THE HIGH COURT
PLANNING & ENVIRONMENT
JUDICIAL REVIEW

2022 No 336 JR

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

Between

CIARAN MULLOY

Applicant

and

AN BORD PLEANÁLA, IRELAND AND THE ATTORNEY GENERAL
and
DUN LAOGHAIRE RATHDOWN COUNTY COUNCIL

Respondents

and

KNOCKRABO INVESTMENTS DAC

Notice Party

JUDGMENT OF MR JUSTICE DAVID HOLLAND DELIVERED 12 March 2024

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INTRODUCTION[1]

1. The Applicant ("Mr Mulloy") seeks to quash the grant by the First Respondent (the "Board") on 8 March 2022 of Strategic Housing Development ("SHD") planning permission[2] (the "Impugned Permission" /"Impugned Decision") to the Notice Party ("Knockrabo Investments") pursuant to s.4 of the "2016 Act"[3], for 227 apartments ("the Proposed Development") on a site of c.1.78ha at Knockrabo, Mount Anville Road, Goatstown, Co. Dublin (the "Site").

2. The relevant lands generally comprise the adjoining former grounds of two large houses – Knockrabo House and Cedar Mount House. Knockrabo House, on the eastern side of the lands, no longer stands. Its site was once the site of the Bank of Ireland sports centre but had been derelict for many years before its recent redevelopment. In 2021, Cedar Mount House, to the west, was described as having been in "recent years" refurbished as a private residence with landscaped formal grounds and as thereafter derelict only "in recent years" (presumably more recent years).[4] Perhaps this explains the different treatment of the respective grounds in planning policy – specifically the 2016 Local Area Plan – though nothing turns on that explanation. Cedar Mount House still stands and is a protected structure.

3. Broadly, the Knockrabo House grounds are now occupied by 125 residential units, being Phase 1[5] of the overall Knockrabo development – of which the Proposed Development is to be Phase 2. Pursuant to Permission D17A/1124, granted by Dun Laoghaire/Rathdown County Council ("DLRCC") in September 2018, Phase 2 was to have consisted of 81 residential units[6] (of which 57 were to be apartments), on a 2.74ha site to the west of Phase 1 – generally in the grounds of Cedar Mount House.[7] That house, by Permission D17A/1124, is to be renovated as childcare facility and for community/leisure uses, with open public areas to its south (front) and east (side).

4. The Site is part – 1.78ha – of the 2.74ha site to which Permission D17A/1124 for Phase 2 applied. The Impugned Permission amends Phase 2 by, essentially, substituting 227 apartments (the Proposed Development) for the 93 units previously permitted. The Proposed Development includes no works to any protected structure.[8] The development permitted by Permission D17A/1124 outside the Site[9] will remain unchanged.

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[1] Headings are for general assistance in navigating the judgment. They are not exhaustively determinative of content thereunder.
[2] ABP 311826-21.
[3] Planning and Development (Housing) and Residential Tenancies Act 2016.
[4] Knockrabo Investments' Arboricultural Report p1 and §5.2.3 It is also suggested in the Arboricultural Report that the Cedar Mount House grounds also formed part of the Bank of Ireland sports centre grounds before its most recent use as a residence, but nothing turns on that for present purposes.
[5] Of which the apartment buildings, generally 5-6 storeys, are adjacent Knockrabo Way – see Figure 1 below.
[6] The Planning Report in the present case recorded that Permission D17A/1124 had omitted Block E as proposed in that application such that the Phase 2 development as granted comprises 20 houses, the refurbished Coach House and West Gate Lodge, 2 apartments and a creche and community / leisure uses in Cedar Mount, and 57 apartments in 3 blocks.
[7] This location of Phase 1 and Phase 2, as between the former Bank of Ireland Sports Centre/Knockrabo House grounds and the grounds of Cedar Mount House respectively, is not entirely accurate but suffices for present purposes.
[8] There are 3 protected structures on the overall 'Knockrabo' landholding. All are outside the application boundary. They are 'Cedar Mount House', 'Knockrabo Gate Lodge (West)' including Entrance Gates and Piers, and 'Knockrabo Gate Lodge (East)' including Entrance Gates and Piers.
[9] The Knockrabo Way entrance road (constructed and unconstructed), the renovation of Cedar Mount House including childcare facility and community/leisure uses, Coach House, Gate Lodge (West), the Gate House and all associated landscaping.

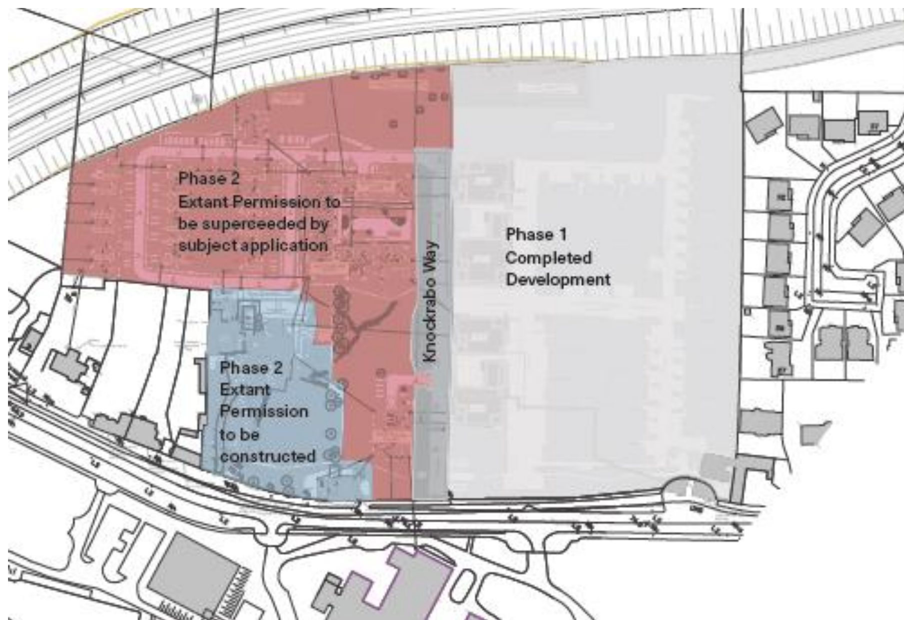

Figure 1 – The Knockrabo Phases[10]

- The light grey area, approximating to the Knockrabo House Grounds, is already built as Phase 1.
- The areas coloured red, blue (marked "*Phase 2 extant Permission to be constructed*") and dark grey (marked "*Knockrabo Way*") comprise the site of Permission D17A/1124 for Phase 2.
- The Site is coloured red (marked "*Phase 2 extant Permission to be superseded by subject application*"). The "red line" on the "red line drawing" of the Planning Application runs along the boundaries of this area.
- The blue and dark grey areas will be developed as permitted by Permission D17A/1124.
- Cedar Mount House sits at the northern boundary of the blue area.

[10] Architectural Design Statement p8.

