning decision was made. That hazard can be expressed, without altering its substance, by the assertion that the Fitzwilliam's position at all times prior to and on the making of a planning decision was to have that decision made having regard to the development plan current at the date of the planning decision applied.

- Second, I do not see that the fault of the Board in making an invalid decision takes Fitzwilliam "off" the hazard, which it otherwise accepts, of a change in the development plan.

- Third, the framing I prefer is consistent with the underlying and clear purpose of the Planning Acts – which is that planning decisions conform to the principles of proper planning and sustainable development. The development plan is a vital expression of the "overarching principles"[144] of proper planning and sustainable development. The proposition that the principles of proper planning and sustainable development represents a high public interest hardly needs citation of authority. Albeit in a different context, the Supreme Court recently referred to *"the public interest imperative in upholding and maintaining planning control, planning regulation, orderly and sustainable development and the rule of law."*[145] While the principles of proper planning and sustainable development persist and evolve, that their application to locales necessarily produces outcomes changing significantly over time is recognised in the statutory scheme for periodic and mandatory replacement of development plans and for their variation as required in the interim. The considerations informed by those principles have been judicially described as ever-changing[146]. There is a clear public interest in applying those principles and considerations as they subsist at the date of the planning decision. It is clearly consistent with that public interest "imperative" identified by the Supreme Court, and the statutory scheme, that the development plan to which regard is had in making a planning decision be that current when the decision is made. Indeed, the greater the relevant differences between successive plans, the greater the public interest imperative that regard to be had to the later rather than the earlier in taking a planning decision.

- Fourth, I cannot see that a planning decision which is invalid and ineffective and is a nullity for all but very limited purposes can vest a right of the type contended for – to have a later valid decision made applying the development plan current at the invalid decision. I appreciate that this is to state my conclusion as my reason for drawing it but in truth it is a case of *res ipsa loquitur*. In this respect, I note that in **Barry**[147] Humphreys J. noted that the effect of certiorari is that is *"quashes – i.e. positively invalidates – the impugned decision. The person who (or body which) took that decision is thus free to consider the matter afresh".*

111. Viewing the matter in that way – that Fitzwilliam's entitlement always was and remains to a valid decision which has regard to the development plan extant at the date of that decision - Fitzwilliam's arguments as to retrospective application of the 2022 Development Plan and the increased Part V requirement, unfair procedures by way of such retrospective application, prejudice to Fitzwilliam, incomplete rectification of the error which infected the Quashed Decision and failure to respect an alleged legitimate expectation[148] or analogy with legitimate expectation[149] all fall away.

Kenny #1 or Clifford #3? – Ebonwood *&* Element Power

144 Killegland Estates Limited v Meath County Council [2022] IEHC 393
145 Clare County Council v McDonagh, Hogan J 31st January 2022
146 Jefferson, supra.
147 Barry v The Commissioner of An Garda Siochana & Ors [2020] IEHC 307
148 Including its reliance on Fakih v The Minister for Justice [1993] 2 IR 406. It does seem that Fitzwilliam at hearing retreated to a position of merely analogy with legitimate expectation but
149 It does seem that Fitzwilliam at hearing retreated to a position of merely analogy with legitimate expectation

112. **Kenny #1**[150] held that *"[w]hen under a statutory regime a process has been commenced, those involved in or affected thereby, have a right to see that process through, to a conclusion, under the law as it was at the date of its commencement."* The decision in **Kenny #1** was to refuse leave to seek judicial review as the protected status of a gate lodge, on which protected status the applicant for judicial review relied, had not come into being until after the appeal to the Board had been made, as the legislation permitting such protection had not taken effect until after the appeal to the Board had been made.

113. In **Clifford #3** Humphreys J considered[151] **Kenny #1**, in the respect cited above, to be *"general language"* and obiter which, if taken as a "*bald statement*", required "*very considerable qualification.*" He cited "*a mountain of authority and academic opinion"* not opened in Kenny – including **Dodd**[152], **Craies**[153], **Chandra Dharma**[154], **Yew Bon Tew**[155], and **Toss**[156] - to the effect that "*Nobody has a "right" to maintenance of current procedural arrangements by reference merely to the fact that the procedure has already commenced when a new law is enacted."* In **Clifford #3** Humphreys J, in his words "crucially"[157] was concerned with a procedural question[158] to which he considered **Kenny #1** irrelevant[159]. He considered that the obligation to continue the process as it was originally only applies if some vested substantive right is thereby unfairly adversely affected.

114. However, despite the foregoing, his view was not limited to procedural rights. Humphreys J suggested, albeit in passing, that he was not persuaded that there could "*ever be a legally recognisable vested right to demolish a structure that warrants protection … a developer does not have a right to knock down a protected structure or damage it in any way*". Humphreys J went so far as to say that:

> *"If the law, whether procedural <u>or substantive</u>[160] (having regard to objective environmental considerations) changes during the process prior to a decision, the new law should be applied as of the time of the decision, not as of the time of the original application[161]. This is fundamental and has a vast range of implications."*

150 Kenny v. An Bord Pleanála (No. 1) [2000] IEHC 146, [2001] 1 I.R. 565
151 §61 et seq
152 Statutory Interpretation §4.133, p. 108
153 Legislation, 12th ed. (London, Sweet & Maxwell, 2021)
154 R v. Chandra Dharma [1905] 2 K.B. 335 at 338
155 Yew Bon Tew v. Kenderaan Bas Mara [1983] 1 AC 553
156 Toss Ltd. v. District Court [1987] 11 JIC 2401, 1987 WJSC-HC (Unreported, High Court, 24th November, 1987)
157 §58
158 Regulations as to publication of relevant materials changed while Kerry County Council's applications to the Board for development consent under S.51 of the Roads Act 1993 of a greenway project, and confirmation of an associated CPO, were pending. Humphreys J held that the new publication obligations did not retrospectively apply to materials submitted before the change of publication rules but those rules did apply to materials submitted afterwards.
159 §73
160 Emphasis added.
161 By which is meant the new law should be applied as of the time of the decision, not the law as of the time of the original application.

> *"For example, the board bridled at the suggestion that they would or should disregard new ministerial guidelines merely because they were published after a planning application was made, and immediately shied away from that consequence of their argument.*
>
> *Similarly, where a development plan changes, the board also seemed to resist the point that it was a necessary consequence of their argument that such a change should be disregarded as well. I agree with that reluctance – the law to be applied is that as of the date of the decision, not the date of the original application. The board can't be allowed to make an unlawful decision merely because the law was otherwise on the date when the original planning application was made."*[162]

115. For completeness, I note Crofton's citation of **Ebonwood**[163] in which it was decided that the decision-maker could not have regard to a draft development plan and **Element Power**[164], as to consideration of draft statutory guidelines. The Board and Fitzwilliam cite these decisions also. I don't find that these cases assist save in the respects cited above. The exclusion from consideration of drafts yet to be adopted (if adopted) says little, if anything to the question whether the development plan to which regard must be had is that current and having statutory status at the date of the decision or that current and having statutory status at the date of the application. I also note that **CHASE**[165] and **Barna** proceeded on the assumption that the applicant for permission was entitled to have its application determined on the basis of the law applicable when it applied for planning permission. But neither case seems to me to address the issue with which I am concerned.

116. I do not find it necessary to come to a final or all-encompassing view as to the differences between **Clifford #3** and **Kenny #1**. In any event, fuller argument on the question would be needed. In the absence of binding authority on which development plan applies, I am content to follow the obiter in **Clifford #3** on the issue, in addition to the rationale set out above.

117. However I would add the observation that, as to making a planning decision, there seems to me to be a relevant distinction between the law applicable on the one hand and, on the other, the relevant considerations to which a planning decisionmaker must have regard. While development plans do have legal status and consequences, it nonetheless seems to me that they fall into the latter category such that **Kenny #1** would not apply to them.

162 §79
163 Ebonwood Ltd v Meath County Council [2004] 1 I.L.R.M. 305 (High Court, Peart J, 30 April 2003)
164 Element Power Ireland Ltd v An Bord Pleanála [2017] IEHC 550
165 Cork Harbour v. An Bord Pleanála [2021] IEHC 629 (High Court (Judicial Review), Barniville J, 1 October 2021) §122

Conclusion – Which Development Plan Applies on Remittal?

118. For the reasons set out above, I hold that the law requires that on any remittal of the quashed decision to the Board for re-decision, the development plan to which the Board must have regard is the 2022 Development Plan.