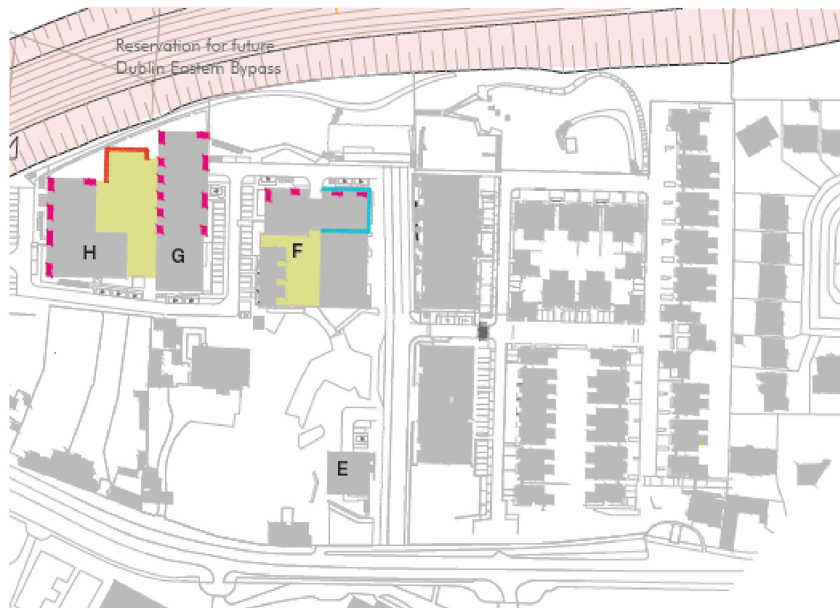

Figure 2 – The Impugned Permission – Blocks E, F, G, H[11]

- The Proposed Development will comprise four blocks of apartments - Blocks E, F, G & H.
- Blocks F & G are to be in part eight storeys high and Block H will be in part seven storeys high, all including semi-basements.[12] Block E will be 5 storeys high including semi-basement and consist of 8 units.
- Cedar Mount House lies south of Blocks G and F. Gate Lodge West lies south west of Block E.
- Permission D17A/1124 had required omission of "Block E". It had been proposed for the same location as Block E permitted by the Impugned Permission, though the latter will be lower and smaller than the former.
- In the application for the Impugned Permission, DLRCC recommended again omitting Block E.[13] The Board disagreed.
- The "Bypass Reservation" corridor for the Dublin Eastern Bypass ("the Bypass") runs along the northern boundary of the Site.
- The area north of Block F, between it and the Bypass Reservation, is to be landscaped public open space – as the area immediately to its east already is as part of Phase 1. Together, they will form a "Northern Linear Park".[14] If needs be, part of it will be made available for temporary construction access to the Bypass Reservation if and when the Bypass is constructed and as a continuation of such access via the central "Knockrabo Way" running north from Mount Anville Road, which runs east/west along the bottom of the drawing.
- The area generally south and east of Cedar Mount House – broadly between it and Block E - will be landscaped public open space.

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[11] Architectural Design Statement p33. Cedar Mount House Below blocks H, G & F.
[12] The lower parts of the buildings being closer to Cedar Mount House, and the taller parts being closer to the northern site boundary.
[13] Block E (c. 1015.3 sqm GIA) is a 5-storey including semi-basement podium apartment block comprising of 8 no. units (1 no. one bed unit and 7 no. 2 bed units).
[14] See Design Rationale – Landscape Architecture, §3.2.

5. Mr Mulloy participated in the planning process before the Board, objecting to the Proposed Development. In this judicial review, Grounds 1, 2, 5, 6 and 10 only are pursued. Ground 10 against the State – as to the validity of s.19(1)(d) PDA 2000[15] – stands adjourned and will be litigated in a second module if needs be. The State did not participate in the present module – nor did Knockrabo Investments, which filed opposition papers merely adopting the Board's opposition papers.

The Development Plan and the GLAP

6. The Dun Laoghaire Rathdown Development Plan 2016-2022 ("the Development Plan") and the Goatstown Local Area Plan 2012 ("GLAP") apply. I will consider both in greater detail in due course. By the Development Plan:

- Zoning objective "A" applies to the Site – "*to protect and or improve residential amenity*". No zoning issue arises in this case.
- The maps of the Site[16] bear a tree symbol denoting an objective "*To protect and preserve Trees and Woodlands".*

7. The GLAP was adopted in 2012. After the adoption of the 2016 Development Plan, in 2017 the GLAP's duration was extended.[17] It could only have been so extended if consistent with the Development Plan[18] – to which LAPs have been described by Browne as "*subservient*".[19] S.19(1) PDA 2000 makes it a precondition to extension of the duration of an LAP that the chief executive of the planning authority have reported to its members that, in his/her opinion, the LAP remains consistent with the objectives and core strategy of the relevant development plan.[20] I therefore agree with the Inspector[21] that Knockrabo Investments was incorrect in submitting[22] that the GLAP was "*out of date*" by reference to the terms of the Development Plan. The GLAP expired in April 2022, after the Impugned Permission was granted.

8. All relevant lands, including the Site, are within the GLAP area. But part of the relevant lands – essentially the Knockrabo House grounds – is more particularly identified as one of two "Knockrabo Sites" governed by specific provisions at §6.4 of the GLAP[23] - as opposed to the more general provisions of the GLAP which apply to most of the Site. This "Knockrabo Site", as identified by the GLAP, consists primarily of

[15] Planning & Development Act 2000.
[16] Development Plan Maps 1 & 2.
[17] See s.19(1)(d) PDA 2000.
[18] See s.19(2) PDA 2000 – "A local area plan shall be consistent with the objectives of the development plan, its core strategy, …". S.18 provides that a LAP may remain in force after the making of a new development plan unless the LAP conflicts with the new development plan.
[19] Simons on Planning Law (3rd ed'n, Browne, 2021) §1–381.
[20] See also Simons on Planning Law (3rd ed'n, Browne, 2021) §1–384. A similar sequence in which an LAP was extended after replacement of the development plan and the applicable statutory process are described in Barford Holdings Ltd v Fingal County Council [2022] IEHC 233 (High Court (Judicial Review), Phelan J, 26 April 2022).
[21] Inspector's report §10.14.2.
[22] Material Contravention Statement p31.
[23] Delineated on GLAP Photo 27. The other "Knockrabo Site" is on the other side of the ByPass Reservation and is not here relevant.

the site on which Phase 1 sits and is divided from most of the Site by a reservation for a spur road (the "Spur") to run off the main Bypass Reservation in an arc roughly southwest to Mount Anville Road.[24] However a small north-eastern corner of the Site, comprising part of the footprint of Block F, is part of that "Knockrabo Site".

DLRCC CE report – 21 December 2021

9. DLRCC as planning authority recommended refusal of permission by its chief executive officer's statutory report to the Board[25] ("the DLRCC CE Report"). It did so for, inter alia, the following reasons:[26]

- 1 & 3. The Proposed Development fails to meet the §3.2 criteria for applying SPPR3[27] of the Heights Guidelines 2018, ("SPPR3") in that, ….. it would, ………. be monolithic and imposing, visually dominant and overbearing …… and so would significantly injure the visual amenities of the area. …. For similar reasons it would detract from the existing residential amenity of and depreciate the value of certain properties and so materially contravene Development Plan zoning objective A, 'to protect and or improve residential amenity'.

- 2. The proposed development would have a detrimental impact on the setting and amenity of both Cedar Mount House and Knockrabo Gate Lodge west (both protected structures).[28]

- 4. The proposed separation distances between blocks would result in overlooking of habitable rooms and substandard residential amenity for future occupants. Therefore, by its overall scale, massing, layout and height it would constitute overdevelopment of the site contrary to the Development Plan and to the proper planning and sustainable development of the area.

- 5. Inadequate car parking would cause car parking overspill on surrounding residential roads.

- 6. The removal of category A trees 0711 and 0710 – a Blue Cedar and a Copper Beech – to construct Block E, breaches Development Plan Policy OSR7 and the site objective to protect and preserve trees and so seriously injure the amenities of properties in the vicinity contrary to the proper planning and sustainable development of the area.

I will consider the DLRCC CE report further as the need arises.

[24] See Figures 3, 4 & 5 infra.
[25] S.8(5) of the 2016 Act.
[26] Which I have edited somewhat without changing meaning.
[27] An SPPR is a "specific planning policy requirement" within the meaning of s.28(1C) PDA 2000. The Board must comply with SPPRs.
[28] Contrary to Policy AR1 and §8.2.11.2 (iii) (Development in Proximity to a Protected Structure) of the Development Plan.

The Inspector's Report – 10 February 2022 & the Impugned Permission – 8 March 2022

10. Beyond the descriptions elsewhere in this judgment of the Impugned Permission and the Inspector's Report, I note that the Inspector's Report is generally detailed, comprehensive and careful.[29] The Board's Direction and Order record, inter alia, as follows:

- The Board decided to grant permission generally in accordance with its Inspector's (the "Inspector") recommendation and draft order. (The parties agree that any differences are merely clerical and insubstantial).

- By its "*Conclusions on Proper Planning and Sustainable Development*", the Board records that the Proposed Development,
  - o would materially contravene both the Development Plan and GLAP as to building heights.
  - o is otherwise broadly compliant with the Development Plan and GLAP.

- Permission in material contravention of the Development Plan and GLAP would be justified under s.37(2)(b)(i)[30] and (iii) PDA 2000 for the reasons drafted by the Inspector. Inter alia, as to s.37(2)(b)(iii), the Board relies on the Height Guidelines 2018[31] – "*in particular*" SPPR3 thereof.

11. I should add that it might have been clearer as to the substance of the material contravention of the GLAP as to building height but I am satisfied, reading it as a whole and in context, that the Impugned Permission adequately identifies that material contravention.

A note on Density

12. Though not at issue in the case, as background, the position as to density is apt to confuse a little. Knockrabo Investments in some documents, and DLRCC, cite the net density of the Proposed Development as 157 units per hectare. That figure is based on exclusion of part of the Spur and the area around Cedar Mount House. The Inspector considered these exclusions erroneous[32] and recalculates the net density as 127 units per hectare. She does not formally accept Knockrabo Investments' assertion of an overall density across Phases 1 and 2 of 83 units per hectare (or 65 depending on the areas included in the calculation) but, given the interconnectedness of the sites, she considers the overall density of the two sites, "worth noting".

[29] Running to 187 pages.
[30] In this respect the Impugned Decision recited essentially that the Proposed Development fell the definition of Strategic Housing Development in the 2016 Act. Despite decisions such as Clonres CLG v An Bord Pleanála [2021] IEHC 303, this justification of material contravention was not impugned. Perhaps because of those decisions the Board did not mobilise this justification in the defence of the Impugned Decision on the basis that it would justify the material contravention even if reliance on s.37(2)(b)(iii) failed. Whatever the reasons, neither side pleaded or mobilised this issue and I therefore disregard it.
[31] Urban Development and Building Height Guidelines for Planning Authorities December 2018.
[32] For reasons explained in her report at §10.5.1.

THE 2016 ACT – MATERIAL CONTRAVENTION STATEMENT AND STATEMENT OF CONSISTENCY

13. By s.8(1)(a)(iv) of the 2016 Act, an SHD application must include "*a statement*" –

> *"(I) setting out how the proposal will be consistent with the objectives of the relevant development plan or local area plan, or*
> *(II) where the proposed development materially contravenes the said plan other than in relation to the zoning of the land, indicating why permission should, nonetheless, be granted, having regard to a consideration specified in section 37(2)(b) of the Act of 2000 …"*

14. As will have been seen, s.8(1)(a)(iv) of the 2016 Act envisages a single statement by the planning applicant addressing these two issues of consistency with, and material contravention of, the development plan or LAP. That is unsurprising as the two are closely linked issues. However, as here, developers often submit two statements. That course is unobjectionable and is, in effect, prompted by §§12 and 13 of the SHD Planning Application Form.[33] Those statements are commonly and respectively called a "Statement of Consistency" and a "Material Contravention Statement" ("MCS") or "Statement of Justification".[34] As to the latter statement, nothing turns on the nomenclature and I will use the former term. The Statement of Consistency is often, as here and sensibly, incorporated into a more general "Planning Report". Given the terms of s.8(1)(a)(iv) and, perhaps more importantly as they represent, in a sense two sides of the same coin – the relationship of a proposed development to the development plan/LAP – in a given file, the Statement of Consistency/Planning Report and the MCS must be read together as complementary.

15. By s.8(1)(a)(iv)(II)[35] of the 2016 Act, as interpreted in **Redmond**[36] and **Jennings**,[37] the MCS in an SHD planning application must, on pain of invalidation of the application and quashing of any erroneously resulting planning permission,

- identify any material contravention of the development plan.
- propose any justifications for the grant of permission despite such material contravention.

16. As was said in Jennings, to reduce the risk of certiorari and in the cause of clarity, an MCS should very preferably address these two issues of identification of contravention and of justification distinctly

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[33] Art 297 & Form 14, Planning And Development (Strategic Housing Development) Regulations 2017, S.I. 271 of 2017.
[34] Redmond v An Bord Pleanála [2020] IEHC 322.
[35] 8. (1) Before an applicant makes an application under section 4(1) for permission, he or she shall —
(a) have caused to be published, in one or more newspapers circulating in the area or areas in which it is proposed to carry out the strategic housing development, a notice—…..
(iv) stating that the application contains a statement—
(II) where the proposed development materially contravenes the said plan other than in relation to the zoning of the land, indicating why permission should, nonetheless, be granted, having regard to a consideration specified in section 37(2)(b) of the Act of 2000 …"
[36] Redmond v An Bord Pleanála [2020] IEHC 322.
[37] Jennings & O'Connor v An Bord Pleanála & Colbeam [2023] IEHC 14.

separately, and sequentially – resisting any temptation to rush to justification, thereby obscuring the necessary identification. Redmond and Jennings establish the obligation of a developer and its professional advisors to carefully address their minds to the question of material contravention in advance of making a planning application and, I would add though it is obvious, to reflect that careful consideration in the MCS.

17. As was also said in Jennings, s.8(1)(a)(iv)(II) of the 2016 Act assumes, rather than explicitly requires, identification of any material contraventions. So it is unsurprising that it does not address the precision required of such identification. However, Redmond and Jennings emphasise that the purpose of the MCS is to enable properly informed public participation in the planning process and properly informed consideration of the planning application by the Board. This purpose provides the means of understanding the precision required of an MCS as to identification of material contraventions. Further understanding is assisted by the view taken in Jennings, in which the applicant for judicial review argued that the MCS was invalid for identifying possible material contraventions but arguing that they were not in truth material contraventions. That argument failed for reasons set out there[38] – in essence that:

- the purpose of an MCS is to ensure that potential issues of material contravention are identified in the SHD planning application and addressed by the applicant for permission - both with a view to
  - notifying the public and prescribed bodies of such issues so they too can assist the Board as to such issues.
  - assisting in the Board in addressing them.

- once its MCS brings to public notice a specific issue of arguable material contravention, a developer may argue in its MCS, as to that issue, that there is no contravention or that any contravention is immaterial.

- failure in such arguments is not on pain of the invalidity of the SHD planning application.

- the developer can argue in the alternative that, if the Board finds a material contravention, permission despite such material contravention is justified.

PERMISSION DESPITE MATERIAL CONTRAVENTION – s.9(6) of the 2016 Act & s.37(2)(b) PDA 2000 & SPPRs

18. As relevant, s.9(6) of the 2016 Act empowers the Board to permit SHDs "even" where the proposed development materially contravenes the relevant development plan or local area plan but "only" where it considers that, were s.37(2)(b) PDA 2000 to apply, it would grant permission for the proposed development.

19. S.37(2)(b) PDA 2000 provides, as relevant, that the Board may grant permission where it considers that —

[38] Jennings, §602 et seq.