Fairness & Chronology of Proceedings

119. In my view the question which development plan applies to any remitted decision is a question of law – which I have decided – rather than a matter of discretion. However, the Quashed Decision was made on 28 April 2021. In compliance with time limits to which applicants in judicial review are generally strictly held, leave to seek judicial review was sought and was obtained on 14 July 2021. I infer that in accordance with the usual directions, the papers were served on the Board and the Notice Party shortly thereafter. From that point it was open to the Board to concede the case as it later did. Equally, it was open to Fitzwilliam to form and express the view that the case 2022 Development Plan be doubted that such an expression of view by Fitzwilliam would have prompted Board's close attention to the question. In short, had a timely view been taken on a point later deemed sufficiently clear as to require concession of certiorari, there can be little doubt but that remittal to the Board would have occurred in ample time to apply the 2016 Development Plan. That is clear because the 2022 Development Plan did not take effect until 21 April 2022.

120. Crofton says and it is not disputed – could hardly have been disputed – that it was common knowledge, and Fitzwilliam must be presumed to have known, that the inevitably lengthy process of making the 2022 Development Plan was under way before these proceedings started. Crofton says and it is not disputed, that instead of expediting matters – or even complying with the usual requirements - to avoid the risk of a remitted decision made having regard to the inevitable 2022 Development Plan, Fitzwilliam did not file its opposition papers until 29 April 2022, after the new plan had taken effect. While perhaps it was delayed in doing so by delay by the Board in filing its opposition papers, there was no suggestion that Fitzwilliam sought to press the matter on.

121. While, as I say, I have decided the issue which plan applies as an issue of law, it is difficult in those circumstances to overly sympathise with Fitzwilliam – not least in its participation in a statutory process the premise of which is the urgency of the provision of housing. In judicial review, obligations of expedition and consequences of delay are not peculiar merely to Applicants.

CAN REGARD LAWFULLY BE HAD TO THE 2022 DEVELOPMENT PLAN ON REMITTAL?

Introduction

122. There is no suggestion[166] but that the process which resulted in the Quashed Decision was entirely lawful until the Quashed Decision was made. As the error in the Quashed Decision proceeded from the view of the Board's inspector that the proposed height of the development was not a material contravention of the 2016 Development Plan, and as there is no suggestion for present purposes that, as to material contravention with respect to height, Fitzwilliam's SHD planning application was flawed from the outset, remittal would, in the ordinary way, likely be to the point in the process at which the inspector would reconsider the file and write a replacement report to the Board in accordance with law. However, as will be seen, the necessity that any remitted decision be made having regard to the 2022 Development Plan complicates the issue of remittal.

123. Unlike the case in **Redmond**, Fitzwilliam's SHD planning application was not flawed from the outset. It properly had regard to the 2016 Development Plan then applicable and applicable up to and including the date of the Quashed Decision. But, Crofton say, the same effect as occurred in **Redmond** has been brought about, if without fault by Fitzwilliam, by the replacement of the 2016 Development Plan on which the SHD planning application was based. They say the planning application is now, if retroactively, flawed and would have in effect to be completely rewritten to reflect the currency of the 2022 Development Plan.

124. Crofton accepts that their position implies that replacement of a development plan ipso facto invalidates any SHD planning application already pending in the functional area to which that plan applies at the date of replacement. Crofton suggests that this is a less alarming implication than might at first appear, as development plan replacement is a lengthy and public process, the timing of which is tolerably predictable years in advance, such that potential SHD planning applicants, in a process designed for expedition, should be able to arrange their affairs accordingly. Further, they say, the implication is a consequence of, and part of the price developers pay for, the rigidity of the SHD process which enables expedition by requiring that the application be "front loaded" and by severely restricting, as compared to an "ordinary" planning application, the facility for obtaining further information and circulating/publishing it for comment by others.

125. In judicial review, remittal implies a resumption and repetition (but this time in accordance with law) of an existing planning process – not the start of a new one. The general effect of certiorari is that the quashed decision is treated as not having been made. But, at least in case of remittal, certiorari does not have the effect that the SHD application will be treated as not having been made and the processing of that application usually remains extant save as the error is excised by certiorari. Any remitted decision will be made in this case in the process commenced by the SHD Planning Application.

166 For present purposes, given the concession of certiorari.

126. In the present case, the essential question is whether a re-consideration on remittal would, in having regard to the 2022 Development Plan, be fair – remembering both that absolute fairness is not required and often unattainable and yet that "fair procedures" are a synonym for constitutional justice and represent a weighty constitutional value. Kelly[167] cites Charleton J in **Galway-Mayo IT**[*168*] as relying on the **IPU** case and as observing that what is required to satisfy the right to be heard will vary depending on the nature of the tribunal involved, but that *'… fundamental to any procedure … is the duty of the tribunal to identify the issue which it is tasked with deciding and to make available to the parties the means, which can be variable, whereby they may address that issue'.* This seems to me an observation notably applicable to the requirements of fair procedures in the present case if the 2022 Development Plan applies, given that no-one in the process to date has had regard to or addressed that Plan.

127. From its point of view, Fitzwilliam suggests that decisions such as **Brownfield, Byrne***,* **Meskell** and **IPU** offer scope for the Board to supplement the procedures of the 2016 Act to provide for submissions to be made by all parties as to the 2022 Development Plan.

Some Factual Matters

128. With their planning application, Fitzwilliam submitted a Statement of Material Contravention[169] of the 2016 Development Plan. This noted that the proposal may be considered to materially contravene that plan as to

- Building Height
- Car Parking Provision - 3 car parking spaces are proposed,
- Unit mix - 79% of the proposed apartments are 1-bed and 21% are 2-bed.
- Private Open Space – as it falls below development plan requirements in the case of some units.

The Statement of Material Contravention then seeks to justify those material contraventions by reference to relevant statutory criteria.

129. The Board found and justified material contraventions as to unit mix and private open space and but not did not find, and hence did not justify, material contraventions as building height and car parking provision. Its decision is being quashed for error in failing to find material contravention as to building height.

130. It seems to me entirely plausible that the 2022 Development Plan may raise new and additional issues of possible material contraventions and that the issues on the four subject-matters

167 §6.1.65 fn181
168 Galway-Mayo Institute of Technology v Employment Appeals Tribunal [2007] IEHC 210
169 See below

identified in the Statement of Material Contravention may be appreciably altered by the 2022 Development Plan. More generally, it is entirely plausible that the 2022 Development Plan may, as to considerations of proper planning and sustainable development, shed light on the Proposed Development quite different to that shed by the 2016 Development Plan and do so in a way which materially affects the consideration and response to the SHD proposal by some or all of

- the present applicants in judicial review,
- those others who made submissions and observations in the SHD planning process,
- the public generally
- prescribed bodies[170] and
- the planning authority.

And, as was observed in **Redmond,** all those persons are entitled to a proper opportunity to address these matters of material contravention in response to the developer's suggested justifications of the material contraventions[171].

131. I do not propose to refer to all, or even many, of the contributions by stakeholders. But it is illustrative to mention that the Department of Tourism, Culture, Arts, Gaeltacht, Sport and Media said the following as to Architectural Heritage[172]:

- *"There are concerns regarding the scale of the development and the impact that it will have on the adjoining historic town and port and its unique maritime context. The intrusion of the proposed residential tower in terms of its prominent location within the subject site and in the context of the overall maritime character area is significant.*
- *The proposal as submitted doesn't adequately reflect or respect the guidance of the current …. Development Plan objectives or policy in terms of conserving architectural heritage, the historic character or sense of place in terms of the location and siting of these monolithic blocks within this historic setting and cultural landscape. The architectural heritage does not adequately deal with the overall impact on the setting of the historic town and its core buildings.*
- *The Department recommends reconsideration of the design approach and the reduction in the proposed scale of the dominant tower."*

Having made observations by reference to the 2016 Development Plan on an issue which, as we now know, is at least arguably relevant to the material contravention of the 2016 Development Plan as to height, it is entirely predictable that the Department might wish to be heard on similar issues as informed by the 2022 Development Plan. The same can be said for the views expressed, more explicitly as to building height, by An Taisce – another prescribed body.

132. It is also entirely plausible that such new or different light as is shed by the 2022 Development Plan on considerations of proper planning and sustainable development will materially affect the consideration and response by the Board to both the SHD proposal and the contributions of the others described above and in turn materially affect the Board's decision whether to grant or refuse permission and, if to grant, on what conditions.

170 Typically, public authorities/bodies required to be notified of the SHD application.
171 [2020] IEHC 322 §30
172 See Inspector's report §9.1

Part V

133. As stated above, save in one respect, I am ignorant of the specific differences between the 2016 Development Plan and the 2022 Development Plan as they may bear on the planning considerations relevant to the Proposed Development. The exception is that Crofton point out that, whereas the 2016 Development Plan required for purposes of Part V PDA 2000[173] that agreement for provision of social housing be based on reservation of 10% of the site for social housing[174] in accordance with the maximum percentage then allowed by S.94(4)(c) PDA 2000, on foot of statutory amendment, the equivalent requirement of the 2022 Development Plan is 20%. In essence, the quantum of the Part V requirement has doubled as between the two plans.[175] This seems to me of some significance from both a regulatory and a practical planning point of view.