"(i) the proposed development is of strategic or national importance, ………..
(iii) permission should be granted having regard to … 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,"

20. Though it is not phrased expressly in terms of material contravention, another route to permission in material contravention of development plans or local area plans lies via s.28(1C) PDA 2000 which empowers the Minister to include in planning guidelines "*specific planning policy requirements*" ("SPPR") with which planning authorities and the Board must comply.[39] By s.9(3) of the 2016 Act[40] the Board, in deciding SHD planning permission applications, must apply relevant SPPRS – and do so instead of relevant development plan provisions to any extent that they differ. So, there is a mandatory statutory duty of compliance with a relevant SPPR – **O'Neill**.[41]

GROUND 1 MATERIAL CONTRAVENTION – BUILDING HEIGHT

G1 – Height – Introduction & Obligation to identify Material Contraventions

21. Mr Mulloy pleads that the Impugned Permission was granted in material contravention of the Development Plan as to height,

- which contravention was not advertised by Knockrabo Investments, contrary to s.8(1)(iv)(II) of the 2016 Act and/or
- which decision contravened s.9(6) of the 2016 Act and/or
- as to which the Board erred in law in failing to identify which elements of the Development Plan and/or the GLAP were materially contravened. This error was alleged in submissions to be in breach of s.10(3)(b) of the 2016 Act which requires that a decision of the Board to grant an SHD permission in material contravention *"shall state … … the main reasons and considerations for contravening materially the development plan or local area plan, as the case may be."* That s.10(3)(b) was not specifically pleaded, does not seem to me to matter as the point is acceptably clear from the pleadings – **Eco Advocacy**.[42]

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[39] See also s.34(2)(aa) & (ba) PDA 2000.

[40] S.9(3) (a) When making its decision in relation to an application under this section, the Board shall apply, where relevant, specific planning policy requirements of guidelines issued by the Minister under section 28 of the Act of 2000.
(b) Where specific planning policy requirements of guidelines referred to in paragraph (a) differ from the provisions of the development plan of a planning authority, then those requirements shall, to the extent that they so differ, apply instead of the provisions of the development plan.
(c) In this subsection "specific planning policy requirements" means such policy requirements identified in guidelines issued by the Minister to support the consistent application of Government or national policy and principles by planning authorities, including the Board, in securing overall proper planning and sustainable development.

[41] O'Neill v An Bord Pleanála [2020] IEHC 356 §145 – "Section 28(1C) imposes a very clear mandatory requirement that, where specific planning policy requirements are specified in ministerial guidelines, they must be complied with. It is not sufficient merely to have regard to them (which is a relevant requirement in relation to other aspects of the guidelines)."

[42] Eco Advocacy CLG v An Bord Pleanála [2023] IEHC 713 §39.

22. Whatever about its pleadings, the Board at trial,[43] in my view properly, confirmed that the Impugned Decision found that the Proposed Development would materially contravene both the GLAP and the Development Plan as to building height.

23. As to Ground 1, I understood the essential case made by Mr Mulloy at trial to be that,

- Knockrabo Investments' MCS failed to identify the material contraventions as to building height
  - correctly, as to contravention of the GLAP.
  - at all, as to contravention of the Development Plan. In fact, he says, far from identifying a contravention, the MCS invoked Development Plan content as postdating, superseding, and justifying contravention of, the GLAP.
- the Board breached s.9(6) of the 2016 Act in failing to identify "*which elements of the Development Plan and/or the GLAP were materially contravened*".

<u>G1 – Height – Development Plan and GLAP as to Building Height</u>

24. Development Plan Policy UD6 as to "Building Height Strategy"[44] states that,

> *"It is Council policy to adhere to the recommendations and guidance set out within the Building Height Strategy for the County."*
>
> *"The Strategy will be used in establishing building heights for individual areas and emerging new urban nodes in the County through the vehicles of Local Area Plans, ….. The Strategy will also influence and inform the assessment of building heights proposed in individual planning applications."*

25. The Building Height Strategy[45] predated both the Development Plan[46] and the GLAP – which it expressly envisaged.[47] It "*sets out a broad strategy for building height … and focuses on the role of Local Plans (Local Area Plans/………) for delivering detailed policy on building height. It also proposes a more generic policy for assessing building height in areas which may not be covered by a Local Area Plan.*"[48] §4 of the Height Strategy states that,

- tall buildings[49] can be accommodated only in listed key centres and will generally not be considered elsewhere.

[43] Transcript Day 1, 11:52.
[44] Development Plan §8.1.2.3.
[45] The Height Strategy is set out in Appendix 9 of the Development Plan.
[46] It identifies itself at p5 as the "Building Heights Strategy 2010-2016".
[47] See Height Strategy §4.1.8.
[48] Height Strategy §1.1.
[49] Defined as buildings significantly taller than the prevailing building height for the area.

- "*the appropriate vehicle for identifying the specific sites within these centres that have potential for accommodating building height are …… Local Area Plans …….*". §4.1.8 lists "*Forthcoming Local Plans*" which "*which will provide guidance on building height*". The list includes the "*Goatstown Local Area Plan*".[50]

26. The Board correctly summarises the foregoing as stating that Policy UD6 and the Building Height Strategy, taken together, amount to a core Development Plan policy that, in LAP areas, LAP height policies apply. More specifically, and in my view correctly, it submits that Development Plan policy as to building height for the Site is that height shall conform the GLAP as it applies to the Site. On that analysis, according to the Board, material contravention of the GLAP as to height, ipso facto constitutes material contravention of the Development Plan as to height. I accept that analysis.

27. Though the Site is entirely within the GLAP area, given the approach adopted in the MCS it is necessary to record that, as to the "*residual*" areas not covered by Local Area Plans or similar plans, the Development Plan Building Height Strategy *"generic"* height policy applies.[51] It states that:

- "*A general recommended height of two storeys will apply*."
- Apartments or town-houses "*to a maximum of 3-4 storeys may be permitted in appropriate locations – for example on .. large redevelopment sites or adjacent to key public transport nodes – providing they have no detrimental effect on existing character and residential amenity.*"
- "*This maximum height (3-4 storeys) for certain developments clearly cannot apply in every circumstance. There will be situations where a minor modification up or down in height could be considered. The factors that may allow for this are known as 'Upward or Downward Modifiers'. ………. The presumption is that any increase or decrease in height where 'Upward or Downward Modifiers' apply will normally be one floor or possibly two*."[52]

28. Turning to the GLAP, §4.3 as to height records that the Building Height Strategy[53] is based on the accepted urban hierarchy of the county and focuses on Local Plans as delivering a detailed height policy at a local or micro level. The GLAP states that Goatstown's ability to accommodate increased height is constrained by its predominant, almost ubiquitous, low-rise residential context. Hence, GLAP Objective UD5 states:

> *"UD5: It is an objective of the Plan that height in excess of two-storeys shall only be permitted where it is considered by the Planning Authority that the proposed development can be easily absorbed into the existing urban landscape and will not be visually obtrusive or overbearing."* [54]

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[50] In fact the GLAP had already been adopted in 2012 but nothing turns on that.
[51] Height Strategy §4.8.
[52] The modifiers are listed thereafter. I need not recite them.
[53] Cited as the "Development Plan Buildings Height Study" – "Study" appears to be a misnomer.
[54] GLAP p17.

29. Exceptions are listed "*which may be able to absorb heights of up to three and four storeys*". Inter alia, "*The two separate standalone sites at Knockrabo, … are of a size and scale capable of easily accommodating height in excess of two storeys*." One might, conditioned in 2023 by the hindsight of Phase 1 and Phase 2, imagine this reference, written in 2012, to relate to the sites of both Phase 1 and Phase 2. That is not so. Reading the GLAP as a whole, it is clear that this reference to "*two separate standalone sites at Knockrabo*" is to the sites depicted as follows:

Figure 3 – GLAP Photo 27: "Knockrabo Sites"

- The southeastern "Knockrabo Site" is outlined in red in the bottom right of this photo. It approximates to what was the Knockrabo House grounds – i.e. the Knockrabo Phase 1 site and a small north-eastern corner of the Site.[55]
- The northwestern "Knockrabo Site" is outlined in red in the top left of this photo. It is irrelevant for present purposes.
- The gap between these two standalone Knockrabo Sites represents the Bypass Reservation. §6.4 of the GLAP, describes the Knockrabo Sites as divided by the Bypass Reservation. This description should not be confused with the division of the lands south of the main Bypass Reservation by the route of the Spur.
- The "curved" southwestern boundary of the southeastern "Knockrabo Site" is determined by the route of the "Spur" from the Bypass Reservation to Mount Anville Road. Mount Anville Road can be seen in the bottom right corner. Roughly, the Spur divides the Knockrabo House lands from the Cedar Mount House lands.[56] More roughly again and save for the northeastern corner of the Site, the Spur divides the southern "Knockrabo Site" identified in the GLAP from the Site.[57]

[55] See Figure 4 below.
[56] See also Figure 4 below.
[57] See also Figure 4 below.

30. It follows that the Site (save for its north-eastern corner) is not one of those identified in §4.3 of the GLAP as a standalone "Knockrabo Site" suitable for building heights above 2 storeys.

31. As here relevant, the GLAP "*Site Framework Strategy*"[58] as to the "Knockrabo Sites" includes the following:

- "*The sites provide an opportunity for high quality residential development*".
- "*The lands at Knockrabo include many mature trees and planting. This should be integrated into any redevelopment proposals to help assimilate the development and enhance the character of any new development*."

The GLAP "*Development Guidance*"[59] as to the "Knockrabo Sites" includes the following:

- Variation of Height.
- Benchmark height of four or five-storeys depending on levels (with possible setback floor or occupied roof space on four-storey buildings).
- Maximum height of two storeys along boundaries with existing residential properties.
- Retain and integrate existing mature trees and planting.
- Provide a detailed tree survey, landscape plan and planting plan.

32. So, simplifying a little, the net effect of the GLAP as to height as it bears on the Site is that:

- The north-eastern corner of the Site is subject to §6.4 and Table 6.3 of the GLAP - "*Site Framework Strategy*" and "*Development Guidance*" - which allow a benchmark height of four or five-storeys.
- The rest of the Site is subject to the more general GLAP provisions as to height – i.e. Objective UD5 - a height of two storeys save where the Planning Authority considers that a proposed development can be easily absorbed into the existing urban landscape and will not be visually obtrusive or overbearing.

33. In that light, even a relatively cursory comparison of the Proposed Development and the GLAP readily reveals the former to be in material contravention of the latter as to height. Indeed, that is common case.

<u>G1 – Height – Knockrabo Investments' MCS, Architectural Design Statement and Statement of Consistency & Planning Report</u>

34. Knockrabo Investments' MCS baldly states,[60] "*the Material Contravention <u>of the Development Plan</u>"[61] arises in respect of: Building Heights (considered further in Section 2 of this Material Contravention*

[58] GLAP §6.4.
[59] GLAP Table 6.3: Knockrabo Sites – Development Guidance.
[60] At §1.1 under the heading "Purpose of this Document".
[61] Emphasis added.

Statement)". The word "arises" does not convey that there is a material contravention of the Development Plan as to height. But it does draw the reader's attention to that possibility and, specifically, that the possible material contravention is "*of the Development Plan*".

35. In fact, consideration in the MCS of the issue of material contravention as to height ensues not in §2 but in §3 of the MCS. And §3 is headed at variance with the foregoing reference to the Development Plan. It is headed *"3.0 Building Heights – Subject Proposal Materially Contravenes the Height Policy of the Goatstown Local Area Plan 2012*". Note what one might call the change of plans.

36. MCS §3.1 states that the proposed building heights are in *"contravention to*[62] *the benchmark in relation to height as outlined in the Development Guidance of the Goatstown Local Area Plan 2012".* This is clearly a reference to §6.4 and to Table 6.3 of the GLAP as to the "*Knockrabo Sites*" which identifies a "*Benchmark height of four or five-storeys …".* MCS §3.2.1 states that "*The LAP has prescribed limitations on building height at the sites at Knockrabo"* and that Table 6.3 "*limits building height at the Subject Site".* MCS §3.1 of the acknowledges[63] material contravention of the GLAP "*as a result of the following objective*". Table 6.3 of the GLAP as to height is then set out verbatim as Table 3.1 of the MCS.[64]

37. As the foregoing account of the applicable plans demonstrates, the MCS is incorrect in these regards as to all of the Site save its north-eastern corner, which is the only part of the Site within a "Knockrabo Site" as identified in the GLAP and to which §6.4 and Table 6.3 of the GLAP applies. Correctly, by GLAP Objective UD5,[65] the starting point as to height for all of the Site, other than its north-eastern corner, is two storeys.

38. However, while the acknowledgement of material contravention as to height is incorrectly related entirely to GLAP Table 6.3, which applies only the north-eastern corner of the Site, nothing turns on this error – at least as to general identification of the fact of material contravention of the GLAP As to height. If the Proposed Development materially contravenes the more forgiving height benchmark of the §6.4 and Table 6.3 of the GLAP as to the "Knockrabo Sites", a fortiori it materially contravenes the less forgiving height stipulations of the GLAP as they apply to all but the north-eastern corner of the Site. So, while its reasoning is incorrect, the MCS is nonetheless correct in its opinion "*on balance*" that *"the proposed development amounts to a material contravention of the LAP*."[66] And, in any event, that the Proposed Development contravenes the GLAP as to building height is common case.

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[62] Sic.
[63] §3.1
[64] Though the MCS misidentifies it as Table 6.1 of the GLAP. GLAP Table 6.1 in fact refers to a different site – 'The Goat' Site.
[65] GLAP p17.
[66] §3.2.2.

39. MCS §3, read by itself, acknowledges[67] material contravention of the GLAP as to building height rather than, material contravention of the Development Plan as to building height, which it does not acknowledge - at least explicitly. That is the gravamen of Mr Mulloy's complaint about the MCS. But that complaint ignores §1.1 of the MCS which at least acknowledges possible material contravention of the Development Plan as to building height.

40. The MCS states[68] that *"sufficient justification for this height is available with regard to recent Dun Laoghaire-Rathdown height policy, .."*[69] This is presumably a reference to the Development Plan Height Strategy. At §3.2.2 of the MCS the following appears:

> *"Ultimately, however, it is a matter for the Board to determine whether the proposed development is in material contravention of the Development Plan having regard to the application of the Upward and Downward Modifiers referenced in the DLRCC Building Height Strategy considered in Section 3.2.3 of this Statement."*[70]

Again, while the MCS undoubtedly invokes the Development Plan modifiers to the contrary, we see here acknowledgement in the MCS of possible material contravention of, specifically, the Development Plan as to building height.

41. In similar vein, and remembering that the Height Strategy is part of the Development Plan, §3.2.3 of the MCS is headed "*DLRCC Building Height Strategy Allows for Increased Building Heights"* and argues that there is no material contravention of the Height Strategy because of the applicability of "modifiers" for which that Strategy provides. Other than anticipating the GLAP, that Strategy does not refer to Goatstown and its environs. However §4.2 of the Strategy is cited in the MCS as stating that the only locations suitable for taller buildings are those to which LAPs will apply.[71] The MCS "highlights" that the GLAP in 2012 predated the Development Plan of 2016 and was extended in 2017, *"and has not since been amended or updated in line with the Development Plan, nor national or regional policy, and is therefore out of date".* (As stated earlier, this assertion is wrong in law as to conformity to the Development Plan.)

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[67] §3.1.

[68] §3.1.

[69] §3.1. There follows at §3.2 a justification asserting that the GLAP conflicts with National Policy as it has evolved since the GLAP was formulated in 2012 and, on that basis, that the architect's Design Appraisal, the Statement Of Consistency, and the Planning Report submitted with the planning application provide "a detailed justification for the increased height". Particular reliance is placed on the Design Standards for New Apartments – Guidelines for Planning Authorities 2020 (the 'Apartment Guidelines') and Urban Development and Building Height Guidelines 2018 (the 'Building Height Guidelines'), (including §3.2 and SPPR3), the National Planning Framework 2018, Rebuilding Ireland: Action Plan for Housing and Homelessness (2016) ('Action Plan'), 'Housing for All – A New Housing Plan for Ireland' (2021), The Eastern and Midlands Regional Spatial & Economic Strategy 2019.