134. Proposals for Part V compliance must be submitted as early as the pre-application consultation stage.[176] The Board's statutory Notice of Pre-Application Consultation Opinion in this case was that the proposal required further consideration and amendment in order to constitute a reasonable basis for an application for strategic housing development. It required, inter alia, that the SHD planning application include specific details of Part V proposals, clearly indicating the proposed Part V units.[177] Fitzwilliam's Statement of Response to the Pre-Application Consultation Opinion submitted with the SHD application, stated that it had actively engaged with the planning authority with regard to Part V and proposed to provide, by way of lease, 10 identified social housing units (9 being 1-bedroom units) in a particular building on the site. It included a layout plan identifying them. The Chief Executive's report considered that specific Part V proposal and was mildly positive on it but advised that, were permission granted, it would need further financial and other information and might seek a different mlx of unit types to reflect housing demand at that time. Notably, the Inspector's report records that objectors expressed concerns at the Part V proposal. The Inspector added little to the issue. Condition 23 of the Quashed Decision required Fitzwilliam to make a Part V agreement with the planning authority. On a like-for-like basis, the 20% requirement of the 2022 Development Plan, as opposed to the 10% requirement of 2022 Development Plan, suggests a Part V provision of 20 on-site apartments of the 102 proposed. This, or any broadly equivalent change, would undeniably be a significant change and may or may not prompt Fitzwilliam to propose an alternative Part V provision[178].

173 Planning & Development Act 2000
174 For present purposes, I ignore the possibility of equivalent alternative arrangements.
175 I accept that states the position crudely but it suffices.
176 S.5 2016 Act
177 See inspector's report and Chief executive's report.
178 As contemplated by S.96(3) PDA 2000

SHD Process & Development Plan

135. It was not disputed that the procedures set out in the 2016 Act would apply to any remitted decision-making process. While the specified period under 2016 Act has expired, S.4(3)[179] of that Act preserved its effect in favour of SHD planning applications pending at the expiry of the specified period. S.17(6) of the 2021 Act[180] will repeal the 2016 Act as it relates to such procedures, including S.4(3) of that Act, but S.17(6) has not been commenced[181]. The procedures in SHD planning applications are further regulated by Part 23 PDR 2001[182].

136. Reflecting the importance of development plans, the SHD process imposes considerable requirements to address the applicable development plan's implications for any SHD planning application and to do so from the beginning of what has been judicially described as a "*front-loaded*", "*streamlined and expedited*" and "*fast-track*" process. That process is designed to ensure that the planning application is complete when first made - **Crekav**[183]. Indeed, as these requirements to address the applicable development plan's implications arise in the pre-application consultation process, one could say that they arise even before the "beginning" of the SHD application process proper.

137. Emphasising the importance of development plans in the SHD process is the fact that the Board is absolutely prohibited from granting an SHD permission in material contravention of the zoning provisions of the development plan.[184] In **Redmond**[185] Simons J commented that the statutory restrictions of the grant of permission in material contravention are stricter in SHD applications than in conventional planning applications. This difference is presumably intended to reflect the fact that an SHD application is made directly the Board without there being any first-instance application to the planning authority. Simons J said that "*The <u>enhanced status</u>[186] afforded to the zoning objectives ensures that the planning authority's role, as author of the development plan, in setting planning policy, is respected."*

138. While the brief description which follows is focussed on the relevance of the development plan to the SHD process, and could thereby give the development plan undue prominence, nonetheless I consider that the prominence it suggests is not undue and it is clear that the development plan is "front and centre" in the process from its earliest to its latest point.

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179 (3) Where a request was duly made under section 5(1) during the specified period in respect of a strategic housing development but any matter concerning the development to which Part 2 relates has not been completed before the end of that period, then subject to section 11(10), the other provisions of the Planning and Development Acts 2000 to 2016 shall continue to apply to that matter as if the specified period had not expired.
180 Planning and Development (Amendment) (Large-scale Residential Development) Act 2021
181 The Planning and Development (Amendment) (Large-scale Residential Development) Act 2021 (Commencement) Order 2021 [S.I. 715/2021] - commenced from the 17th of December 2021 the Planning and Development (Amendment) (Large-scale Residential Development) Act 2021 (No. 40 of 2021), other than section 17(6).
182 Planning and Development Regulations 2001 – Part 23 inserted by the Planning and Development (Strategic Housing Development) Regulations 2017.
183 Crekav Trading GP Limited v An Bord Pleanála [2020] IEHC 400 §§86, 225, 257 - 259
184 S.9(6) 2016 Act
185 Redmond v. An Bord Pleanála [2020] IEHC 322 (High Court (General), Simons J, 1 July 2020) §95 et seq. In particular §22
186 Emphasis added

Pre-Application

139. The requirements to address the development plan include mandatory pre-application consultations by the prospective applicant for SHD Permission with both the planning authority and the Board.[187]

- To that end, the prospective applicant must, for purposes of pre-application consultations, describe the proposed SHD development and submit a statement that:
  - the proposal is consistent with the relevant objectives of the development plan, including as relates to the zoning of the land.[188]
  - if the proposal would materially contravene the development plan other than in relation to the zoning of the land, permission should nonetheless be granted, having regard to a consideration specified in S.37(2)(b) PDA 2000.
- The prospective applicant must also submit a brief description of Part V proposals where relevant.
- The consultations with the planning authority must
  - have regard to the development plan, and indicate the relevant objectives of the development plan which may have a bearing on the decision.[189]
  - have regard to Part V issues.[190]
- In the pre-application consultation process, the planning authority must give a written opinion on the relevant considerations of proper planning and sustainable development – "in particular" on the proposal having regard to the development plan.[191]
- Based, inter alia, on the foregoing, and after holding a consultation attended by the Board, the prospective applicant and the planning authority, the Board notifies the prospective applicant of its opinion whether the proposal constitutes, or could with further consideration and amendment (as to which it is to give advice) constitute, a reasonable basis for an SHD application.[192] This may or may not result in further pre-application consultation.
  - We know, for example, that in the present case that the Board's opinion included a requirement of further consideration and/or justification of building height by reference, inter alia to the building height guidelines in the 2016 Development Plan.

140. Before making its SHD Application, the prospective applicant must[193] publish notice of the intended SHD application, briefly describing the proposed development and stating that the application contains a statement:

- Setting out how the proposal will be consistent with the relevant objectives of the development plan, including as relates to the zoning of the land.
- Where the proposal would materially contravene the development plan other than in relation to the zoning, indicating why permission should nonetheless be granted, having regard to a consideration specified in S.37(2)(b) PDA 2000.

187 S.5 2016 Act
188 This latter issue as to zoning is not explicit but is necessarily implicit.
189 S.5(2)(a) 2016 Act & S.247(2) PDA 2000
190 S.5(2)(b) 2016 Act
191 S.6 2016 Act
192 S.6 2016 Act
193 S.8 2016 Act

Importantly, the public notice must make the application documents available for public inspection[194] and invite public participation in the process[195] - allowing 5 weeks from the making of the SHD Application for that purpose.

SHD Application, Submissions & Observations, Local Authority Report & The Board's Decision

141. The SHD application must include, inter alia[196],

- A statement of response to the Board's opinion that the proposal made in pre-application consultations required further consideration and amendment in order to constitute a reasonable basis for an SHD application.
- A statement of consistency with the Development Plan[197]. (Colloquially termed a "Statement Of Consistency").
- A statement of justification why permission should be granted despite any material contraventions of the Development Plan[198]. (Colloquially termed a "Statement Of Justification" or a "Material Contravention Statement").
- Details of proposed Part V compliance.

142. I should add that SHD Applications invariably, and no doubt in this case, contain numerous expert and technical reports, many of which will be premised on, and canvass issues relating to, the content of the applicable Development Plan. In this case and at that point, but no longer, the 2016 Development Plan applied.

143. It is of some note that the public has 5 weeks from the receipt by the Board of the SHD application within which to make submissions and observations[199]. Despite the impetus to expedition in the 2016 Act, this is no shorter than the period allowed in ordinary planning applications[200] and doubtless reflects the appreciation that, not least as to SHD proposals, members of the public need adequate time to bespeak, study, digest, consult and seek advice on, form their views on, perhaps co-ordinate their efforts as to, and draft and finalise submissions and observations on, the SHD application. I can take judicial notice that such submissions and observations can, and often do, very properly vary from the short and simple to the lengthy, complex and professionally composed - expertly addressing multiple issues of proper planning and sustainable development and environmental issues.