[70] Emphasis added.

[71] §4.2 of the Strategy states "The forthcoming local plans will likewise include specific policy on building height. From a strategic perspective, the only areas where any cogent case can be made for taller buildings in the County is within the boundaries of certain local plan areas and UCD. It is considered that these local plans are the most appropriate vehicle for providing the kind of fine- grained analysis which can determine if taller buildings are appropriate or not to any given location."

42. The MCS[72] cites §4.8.1 of the Development Plan Height Strategy, "*which outlines a number of 'Upward Modifiers' …….. characteristics of a proposed development or development site, which may allow for buildings in excess of the recommended height outlined for this area under certain conditions*." There follows an account of these modifiers and assertion of their application to the Proposed Development/Site, which I need not recite – save the conclusion that the proposed height is "*acceptable due to the compliance with several of the Upward Modifiers outlined in the DLRCC Height Strategy*".

43. The following is the last content of §3.2.3 of the MCS:[73]

> *"While the scale of the proposed development is larger than that of the surrounding context, it is our opinion that the height is regarded as acceptable due to the compliance with several of the Upward Modifiers outlined in the DLRCC Height Strategy. This is considered in combination with a shift in national guidance on building heights, which has been adopted since the Development Plan was originally drafted.*
>
> *It is a matter for the Board to determine whether the proposed development meets the criteria set out in the upward modifiers as per the Development Plan with the result that there is no material contravention of the LAP.*
>
> *In the event that the Board concludes that it does not do so, we are of the opinion that a grant of planning permission for the development of the height proposed can be justified by reference to the Building Height Guidelines and other Regional and National Guidance, as detailed above."*

44. Given the general premise of the Development Plan Height Strategy[74] is at most 4 storeys and the Proposed Development extends to 8 – and that on a Site for most of which the general premise is 2 storeys, it is striking that the MCS does not address the presumption, stated in the Development Plan Height Strategy, that even where upward modifiers apply, they normally justify only one additional storey or "*possibly two*".[75]

45. However, and perhaps more significantly, these modifiers are explicitly said by the Development Plan Height Strategy to apply only in "*Residual Suburban Areas not included within Cumulative Areas of Control*". Cumulative Areas of Control include areas covered by an LAP – such as the GLAP. So the Height Strategy modifiers simply don't apply to the Site at all. That being so, it is very unclear by what reasoning the MCS applies the Height Strategy modifiers to the Site. Perhaps it is alleged to be implicit that, given the (incorrect) view that the GLAP is "out of date", the Development Plan Height Strategy applies to the Site. But we do not know. We are not told.

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[72] MCS §3.2.3 p31.
[73] MCS p36.
[74] Height strategy – §4.8 as to Apartments.
[75] Height strategy – §4.8.

46. Thereafter the MCS states:

> *"3.3 Conclusion of Justification for Material Contravention of LAP in relation to Building Heights*
>
> *As outlined above, the Subject Site is suitable for higher-density residential development and taller buildings, as per the Dun Laoghaire-Rathdown Development Plan 2016-2022 and various national and regional planning policies.*
>
> *The Subject Proposal is therefore justified in materially contravening the Goatstown Local Area Plan 2012, which was adopted a number of years prior to the referenced higher-level policies and is inconsistent with national policy and section 28 Guidelines."*

47. So, it seems to me that the MCS, in the respects just described, is based on misinterpretations of the GLAP and of the Development Plan Height Strategy and on a view, erroneous in law, that the GLAP is rendered "out of date" by the Development Plan. That said, the MCS also and as a separate matter calls in aid the Building Height Guidelines as justifying the proposed height. This issue is considered below as to Ground 2.

48. The foregoing account of the MCS demonstrates that it is quite unclear as to whether the Proposed Development may be in material contravention of the Development Plan as to height or is, in marked contrast, so much in compliance with its Height Strategy (including its upward modifiers) as to justify material contravention of the GLAP. In my view however, and as a matter of interpretation of the Plans (which interpretation is a matter of law) the application of the Development Plan Height Strategy modifiers does not arise as to a possible contravention of the GLAP as those modifiers explicitly apply only outside LAP areas.

49. It is important to record that the Board accepts[76] that the MCS did not explicitly identify the precise mechanism identified by the Inspector (and so, the Board) whereby the Development Plan was contravened – i.e. because the LAP is contravened, ipso facto the Development Plan (Policy UD6 and the Height Strategy) is contravened.

50. For all that, the MCS does acknowledge the material contravention of the GLAP as to height and that an issue arises as to material contravention of the Development Plan as to height and that the Board might find such a material contravention. Albeit confusedly and confusingly, the MCS would, in my view, inevitably alert the intelligent lay reader to the question whether there was a material contravention of the Development Plan as to height and in that respect serve its statutory purpose as identified in **Jennings**.[77]

[76] Transcript Day 3, p35 & p38.
[77] See above.

51. The MCS asserts[78] that the Architectural Design Statement[79] and the Statement of Consistency and Planning Report[80] submitted with the planning application provide "a *detailed justification for the increased height*". In fact, the Architectural Design Statement[81] states a general rationale for the proposed heights but does not address issues of material contravention. The Statement of Consistency and Planning Report cites[82] Development Plan Policy UD6, cited above, as adopting the Building Height Strategy and asserts that the Proposed Development complies with it as to avoidance of overlooking or overbearing impacts on surrounding existing development. The Statement of Consistency and Planning Report acknowledges material contravention of the GLAP as to building height and cites the MCS for its justification. The circularity of the MCS and the Statement of Consistency and Planning Report in this regard – each citing the other for a detailed justification for the increased height – will be apparent.

52. Other than as to height, and rather than asserting that the GLAP is "out of date", the Statement of Consistency and Planning Report analyses and asserts compliance with the GLAP in some detail. As to GLAP Objective UD5, it cites[83] the GLAP reference to the "*two separate standalone sites at Knockrabo*" as capable of easily accommodating height in excess of two storeys. It makes that statement without clarifying, as it should have done, that the Site, save for its north-eastern corner, is not one of those "*two separate standalone sites*".

53. There follows[84] a detailed assertion of compliance with the Knockrabo Sites Framework Strategy[85] which is in fact inapplicable to all but that small area in the north-eastern corner of the Site. GLAP Photo 27[86] depicting the "Knockrabo Sites" is reproduced.[87] The alert could compare it to the Site plans and discern that the Knockrabo Sites Framework Strategy is inapplicable to all but that small area of the Site. But that is far from the general impression conveyed by the Statement of Consistency and Planning Report. Of course, one can readily see that there may well have been good planning reason to analyse compliance of the Proposed Development with a Site Framework Strategy applicable, not to the Site (save for a corner thereof) but to the adjacent Phase 1 area. Perhaps there is an argument by analogy that, from a general planning point of view, the Cedar Mount House Grounds present very similarly to the Knockrabo House Grounds – indeed, as will be seen, that seems to be the view the Inspector took. But the inapplicability of the Knockrabo Sites policy to all but a small part of the site should have been stated. Specifically, as to the height provisions of

[78] §3.2.1.
[79] Cited sub nom "Architect's Design Appraisal".
[80] A single combined document.
[81] P17, Design Strategy, Height. It states, in substance, that the heights of the constructed apartment blocks (A, B, C and D in Phase 1 along Knockrabo Way), and apartment blocks G and H permitted by permission D17A/1124, vary between 3 and 7 storeys including podium level, and set a precedent for scale on the Site. The application proposes that the height of the existing Block B sets a consistent building height for the streetscape to the rear of Cedar Mount House, and that the proposed building heights increase towards the public open space and the Bypass Reservation to the north of the Site.
[82] §3.1.12.
[83] Statement of Consistency and Planning Report P59.
[84] Statement of Consistency and Planning Report P64.
[85] At §6.4 of the GLAP.
[86] See Figure 3 above.
[87] Statement of Consistency and Planning Report P65.

the Knockrabo Sites Framework Strategy, one is merely referred to the MCS. Ultimately, the Architectural Design Statement and the Statement of Consistency and Planning Report do not live up to their billing in the MCS as providing "a *detailed justification for the increased height*" – at least as to the correct identification of applicable local planning policy and the issue of material contravention thereof.