194 S.8 (2)(iii) 2016 Act
195 S.8 (2)(vii) 2016 Act
196 See generally Art 297 & 298 & Form 14 PDR 2001
197 S.8(1)(a)(iv) of the 2016 Act
198 S.8(1)(a)(iv) of the 2016 Act
199 S.8(1)(a)(iii)(II) & (vii) of the 2016 Act
200 Art 29 PDR 2001

144. I have no doubt that, generally at least, time of that order is required to afford adequate opportunity for public participation and that the public cannot reasonably be expected to make submissions and observations "on the hoof" or by way of immediate response to significant aspects of an SHD application.

145. Once the SHD Application has been made and the submissions and observations of the public received, the planning authority must submit to the Board a report by its chief executive of his/her views, and those of its elected members, 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 the development plan and to the submissions and observations of the public.[201] It may, I think, be assumed that submissions and observations of the public are likely to have drawn attention to elements of the development plan as allegedly relevant to the Board's decision.

146. In particular, the chief executive must set out the planning authority's opinion as to whether the proposed SHD would be consistent with the development plan and as to what precisely the authority considers the Board's decision on the application should be and why. In **Redmond**[202] Simons J describes the role and importance of the chief executive's report in the SHD process, notably to the effect that, given the constitutional position of the planning authority,[203] "*The obligation for An Bord Pleanála to engage with the recommendation set out in the chief executive's report is more obvious than the obligation to engage with an internal report such as that prepared by a board inspector*." Given the importance of inspector's reports in the Board's processes, this is a striking observation. It seems reasonable to infer that this observation by Simons J was also informed by his earlier reference to the respect due to *"… the planning authority's role, as author of the development plan, in setting planning policy …."*. Ceteris paribus, the planning authority's views are likely to be of particular value in the SHD process. It is the public planning expert with particular local knowledge of the area. Its development plan is the considered and democratically validated expression of its views of the proper planning and sustainable development of the area, made after lengthy public consultation and revised periodically to adapt to contemporaneous circumstances. It is self-evident that in a remitted decision having regard to the 2022 Development Plan, its views on the Proposed Development in light of that plan are required.

147. In deciding the SHD application, the Board must[204] consider, inter alia, the chief executive's report and the submissions or observations of the public, as they relate to proper planning and sustainable development and likely effects on the environment and the Board must have regard, inter alia, to the development plan. As we have seen, the Board may not grant permission in material contravention of the development plan as to zoning. It may grant permission "*even where*" the proposed development is in material contravention of the Development Plan other than as to

201 S.8(5) 2016 Act & S.34(2) PDA 2000
202 Redmond v. An Bord Pleanála [2020] IEHC 151 (High Court (General), Simons J, 1 July 2020) §95 et seq. In particular §115.
203 Art. 28A Bunreacht na hÉireann
204 Section 8(5)(a) 2016 Act

zoning but "*only*" where it considers that, if section 37(2)(b) PDA 2000[205] were to apply, it would grant permission. The Board's decision must state the main reasons and considerations for any permitted material contravention of the development plan.

148. Counsel for Crofton argues therefor that even from pre-application consultation, the SHD planning application is "wedded" to a particular development plan. In a general sense one could say that of any planning application but there can be no doubt that Simons J was correct in **Redmond** in in identifying, on the basis of the content of the 2016 Act, the "*enhanced status*" of the development plan in SHD applications – especially in to the context of the "front loading" and "oven ready" requirements[206] and the absence of further information and public participation in the later phase of the process[207].

149. To this point, in my account of the SHD process, I have "skipped" two possible steps – as to further information and an oral hearing – as these raise practical issues relating to fair procedures in adapting the SHD process, on a remittal, to the requirements of the 2022 Development Plan and fair procedures. Before I turn to those issues I should elaborate a little on the positions of the parties.

Significance of the 2022 Development Plan and Prospects of Lawful Remittal – Positions of the Parties & Role of the Court.

150. Crofton's position is simple. Especially in an SHD application in which the importance of the development plan is "enhanced"[208] beyond even its centrality to an ordinary planning application, and in which regard to the development plan is "front loaded" from the earliest phase of the SHD process, a new development plan necessarily requires, in effect, a rewriting of the SHD application, more or less ab initio. Crofton says the SHD process provides no means of doing so or means of the ensuing public participation necessary, in light of that new development plan, to lawful remittal having regard to requirements of fair procedures. It gives the example of the position as to Part V[209].

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205 (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 F328[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.
206 See below
207 See below
208 Simons J in Redmond
209 See above.

151. While the Board argued that I should not assume that the Development Plan had been rewritten wholesale, it accepted that I should assume changes in the Development Plan relevant to the determination of the present SHD application. However, on even that that significant assumption, and other than as to a possible oral hearing, the Board suggested no means of ensuring fair procedures in a remitted process. Other than by reference merely to the possibility of an oral hearing, I have no information as to what, in substance, the Board intends to do – or even contemplates doing - by way of provision of fair procedures. Indeed it seems that there is no lawful possibility other than an oral hearing.

152. I should add that the other parties have been no more informative - save as to the Part V issue. I also should say that I accepted at the hearing that all parties to the judicial review had deliberately not embroiled me in a comparison of the two Plans. But it seems to me significant that Fitzwilliam asserts[210] that if, contrary to its submission, the 2022 Development Plan applies, then *"in circumstances where the Development Plan has changed since the application was lodged, there is a compelling case for an oral hearing in this particular case. The holding of an oral hearing would enable further public participation in relation to the* [2022 Development Plan]". That assertion of a "compelling case" necessarily implies a submission that the differences between the 2016 and 2022 Development Plans are indeed such as would materially affect a proper and fair consideration and decision of its SHD planning application and require further public participation.

153. As stated, Fitzwilliam has proposed an oral hearing as a solution enabling lawful remittal. The Board has intimated the possibility of (but not a commitment to) holding one. The Board has declined to commit because, as its counsel says, "*we don't know what the differences between the two plans are, we don't know what it would take in terms of further information or fair procedures to enable any changes between the plans to be addressed."* Whatever about my being in that position, I do not know why the Board is in that position. I must take it that the 2022 Development Plan has been available to the Board since it took effect last April. It is surprising that the Board has not informed itself of any differences between the 2016 and 2022 Plans relevant to the subject SHD application and made known to the Court its views of the specific requirements of fair procedures on a remittal of this particular case.

154. On my inquiry as to how the Board would deal with the matter if it found that fair procedures could not be accommodated on remittal, counsel indicated that the Board would have to refuse the SHD application and would be exposed to judicial review if it did not. The Board's satisfaction that remittal would be lawful is premised on my reliance entirely on the Board's general obligation to conduct a lawful process on remittal on the footing that, if it failed to find a fair way of proceeding, it would be obliged to refuse the SHD planning application – leaving to further judicial review any remedy for unlawful process on remittal.

210 Written submissions §57

155. While any decision made following remittal is just as subject to judicial review as is any decision of the Board, it seems to me that the function of the court in deciding to remit includes that of seeing, to its satisfaction, that the applicable statutory procedures can accommodate fair procedures – if needs be by adaptation of those procedures within the limits of lawfulness. A mere recommendation or direction to respect fair procedures would be superfluous as the Board is always bound to respect fair procedures. The Court should not, to coin a phrase, kick the can of fairness down the road if no fair process is in prospect despite the Board's having been in a position to demonstrate that prospect if it exists. In deciding on the lawfulness of remittal, I should take a view whether there is any real prospect that the statutory scheme, as adapted within the bounds of lawfulness by appropriate directions or recommendations, would accommodate fair procedures in the circumstances of this case. Indeed, I find it difficult to see how I could properly exercise my "*inherent power*" to formulate directions or recommendations without taking such a view. It does not seem to me that the approach taken by the Board, and the approach it suggests I should take, adequately enable the Court to fulfil its duty to satisfy itself of the fairness, and more generally the lawfulness, of remittal.

156. As has been seen, there is authority that I should not lightly reject the Board's view that remittal is possible. I will in due course address that observation as it bears on issues of lawfulness. That apart, the observation that the court should not lightly reject the Board's view states, first, the obvious - that the court is the decisionmaker on the question whether lawful remittal can be achieved. Second, it necessarily implies a power to reject the Board's view – even if one not lightly to be exercised. Third, it necessarily implies that the Court should have the necessary information to enable it to decide whether it should exercise that power to reject the Board's view. Fourth, the duty of a public body to assist the court in reaching the correct decision in judicial review requires that the Board should provide that information to the extent possible. Accordingly, it does seem to me that, in expressing the view that it can carry out its statutory function, it is incumbent on the Board to identify why it takes that view and how it can carry out its statutory function. The Board has not done so in this case. I am not overly critical of the Board in this regard as all parties essentially took the same approach and the precise issue arising in this case is somewhat novel (if surprisingly so and despite the general practice) in the absence of authority on the question which development plan applies on remittal. However, the net position is that I do not have the information in question.

Remittal – Further Information

157. In light of the foregoing considerations and statutory scheme, I will consider what possibilities exist of lawful remittal to consideration of the SHD planning application having regard to the 2022 Development Plan.

158. As recorded above, in "ordinary" planning applications and appeals there are facilities for decisionmakers to seek and/or allow the submission of further information and to publish and circulate such further information for further comment. It suffices for present purposes to note that,

by **S.131 PDA 2000**, the Board, in considering an appeal, may request any person or body to make submissions or observations in relation to any matter which has arisen in relation to the appeal or referral if it considers that it is, in the particular circumstances, appropriate "*in the interests of justice*" to do so. Importantly, the Board can exercise that power at any time prior to making its decision. Equally importantly, the premise of S.131 is the recognition that circumstances may arise at any point in the decision-making process in which "*the interests of justice*" require that such submissions or observations be permitted. It can hardly be disputed that "*the interests of justice"* is a highly significant phrase redolent of constitutional justice – also known as fair procedures – and hence a weighty legal interest. To put it another way, notwithstanding that the power created by S.131 is discretionary, it is difficult to conceive that the Board could lawfully conclude, taking all relevant and possibly countervailing considerations into account, that the "*the interests of justice*" rendered such submissions or observations appropriate and yet decide not to request them. So the Board has full powers, for example, to adapt an "ordinary" planning appeal to a new development plan as justice may require. By **S.132 PDA 2000** the Board has similar powers to bespeak any document, particulars or other information which may be necessary to enable it to determine an appeal.

159. As to these discretions under Ss.131 and 132 and as to "ordinary" planning appeals, **Browne**[211] says:

> *"Although the legislation envisages a tight time period for the making of submissions and observations, the rules of natural and constitutional justice may, on occasion, require that further submissions be allowed[212], and, presumably for this reason, An Bord Pleanála has been given a statutory discretion to allow submissions outside the prescribed time periods.[213]*
>
> *Guidance may be sought as to the manner in which this discretion might be exercised from the earlier case law which, although decided prior to the introduction of the various statutory time limits on the making of submissions and observations, does indicate the nature of the function being exercised by An Bord Pleanála. In this regard, reference is made to the following passage from the judgment of Finlay P. in* ***State (Genport Ltd) v An Bord Pleanála****[214]:*
>
> > *"I am satisfied that as a matter of general law An Bord Pleanála carrying out a quasi-judicial function would have an obligation to take reasonable steps to ensure that every party interested in any particular application before it should be aware of the submissions or representations made by any other party; should have a reasonable opportunity of replying to them; and should have a general reasonable opportunity of making representations to the Board."*

211 Simons, Planning Law, 3rd ed'n §6-131 et seq
212 Citing generally, State (Genport Ltd) v An Bord Pleanála [1983] I.L.R.M. 12; State (Boyd) v An Bord Pleanála, unreported, High Court, Murphy J., 18 February 1983; and State (Córas Iompair Éireann) v An Bord Pleanála, unreported, Supreme Court, 12 December 1984.
213 Citing Mulhall v An Bord Pleanála, unreported, High Court, McCracken J., 21 March 1996 (Irish Times Law Report, 10 June 1996).
214 [1983] I.L.R.M. 12 at 14.

160. **Browne**[215] cites **Haverty**[216] as stating, in the context of an argument that an observer on a planning appeal should have been allowed to make a further observation in response to further submissions from an interested party, that:

> *"The essence of natural justice is that it requires the application of broad principles of commonsense and fair play to a given set of circumstances in which a person is acting judicially. What will be required must vary with the circumstances of the case."*

161. However, **Browne**[217] also cites **Wexele**[218] to the effect that there is only limited scope for the courts to supplement the statutory procedures prescribed under the planning legislation, stating that there is "*no warrant for judicial intrusion by way of reformulating procedures where these have already been set out in statute*". Charleton J said that *"To a limited extent, the principles of natural justice have an influence on the interpretation of"* S.131. He noted[219] that the key principles are the interests of justice and utility, and the party asserting that (s)he was shut out unfairly bears the onus of showing prejudice - that (s)he had something new to say which could reasonably arguably have had an effect on the appeal, such that it had been unjust for the Board to cut them out of saying it.

162. However in broad terms it is clear that if, during an "ordinary" planning application, the development plan is replaced, statutory machinery exists to allow further information to be tendered by any relevant party, and circulated for response if needs be, to enable a decision properly informed as to the implications of the new development plan for the decision to be made – and made fair procedures having been observed in terms of the principle audi alteram partem.

163. In some contrast (one must infer deliberately so), and no doubt in the cause of the expedition which the 2016 Act seeks to achieve, the SHD procedure contains no equivalent to S.131 and, as will be seen, did not incorporate S.131. When one considers that, even in an ordinary planning application, the exercise of S.131, by its express terms, occurs precisely and only because its exercise is "*appropriate in the interests of justice*", it will be appreciated that the omission of an equivalent from the 2016 Act is no small matter. It implies that, even where it would be "*appropriate in the interests of justice*" to seek further submissions or observations, the Board has no power to do so.

164. That is no doubt because, in the cause of expedition, the SHD planning applicant, having had the benefit of pre-application consultation and the Board's resulting opinion, is expected to submit its planning application in an "oven-ready" condition, to which the public and observers will have had the opportunity to respond. A price of this expedition is that, while the procedure is fair as far as

215 Simons, Planning Law, 3rd ed'n §6-136
216 State (Haverty) v An Bord Pleanála [1987] I.R. 485 at 493
217 Simons, Planning Law, 3rd ed'n §6-138 et seq
218 Wexele v An Bord Pleanála (No. 1) [2010] IEHC 21
219 §§ 19 & 20

it goes, where, as matters turn out, it is indeed "*appropriate in the interests of justice*" to seek further information submissions or observations, the Board has no power to do so. Though S.132 is framed in terms of the Board's "*absolute discretion*" (the exercise of which is judicially reviewable[220]) and "*necessity*" rather than the interest of justice, broadly similar comment can be made as to the absence of an equivalent from the SHD process.

165. In **Crekav**[221] - an SHD case - the Board argued and Barniville J noted that there is no general provision in the 2016 Act by which the Board may request further information from the applicant for permission. He noted a possible workaround via ss.177U and 177V of the 2000 Act. But those sections are specific to screening for AA and to AA and they do not arise in the case now before me and/or may not encompass issues arising by reason of the change of development plan.

166. Barniville J emphasised[222] the Board's assertion "*that the key issue for the Board in deciding not to request further information was the practical and legal difficulty in making such a request because of the limited time available and the absence of a statutory process for further public consultation".* Barniville J concluded[223] that the Board was correct in its view that it did not have the power to circulate any further information obtained from the Applicant for SHD permission to interested parties or to the public for their submissions or observations on that information – whether under s. 131 or otherwise. He came to that view, as he said himself, "*with some difficulty*" and on a consideration of statutory provisions which he considered were "*far from a model of clarity*" and "*extremely confusing*" and created "*real difficulties*" of interpretation. In particular there was "*nothing at all clear about s. 17 of the 2016 Act*" but it did not incorporate S.131 in the SHD procedure.[224] Not least in that light, I am grateful for the fruits of his labours.

167. Barniville J did note that, by **Reg. 302(6)(b) SHDR 2017**[225], *"The Board may, at any time before making its decision, request any person, authority or body to make a submission or observations or elaborate upon a submission or observations in relation to an application".* However, the SHDR 2017 did not allow "*circulation of any such submission or observations or elaborations received*". He noted in this regard that "*the Board is a "creature of statute" and is required to act within the four walls of the statutory regime which applies to it*". So, as Charleton J had said in **Wexele**, it would be inappropriate for the Court to reformulate the statutory procedures applicable to the Board. And *"as Regulation 302(6)(b) confers a discretionary power on the Board to request a submission or observation or an elaboration on them, it ought to be construed as applying only to requests dealing with minor, non-material clarifications, which would not require to be circulated to others or to the public to ensure effective public participation".*

220 See further below.
221 Crekav Trading GP Limited v An Bord Pleanála [2020] IEHC 400 §87
222 §95
223 §247 et seq including §264
224 §§260 & 262
225 Planning and Development (Strategic Housing Development) Regulations 2017.