54. That said, the conclusion of the Statement of Consistency and Planning Report requests that the Board "*acknowledge and assess the material contravention in relation to the County Development Plan and the Goatstown Local Area Plan"* including as to height.[88] Again, and on an overview, that Statement would, in my view, inevitably alert the intelligent lay reader to the question whether there was a material contravention of the Development Plan as to height – not least when read with the MCS.

G1 – Height – DLRCC CE report

55. DLRCC correctly identifies material contravention of the GLAP as the height. Its reasoning is largely incorrect as it also applies the GLAP Knockrabo Sites Development Guidance of a benchmark of four or five-storeys to the Site[89] despite the fact that the Site, save for its north-eastern corner, is not one of the GLAP Knockrabo Sites.

56. DLRCC opines that the contravention has not been sufficiently justified by reference to SPPR3 and the criteria of §3.2 of the Height Guidelines for the application of SPPR3. In summary, DLRCC considered that the proposed height, scale, massing and layout, would constitute overdevelopment of the Site. DLRCC's reasons for recommending refusal on this account are briefly set out earlier in this judgment. Alternatively, DLRCC recommended omission of Block E, reduction of Blocks F and G to 5 storeys and reduction of Block H to 4 storeys.

G1 – Height – Board Order & Inspector's Report & Comment thereon

57. In its Impugned Decision, as recorded above, the Board concluded that the Proposed Development would materially contravene the Development Plan with respect to building height limits. In the following sentence it justifies that material contravention of the Development Plan "*and Goatstown Local Area Plan 2012*". Overall, it is clear that the Board found material contravention of both the Development Plan and the GLAP as to building height limits.

[88] Statement of Consistency and Planning Report §4.0 p69. Emphasis added.
[89] DLRCC CE report p30.

58. The Impugned Decision does not elaborate a more precise description of the material contravention of each plan as to building height limits. But, as it was made generally in accordance with the Inspector's recommendation and draft order, one may look to the Inspector's report for elaboration.

59. In describing relevant local planning policy as to building height, the Inspector notes Development Plan Policy UD6 to adhere to its Height Strategy.[90] She notes[91] the Height Strategy statement at §4.2 that local plans are the appropriate vehicle for fine-grained analysis to determine if taller buildings are appropriate to a given location and that height guidance will be provided in Local Plans, including the GLAP.

60. As to the GLAP, the Inspector notes,

- GLAP policy UD5[92] - generally two storeys - which I have set out above.[93]
- objections by members of the public as to excessive height and contravention of the GLAP as to height and that the Proposed Development will dominate and overshadow existing properties and negatively impact residential and visual amenities.[94]
- similar views of DLRCC members[95] and that the DLRCC executive considered that the Proposed Development height
  - o would constitute overdevelopment.
  - o would contravene the Development Plan and GLAP – which contravention had not been sufficiently justified.[96]
  - o did not meet the criteria of §3.2 of the Height Guidelines for the application of SPPR3 and would be visually obtrusive and overbearing.

These were amongst the reasons for DLRCC's recommending refusal of permission – two related to height.

61. In her planning assessment, the Inspector correctly states[97] that

- while the applicant and the DLRCC CE report considered the Site against the "Knockrabo Sites" Development Guidance in the GLAP,[98] only a small part of the Site, in the area of Block F, falls within the area identified in the GLAP as the Knockrabo Sites.
- as the Site is in the GLAP Area,[99] §4.8 of the Development Plan Height Strategy (i.e. as to "Upward Modifiers") does not apply.

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[90] Inspector's Report §6, §6.3.1. p15. & §10.7.10.
[91] Inspector's Report §6.3.1. p20. & §10.7.10.
[92] It is an objective of the Plan that height in excess of two-storeys shall only be permitted where it is considered by the Planning Authority that the proposed development can be easily absorbed into the existing urban landscape and will not be visually obtrusive or overbearing.
[93] Inspector's Report p21.
[94] Inspector's Report §7.2.
[95] Inspector's Report §8.1.2.
[96] Inspector's Report §8.1.3 §8.2. See also §10.7.7.
[97] §10.7.10, §10.7.11 & §10.14.3.
[98] i.e. GLAP §6.4 & Table 6.3.
[99] And hence in within the Cumulative Area of Control of height.

62. So, she considered only Block F against the GLAP "Knockrabo Sites"[100] Development Guidance. She considered the rest of the Site against the general GLAP policies. One might quibble even about Block F – on the basis that most of even it is outside the south-eastern Knockrabo Site.[101] But it would be a quibble. It will be apparent from the analysis set out above that, in my view, the Inspector was correct in her analysis in this regard. It follows that the errors by Knockrabo Investments, of analysis of the height issue and identification of the applicable policy, as described above, did not flow through into the Board's decision in the sense recently considered in **Walsh**[102] and **Fernleigh**.[103]

The Inspector's Identification & Justification of the Material Contravention.

63. The Inspector[104] as to the issue of material contravention, correctly

- disagrees with the view, stated in the MCS, that the GLAP and its height strategy are superseded and should not be applied. She points out that the GLAP's duration would not have been extended were there conflicts between it and the Development Plan.
- states that the height strategy applicable to the Site, by virtue of the Development Plan (i.e. Policy UD6 and the Height Strategy[105]), remains that applied to it by the GLAP. As counsel for the Board put it, the Inspector is saying that because the LAP is contravened, ipso facto the Development Plan is contravened.[106]

64. In assessing the Site (other than Block F) against the general GLAP policies, the Inspector specifically noted GLAP policy UD5,[107] which states that height over two storeys shall only be permitted where the Planning Authority considers that the proposed development can be easily absorbed into the existing urban landscape and will not be visually obtrusive or overbearing. She correctly observes that GLAP policy UD5 does not preclude development in excess of two storeys.[108] She cites the GLAP to the effect that *"Generally, the larger a site is, the greater its ability to absorb height"* and, by way clearly of her own planning judgment, says *"Given the scale of this application site at 1.78ha, I would argue that this site is also of a scale in its own right and combined with the adjoining Knockrabo development site is capable of accommodating height in excess of two storeys."*[109] While she does not consider that the GLAP specifies a maximum height, a "*precautionary approach*" "*may lead one to consider a height of four or five storeys is the desirable height*". This view seems to have been informed by analogy with the benchmark for the Knockrabo Sites.[110] In similar vein, she later states: "*The LAP considers the area of Knockrabo can accommodate buildings of height and a*

[100] i.e. the Knockrabo Sites as defined by the GLAP and depicted in Figure 3 above.
[101] Figure 3 above.
[102] Walsh v An Bord Pleanála & St. Clare's GP3 Ltd [2022] IEHC 172 (High Court (Judicial Review), Humphreys J, 1 April 2022).
[103] Fernleigh v An Bord Pleanála & Ironborn [2023] IEHC 525 §65 & 66.
[104] Inspector's Report §§10.7.13 & 10.14.2 et seq.
[105] Transcript Day 3, p30 et seq.
[106] Transcript Day 3, p34. I have not cited him verbatim.
[107] Cited above.
[108] Inspector's Report §10.7.13.
[109] Inspector's Report §10.7.12.
[110] i.e. the Knockrabo Sites as defined by the GLAP and depicted in Figure 3 above.

variation of height, and I consider the physical characteristics of this site to be similar to Knockrabo."[111] Given the adjacency of the Site to the GLAP-identified "Knockrabo Site" on which Phase 1 sits, it is easy to see why.