168. It can hardly be suggested, and wasn't, that a change in the development plan applicable to an SHD planning decision is likely to require merely minor, non-material clarifications which would not require circulation to the public to ensure effective public participation. It is clear therefore that **Reg. 302(6)(b) SHDR 2017** does not provide a solution to the issue of lawful remittal in this case.

169. It is notable, though not per se of legal significance, that Barniville J, in taking the views he took as described above, was expressing himself in precise agreement with the case which the Board itself had made in **Crekav**. In that light the Board's submission is unsurprising – and in my view correct in law - in this case to the effect that *"… the 2016 Act does not provide for further information to be requested from the Notice Party or for submissions to be circulated to the public/prescribed bodies. In those circumstances, the Board does not contend that it would be appropriate for the Court to make the directions invited by the Notice Party"*. That invitation is to "*make such directions and/or recommendations to enable the parties to the process (developer, planning authority, prescribed authorities and the public) to make further submissions in that regard*".

170. I have considered **Redmond**[226] already. It bears some revisiting. It differed from the present case in that, in Redmond, remittal was refused as pointless as the SHD planning application had been flawed from the outset. That was so because it, including its statement of justification of material contravention, had failed to recognise and justify a material contravention of the development plan as to each of housing density and public open space. Crofton says substantially the same net effect, though more widely as to the entirety of the applicable development plan, has resulted from the change of development plan in the present case. In **Redmond**, Simons J considered that

> *"The resolution of this issue turns largely on the legal significance to be attached to public participation rights in the planning process. The principal judgment had found that the proposed development project represents a material contravention of the development plan. The legislation envisages that where a planning application involves a material contravention, express public notice of this fact must be given at the time of the making of the application. This did not happen on the facts of the present case where the developer and the board — mistakenly — considered that there was no material contravention. The question now arises as to whether this absence of public notice, and of a statement of the justification for seeking a material contravention, is fatal to the remittal of the planning application."*[227]
>
> *"If, as will happen occasionally, the developer and its advisors misinterpret the plan and fail to recognise that a material contravention is involved, then the legal consequence is that the planning application is invalid. The legislation does not allow the developer's error to be visited upon the public by undermining their rights of public participation."*[228]

226 [2020] IEHC 322
227 §3
228 §40

171. Simons J considered the caselaw as to remittal and noted[229] that where the Board, as the statutory decision-maker, has taken the view that it can carry out its statutory function in light of the findings of the court if the matter is remitted to it for a fresh decision, the court should not lightly reject such an application to remit in favour of simply quashing the decision *simpliciter* with the result that the application goes back to square one. That was significant as the Board opposed remittal in **Redmond**. However S.50A(9A) was not yet in force and, as I have said, it seems to me that the Board's view whether remittal would be lawful is no more weighty than others.

172. It is interesting to note Simons J's summary the basis of the Board's opposition to remittal in **Redmond**:

> *"On the facts of the present case, An Bord Pleanála opposes the making of an order for remittal. In particular, the board submits that it would be inappropriate to remit the planning application in circumstances where it says that the consequence of the error which led to the planning permission being invalidated is that public participation had been frustrated. The public were not notified that a planning application was being made for a development that would materially contravene the development plan. Nor were they given an opportunity to make submissions or observations on the developer's case as to why planning permission should be granted notwithstanding that material contravention."*

Simons J agreed and took the view in consequence that the planning application was fatally flawed from the outset and so the Board lacked jurisdiction to grant permission such that, were it remitted, the Board would have to dismiss the application as invalid[230].

173. Simons J cited[231] **S.8(1)(a)(iv)(II) of the 2016 Act** as ensuring effective public participation and reflecting the especial importance of the development plan under the 2016 Act[232] - as did the stricter restrictions than usual on the grant of permissions in material contravention.

174. On the facts, Simons J was able to state that the statute did not allow the developer's error to be visited on the public by undermining the rights of public participation. But I consider that it would be a mistake to infer a corollary that, if the error was the Board's not the developer's, rights of public participation may be undermined. If one strips out the element of error, the logic of the view taken by Simons J, which seems to me correct, is that effective public participation in planning procedures can be adjusted within the bounds of fairness and the four walls of the statute. But cannot be sacrificed – even to the pressing public interest in the provision of housing during a housing crisis. Delay is no small matter – especially in the urgency of a housing crisis – and may create or exacerbate other and various uncertainties - for example, as to cost of and financing the

229 §15
230 §28 & 31
231 §18 et seq
232 §21

project. But it does bear observation that the price is, as a probability, likely to be delay rather than the ultimate frustration of any development permissible by reference to a contemporary understanding of the proper planning and sustainable development of the area.

175. Any prospect of a material contravention here, other than that grounding certiorari, derives not, as it did in **Redmond**, from error by the developer such that the application was flawed from the start, but from the change of development plan after the application as made. However the net result for public consultation is essentially the same, if not, in a sense, worse. In Redmond only a single issue of material contravention arose. Here, not merely would, in a remitted decision, the prospect of early public participation as to possibly multiple material contraventions of the 2022 Development Plan be frustrated, public consultation by reference to the 2022 Development Plan more generally would be frustrated.

176. Notably, Simons J did not decide **Redmond** on a discretionary basis – though, only "*for the sake of completeness*", he said he would have made the same decision on a discretionary basis[233]. It was to that discretionary issue that he considered the Board's attitude relevant. However, his decision was based on lawfulness not discretion. He said[234]:

> *"These deficiencies are not capable of being remedied by the form of remittal sought by the developer. In particular, the absence of any allowance for further public participation would mean that the making of an order for remittal would result in a risk that planning permission would be granted in material contravention in circumstances where the public were not properly notified nor given an opportunity to make submissions or observations on the developer's case as to why planning permission should be granted notwithstanding the material contravention.*
>
> *This conclusion on its own is sufficient to dispose of the developer's application for an order for remittal."*

177. On the basis of the analysis set out above, I conclude that it is clear that there is no prospect in this case, within the statutory process, of lawful remittal on a basis of seeking or submission of further information and its circulation to Crofton and the public generally for response.

178. So I turn to the prospect of fair procedures by way of the only suggested solution – an oral hearing.

233 §43
234 §§42 & 43

Remittal – Oral Hearing

179. By **S.134 PDA 2000** as amended by S.18 of the 2016 Act, the Board may, in its "*absolute discretion*" hold an oral hearing in an SHD application. But in making that decision it must have regard to the exceptional circumstances requiring the urgent delivery of housing and shall only hold an oral hearing if it decides, having regard to the particular circumstances of the application, that there is a compelling case for such a hearing. Despite that absolute discretion, a decision not to hold an oral hearing would be susceptible to judicial review. As has been said, the exercise of even such a discretion "*must comply with certain basic requirements of fairness, and accord with the statutory parameters within which the underlying power is conferred*" and "*the general principles that govern the review of administrative decision making are applicable*". [235] The Board must "*act fairly and judicially in accordance with the principles of constitutional justice*"[236]. The term "*absolute discretion*", as opposed to "*discretion*", does not oust the power of the court to review the decision – which must be made bona fide and must be rational, reasonable, and within the legislative framework that enables the decision to be made.[237] Accordingly, the particular terms of **S.134 PDA 2000** as amended by S.18 of the 2016 Act do not displace the general observation by **Browne**[238] that "*although it is absolute discretion, the Board's discretion as to whether to hold an oral hearing must be exercised in accordance with natural constitutional justice*".[239] **Mallak**[240] as to reasons for the exercise of such discretion is based on the impermissibility of "arbitrary power". The **Waterville Fisheries** case[241] is to similar effect.

180. It seems to me significant that, whereas ordinarily the exceptional circumstances requiring the urgent delivery of housing militate against oral hearings, in the particular circumstances of the present case they militate in favour of an oral hearing as potentially enabling a lawful remittal, and thereby the continuation of the present SHD application, instead of putting Fitzwilliam back to the delay involved in making an entirely new planning application.

181. Oral hearings are in practice held in public and may in practice be widely publicised and well-attended. Indeed Galligan[242] many years ago observed that oral hearings were usually held only in complex cases "*in which there is wide public or neighbourhood interest*". Yet it seems that the Board is obliged to notify only "*relevant persons[243] and any other person or body which it considers appropriate"* of an oral hearing.[244] It does not appear that the public must necessarily be notified. However, it seems to me that the phrase "*any other person or body"* is flexible enough to enable public notice – especially when interpreted in the context that the practice has been, including before the enactment of PDA 2000, that oral hearings are held in public.

235 Cleary Composition and Shredding Limited v. An Bord Pleanála [2017] IEHC 458 (High Court, Baker J.)
236 Talla v. Minister for Justice [2020] IECA 135 (Court of Appeal (civil), Haughton J, 12 May 2020)
237 Friends of the Irish Environment Ltd v. An Bord Pleanála [2018] IEHC 136 (High Court, Meenan J, 9 March 2018)
238 Simons, Planning Law, 3rd ed'n (Browne) §6-339
239 Citing *Galvin v Minister for Social Welfare* [1997] 3 I.R. 340
240 *Mallak v Minister for Justice, Equality and Law Reform*, [2012] 3 I.R. 297, cited at Simons, Planning Law, 3rd ed'n (Browne) §6-340
241 *Waterville Fisheries Development Ltd v Aquaculture Licence Appeals Board (No. 2)* [2014] IEHC 381 cited at Simons, Planning Law, 3rd ed'n (Browne) §6-344 et seq
242 Planning Law 1997 §9.2.10
243 The parties to the appeal, any persons who have made submissions or observations, the planning or local authority – Reg. 67 PDR 2001
244 Reg. 76 PDR 2001

182. By **S.135(2A) PDA 2000**, persons intending to appear at the oral hearing may be required to submit "*in writing and in advance of the hearing, the points or a summary of the arguments they propose to make at the hearing*". Counsel for the Board referred to this power as potentially enabling fair procedures at an oral hearing. Undoubtedly and read alone, the literal terms of S.135(2A) do not readily accommodate the possible re-writing and replacement of the Response to the Board's Opinion, the Statement of Consistency, the Material Contravention Statement, the Planning Report, other technical/expert reports submitted with the SHD application, the Part V proposal and the Chief Executive's Report. However the contradistinction of *"the points"* and *"a summary"* suggest that the former may be at least somewhat more substantial than the latter.

183. And for present purposes **S.135(2A)** must be read with **S.50A(9A) PDA 2000**, in which the strong impetus in favour of remittal is unmistakable and where, as here and as recorded above, the exceptional circumstances requiring the urgent delivery of housing identified in the 2016 Act militate in favour of an oral hearing. Accordingly, present circumstances require a broader rather than a narrower interpretation of the power created by S.135(2A). While the four corners of the statute must be respected, that observation must be read in light of the view expressed in **Christian** that in making directions *"It will not always be possible to ensure exact compliance with the relevant regime, for it is in the nature of a decision having already been made and having been subsequently quashed, that some variation on the normal procedure may be necessitated."* An important implication of this observation is that the Courts powers of direction may somewhat exceed those of the Board and the Board may require directions to enable it to proceed fairly and lawfully. I should add that the words "*in advance of the hearing*" in S.135(2A) appear to me to imply a power in the court to direct a timescale for provision of such documents.

184. Accordingly I am satisfied that, I am entitled, in the specific context of remittal on certiorari, to give directions enabling and requiring the Board to exercise its powers so as to ensure that documents are supplied to the Board by Fitzwilliam, in advance of an oral hearing, reflecting the necessary adjustments to its SHD application in light of the 2022 Development Plan. I consider that the Board should be specific in its requirements as to what those documents ought to be so as to ensure as closely as possible that the documents before it reflect the documentary requirements of the SHD Process. I will recommend that the Board consider imposing requirements which will enable a ready comparison of such documents (applying the 2022 Development Plan) with the documents already before the Board (applying the 2016 Development Plan) to enable identification of the differences between them.

185. It follows from the necessity of such directions and recommendation to render an oral hearing fair that, to provide a basis for them, I will direct the Board to exercise its power to hold an oral hearing. I find in any event that, in the circumstances of this case, a view that there was no compelling requirement for an oral hearing would be untenable.

186. These findings also imply that the Board may be directed, and I will so direct the Board, to likewise exercise its powers under **S.135(2A)** to require the present parties, prescribed bodies and any members of the public who may wish to do so, to provide in advance of the oral hearing and in writing, such submissions or observations as they wish to make at the oral hearing. The same applies to the Planning Authority and that such a direction is proper is amplified by **S.135(3) PDA 2000** which entitles a person conducting an oral hearing to require any officer of a planning authority or a local authority to give to him or her any information which he or she reasonably requires and obliges that officer to comply with the requirement.

187. By **S.135(2B) PDA 2000**, only the parties to the appeal and those who have made objections, submissions or observations to the Board are entitled as of right to be heard at the oral hearing. Others may be heard "*if it is considered appropriate in the interests of justice to allow the person to be heard*." While no doubt that discretion would be properly exercised, it is a discretion and the public are not ordinarily entitled as of right to be heard at an oral hearing as they are entitled as of right to make submissions or observations earlier in the process. Accordingly, I think it proper to direct in the present circumstances that any members of the public who have made submissions or observations in response to the Board's invitation under **S.135(2A)** be heard at the oral hearing. That is, of course, without prejudice to the exercise of the general power under **S.135(2B)** to hear others as required by the interests of justice.

188. In the suite of directions required to ensure fair procedures at an oral hearing, and hence the lawfulness of remittal, the missing piece remains, at this point in the analysis, the means of enabling Crofton and others interested to consider, for the purpose of responding thereto, the information to be provided to the Board by Fitzwilliam.

189. The context is one in which, in the ordinary way, members of the public have 5 weeks to consider and respond to the planning application documents which, I must envisage, will in substance be substantially altered by any documents submitted by Fitzwilliam in response to the Board's invitation under **S.135(2A)**.

190. It cannot be doubted, and is in any event clear both from the scheme of the 2016 Act and from **Redmond**,[245] that the right of the other parties, prescribed bodies, the public and the planning authority to express their views of the implications of a development plan for an SHD planning application is a right to do so informed by, and in response to, the view of those implications expressed by the SHD planning applicant – in this case Fitzwilliam. In my view it cannot be said, nor in fairness was it suggested, that if the changes to the development plan required the provision of the documents by Fitzwilliam in advance of and in contemplation of an oral hearing, the requirements of fair procedures could be met by making their content known to the other parties,

[245] §30 – *"Mr Redmond did not have a proper opportunity to address these matters in the context of the original planning application in circumstances where the developer had not put forward grounds for saying that any of the statutory criteria had been met."*

prescribed bodies, the public and the planning authority for the first time at the oral hearing - on the footing that the parties and the public could thereupon respond.

191. That issue of public circulation proved an insuperable obstacle in **Redmond**. However, and it seems to me significantly, the judgment on the remittal issue in **Redmond**[246] contains no indication that the possibility of an oral hearing was canvassed, much less ruled upon. Also, Redmond preceded the statutory reinforcement of the impetus to remittal now found in S.50A(9A) PDA 2000.

192. There is a power to adjourn oral hearings. But it seems to me that it would be wasteful and cumbersome to envisage that the oral hearing would commence by the opening of any documents submitted by Fitzwilliam in response to the Board's invitation under **S.135(2A)** and then adjourned for some weeks to enable the other parties prescribed bodies, the public and the planning authority to consider and respond to those documents. Nor was such a course suggested. There can be no doubt that, if lawfully possible, the proper course, commensurate with both efficiency and fairness of procedure, is to circulate in advance of the oral hearing any documents submitted by Fitzwilliam in response to the Board's invitation under **S.135(2A)** and to have, in advance of the oral hearing, any documents responding to Fitzwilliam's, submitted by others in response to the Board's invitation under **S.135(2A)**.

193. I confess that I have been troubled by this issue of public circulation and the absence of a specific power in the Board in that regard. Given the different context – oral hearing and S.50A(9A) PDA 2000 – I do not see Redmond as directly an obstacle. I must stay within the "four walls" of the statutory process. But Christian makes clear that those walls can be relocated a little as fairness requires. That implies some scope for judgment as to degree of relocation. And even the more restricted view taken by Charleton J in **Wexele** espoused the "*key principles*" as including one of "*utility*". That is a principle which can point in different procedural directions depending on circumstance. Here I return to **Genport**[247]. I am not at all sure that, on similar facts, the outcome of that case would be the same today given developments since in the law. Nonetheless, and as cited by **Browne**[248], the judgment of Finlay P includes the following:

> *"I am satisfied that as a matter of general law An Bord Pleanála carrying out a quasi-judicial function would have an obligation to take reasonable steps to ensure that every party interested in any particular application before it should be aware of the submissions or representations made by any other party; should have a reasonable opportunity of replying to them; and should have a general reasonable opportunity of making representations to the Board."*

246 [2020] IEHC 322

247 State (Genport Ltd) v An Bord Pleanála [1983] I.L.R.M. 12 at 14.

248 Simons, Planning Law, 3rd ed'n §6-131 et seq

194. This observation is to be read in the context of that case. It related to opportunities to respond to objectors in an appeal of a refusal of planning permission. Finlay P observed that the statutory scheme which he was considering (it should be said, different from the present scheme) implemented *"general obligations of the Board arising from the requirements of natural justice"* - but only partially. It is clear that Finlay P was willing to make up the difference:

> *"Insofar as there is no section specifically providing the method by which the Board shall discharge their general obligation to give a reasonable opportunity to an appellant such as this prosecutor to deal with representations made by the other parties to the appeal, I am satisfied that the letters were an adequate discharge of that obligation."*

195. I consider

- in light of Genport,
- in the particular circumstances of remittal of a quashed decision to consideration of the SHD planning application having regard to a new development plan,
- in order to make sense of what I consider to be the Board's obligation to exercise its power under S.135(2A) as to Crofton, prescribed bodies, the public and the planning authority in the statutory context of their entitlement to express their views of the implications of the development plan for the SHD planning application specifically in response to the position of Fitzwilliam in that regard, and
- having regard to the impetus to remittal provided by S.50A(9A) PDA 2000,
- having regard to the statutory recognition of the exceptional circumstances requiring the urgent delivery of housing,

that I may, and I will, direct that the Board circulate and publicise any documents submitted by Fitzwilliam in response to the Board's invitation under S.135(2A). I will direct that it do so with a view to ensuring that all others, in their responses to the Board's invitation under S.135(2A) will be enabled to respond to Fitzwilliam's documents.

196. I should say, lest this decision be considered to have wider implications than those I intend, that my view is considerably conditioned by S.50A(9A) PDA 2000 and the statutory recognition of the exceptional circumstances requiring the urgent delivery of housing. Nor do I not rule out the possibility that in a particular case, as between two successive development plans and as their differences and similarities may bear on a particular planning application, a different way to remittal might be found or remittal might prove unlawful. In particular, I consider that the Board may reasonably be expected to assist the court as to the prospects and modalities of remittal in the more specific manner envisaged above. I do not see that such a different way to remittal has been charted in this case.

197. I should also make clear that my directions do not in any way foreclose or circumscribe the general duty of the Board to conduct the remitted process as fair procedures require and, if they prove impossible, to adopt the course it has intimated, of refusing to grant planning permission.

Time-Limits Expired

198. As to jurisdiction to remit despite expiry of relevant statutory time limits, I observe that **Kells** preceded **Tristor, Christian** and later cases – perhaps especially **Clonres** - in which the principles of remittal were developed significantly, flexibility to adhere to statutory schemes "*as far as practicable"* was elucidated and time limits were adapted to circumstances. True Kells was not, it seems, cited in Clonres. But, to the extent of any conflict between them, I prefer the latter as conducive to advancing the governing criteria of fairness and justice. I am reassured somewhat in doing so by **Browne's** suggestion[249] that, as to time limits in particular, (though not in its primary ratio that remittal must serve a useful purpose) Kells was wrongly decided. Though reassured, needless to say, I do not so hold. Indeed, few now are the planning processes and environmental law processes in which time-limits do not apply and their presentation of an insuperable impediment to remittal would, as Browne suggests[250], *"undermine the effectiveness of the statutory judicial review procedure. The legislature clearly envisages an important role for the High Court in supervising the planning legislation. On occasion, this role will necessitate disrupting the ordinary flow of the planning process."*

199. Accordingly, I am not dissuaded from remittal by the consideration that relevant time limits have elapsed.

CONCLUSION – LAWFULNESS OF REMITTAL & DIRECTIONS

200. For reasons identified above, any remittal of this matter must be on the basis that the decision on remittal will be made having regard to the 2022 Development Plan.

201. Applying the rationale of Redmond to the present case, it is clear that the public were not notified that a planning application was being made for an SHD development the decision as to which would be made having regard to the 2022 Development Plan. And while it may be that in substance the Proposed Development would materially contravene the 2022 Development Plan in precisely the same ways as it did the 2016 Development Plan, there seems to me to be no reason to assume that will be so. More generally and material contravention aside, there seems to me to be no reason to assume that the 2022 Development Plan will bear on the Proposed Development in the same ways and with the same effects as did the 2016 Development Plan. Indeed the parties accepted that.

249 Simons on Planning Law, 3rd Ed'n (Browne) §12–1613 et seq
250 §12–1615

202. No-one would suggest that successive developments plans are at all likely to differ significantly only as to the date in the title. While I accept that it may be less sure that they differ significantly as bearing on a particular proposed development, that observation does not suffice to significantly alter my view. In any event, we are aware that the Part V quotient has increased from 10% to 20% and that alone seems likely to significantly change the context, set by the 2022 Development Plan, in which the decision will fall to be made – not least by requiring Fitzwilliam to double their Part V proposal.[251] And we know that the Part V issue, at 10%, was the subject of submissions and observations by members of the public.

203. In my view a remitted process would not be fair or lawful unless it included circulation to Crofton, prescribed bodies, the public and the planning authority, in good time and for their considered response, of Fitzwilliam's articulation of the bearing of the 2022 Development Plan on its SHD planning application. The ultimate question therefore is whether that position can be achieved by appropriate directions and recommendations by the Court.

204. **Crekav** makes clear that such directions on remittal must stay within "*the four walls of the statutory regime".* As the Board submits and I agree, I can't simply rewrite the statutory scheme. But **Christian** makes apparent, and **Genport** supports the view, that the court can, in directions and to a certain degree, flexibly adapt and shape, statutory procedures to the circumstances of remittal and even supplement them - even where those statutory procedures do not neatly apply to those circumstances.

205. On the information available to me and for the reasons set out more fully above, the only way that can be achieved in this case is by an oral hearing. Even then, for that to suffice requires additional directions and to underlie such directions it seems to me that I should direct an oral hearing rather than leaving to the Board's discretion a decision whether one should be held. Those additional directions will seek to ensure procedures fair to all concerned as to the adaptation of the SHD process to the 2022 Development Plan.

206. I respectfully observe that my task could have been made a lot easier and this judgment a lot shorter had the legislation made specific provision for the inevitable reality of changing circumstances bearing on an SHD planning application. The PDA 2000 recognises that such changing circumstances may alter the requirements of the interests of justice. That is no small matter. If, in the cause of expedition generally, the Oireachtas accepts that the result of such alteration in the requirements of the interests of justice will be the refusal, in hopefully few specific cases, to grant permissions considered urgent, so be it. But, if that view is to be taken, it should be remembered that many changes of circumstances may alter the requirements of the interests of justice: not merely replacement of development plans but also such as, for example, variations of development plans, new local area plans and variations thereof, new ministerial guidelines and new requirements

251 I accept that states the position crudely but it suffices.

of EU Law. The cases affected might not be as few as one might imagine. Alternatively, the Oireachtas might prefer to "freeze" the planning policy applicable to urgent planning applications as at the date of the making of the planning application, if prepared to pay the price in terms of proper planning and sustainable development and the evolution of planning policy at local, regional and national level and, on the view taken by Humphreys J in **Clifford #3**, at some risk of non-compliance with developments in EU law. Perhaps there are other solutions and the specific problem here may be of residual concern given that SHD applications are a dying breed. But to any extent the problem may arise in the future, legislative assistance would be very welcome.

Proposed Directions

207. I will ask the parties to seek to agree directions in accordance with the tenor of this judgment. Without purporting to finally settle them, I envisage them as including the following elements: That the Board will:

- Hold an oral hearing.

- Notify the parties to these proceedings, the planning authority, prescribed bodies and the public of that oral hearing. Broadly, it seems to me that notice of in the order of 8 weeks may be needed.

- Require, under S.135(2A), Fitzwilliam to provide, within a stated time limit and in documentary form, its intended submissions to the oral hearing. The Board will be at liberty to be more or less specific as to its requirements in this regard so as to ensure as closely as possible that the documents before it reflect the documentary requirements of the SHD Process.
  - I will recommend that the Board consider imposing requirements which will enable a ready comparison of such documents (applying the 2022 Development Plan) with the documents already before the Board (applying the 2016 Development Plan) to enable ready identification of the differences between them.

- Provide for the circulation of Fitzwilliam's intended submissions to the parties, the planning authority and prescribed bodies and their publication to the public.

- Require, under S.135(2A), the parties, the planning authority, prescribed bodies and the public to respond in writing, by way of their submissions to the oral hearing, within 5 weeks and in documentary form, to Fitzwilliam's intended submissions to the oral hearing.

- Require that all those who make such responses be heard at the oral hearing.

208. As I have said, such directions will not foreclose or circumscribe the general duty of the Board to conduct the remitted process as fair procedures require and, if they prove impossible to achieve, to adopt the course it has intimated, of refusing to grant planning permission.

209. I will list this matter for mention, with a view to final orders, on 16 January 2023.

DAVID HOLLAND
20/12/22