65. On these bases she said, *"it is open to the Board to consider the proposal in terms of a material contravention."*[112] I take the view that that is what the Board did. As I have found already, reading the Impugned Decision as a whole, it is clear that the Board found material contravention of the GLAP as to building height.

66. The Inspector records that the GLAP Development Guidance for the Knockrabo Sites applies only to Block F. She considers that, as to Block F, the Development Guidance envisages "*Variation of Height*" and a "*Benchmark height of four or five storeys depending on levels*". She cites an Oxford dictionary definition of a "*benchmark*" as "*something that can be measured and used as a standard that other things can be compared with"*. So, she says, correctly, that a "benchmark" is not a "maximum" but implies some flexibility – as does the phrase "Development Guidance". She says, uncontroversially it seems to me, that restricting Block F to two storeys makes no sense given that the adjacent already-built Blocks A and B are 4-5 storeys over undercroft.

67. However, the Inspector notably omits to take her own cue from the dictionary – indeed to follow her own logic. She fails to compare both the GLAP benchmark of four or five storeys and the four or five storeys of Blocks A and B, to the eight storeys of Block F.[113] As has been said, standards are just that – standards. And that standards allow flexibility does not mean that they are not standards and does not mean that availing of flexibility need not be justified. Flexibility is importantly and properly characteristic of development plans and local area plans and considerable room must properly be left for the judgment of the decision-maker.[114] But too ready resort to and, importantly, failure to justify resort to, flexibility undermines standards and the reasonable expectations to which the public is entitled – that the application of those standards will be general. It is important to say that exceptions must remain exceptional and even flexibilities must remain less than usual. See, recently, **Fernleigh**[115] and **O'Donnell**.[116] In this light, and given material contravention is at least ordinarily an issue of law rather than planning judgment, I respectfully doubt the Inspector's view that no material contravention of the GLAP[117] or the Development Plan[118] as to height arose.

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[111] Inspector's Report §10.7.22.
[112] Inspector's Report §10.7.13.
[113] Though I note that the eight storey element of Block F is the element farthest away from Blocks A & B and that the Site seems to fall to the west away from Blocks A & B and into the Site – see section drawings in the Architectural Design Statement p18. The Site also falls to the north. That said, the assertion in the Architectural Design Statement that Section AA shows a continuity in height between existing Block B and proposed Block F, G and H required some consideration – which appears at §10.7.31 of the Inspector's Report. That is a planning matter for the Board rather than a legal matter for the Court.
[114] Ballyboden Tidy Towns Group v An Bord Pleanála & Shannon Homes [2022] IEHC 7 §139
[115] Fernleigh Residents Association v An Bord Pleanála [2023] IEHC 525 §73. "It is important to remember that flexibility in guidelines is not carte blanche to degrade the norm set by guidelines such that the exception becomes the rule – or at least, something less than a true exception. Such an approach tends to degrade norms towards meaninglessness – not least incrementally in repeated decisions and over time. So, as a matter of proper rigour in decision-making, one must start with the norm, assess compliance against it and justify availing of flexibility to depart from it."
[116] O'Donnell v An Bord Pleanála [2023] IEHC 381 §85.
[117] Inspector's Report §10.14.5.
[118] Inspector's Report §10.14.6.

68. However, nothing turns on that as the Board found material contravention as to height and the Inspector considered, in some detail and engaging with the objections and the DLRCC CE Report, the implications of such a view being taken. Indeed, she did so on the basis that "*a grant of permission may be considered to materially contravene*" the Development and the GLAP "*in terms of building height only*" and as to the application of s.37(2)(b) PDA 2000.[119] Further, her Draft Order[120] (which the Board followed in this respect) explicitly recommended that the Board would consider that:

- the Proposed Development is, *"apart from the building height parameters"* broadly compliant with the Development Plan and the GLAP.
- permission would materially contravene the Development Plan "*with respect to building height limits*".
- having regard to s.37(2) PDA 2000, permission in material contravention of the Development Plan and the GLAP would be justified for reasons listed.

69. In applying s.37(2)(b)(iii) PDA 2000[121] she specifically considers the Proposed Development against the Height Guidelines and in particular §3.1, §3.2 and SPPR3.[122] She notes that the Height Guidelines state that implementation of the National Planning Framework requires increased density, scale and height and requires more focus on reusing brownfield sites and building up urban infill sites and, of relevance here, those which may not have been built on before. With reference to s.37(2)(b)(iii), she was "*satisfied that the proposal can be granted in relation to height*".

70. In a sequential response to each of DLRCC's suggested reasons for refusal, she records her particular regard to the development management criteria set out in §3.2 of the Building Height Guidelines and her view that their satisfaction "*has been adequately demonstrated in the documentation before me and the proposal has the potential to make a positive contribution to this area*."[123] Applying the §3.2 criteria as to the scale of the development and its ability to integrate into and enhance the character and public realm of the area, the Inspector explains, inter alia, why she considers that the Proposed Development, at a height greater than 5 storeys, will not appear out of character with the evolving heights in this area.[124] For this and other detailed reasons, in considering §3.2, she concludes that she is generally satisfied:

> *that "… the proposal responds well to the existing built environment and will contribute positively to the urban neighbourhood and streetscape and contribute to the character of the area, both old and new. In assessing any application on undeveloped lands, there is a delicate balance between respecting the character of an area and visual amenity against allowing the urban landscape to*

[119] Inspector's Report §10.14.6 – Technically the reference should have been to s.9(6) of the 2016 Act but nothing turns on that as s.9(6) in turn invokes s.37(2)(b) PDA 2000. The Inspector addresses s.37(2)(b) PDA 2000 in detail from §10.14.22.
[120] Inspector's Report §15 at p161.
[121] "(iii) permission for the proposed development should be granted having regard to regional spatial and economic strategy for the area, guidelines under section 28, policy directives under section 29, the statutory obligations of any local authority in the area, and any relevant policy of the Government, the Minister or any Minister of the Government".
[122] Inspector's Report §10.7.14 et seq, §10.8 Impact on Protected Structures & §10.11 Impact on the Amenity of Neighbouring Properties. §10.11 considered height-related issues such as overlooking, loss of light, privacy and amenity and §10.14.25 & 26.
[123] Inspector's Report §10.15.1.
[124] Inspector's Report §10.7.19 et seq.

> *evolve in accordance with current housing needs at a scale which supports efficient use of land and supports existing communities in a sustainable manner, and this has been achieved here."* [125]
>
> *"… with the design approach and that the elevational treatment and the design/scale of the blocks will ensure that the development does not read as monolithic."* [126]
>
> *"…. that the proposed development will not negatively impact on the character or setting of historic structures; will add visual interest; will make a positive contribution to the skyline of the area and will improve legibility with the height, scale and massing acceptable in townscape and visual terms. It is my opinion that the proposed development will contribute to the sustainable and compact growth of the area. The Board may in such circumstances approve such development for higher buildings, even where specific objectives of the relevant development plan or local area plan may indicate otherwise, as per SPPR3. In this regard, while the height is greater than the benchmark height outlined in the local area plan and greater than two storeys adjoining existing residential development, I consider the proposed development will provide for a strong well designed urban form at this highly accessible and serviced site, and the building height proposed is in accordance with national policy and guidance to support compact consolidated growth within the footprint of existing urban areas."* [127]

71. As to height-related issues such as impact on residential amenity, overlooking, overbearing, overshadowing and loss of privacy of neighbouring properties, the Inspector took the view that *"in examining applications for multi-unit development, a balance is required in all assessments in relation to making the most efficient use of zoned and serviced land in the delivery of housing, where land is a finite resource, against the impacts of a proposal on existing residential amenities as well as the visual impact of the proposal …"*[128] and she discounted "*significant negative impacts*". She considered that, as to height, scale and massing, the Proposed Development would "*sit comfortably with the modern development of Knockrabo to the east and Cedar Mount and the gate lodge to the west/southwest*".[129]

72. While, of course, one is free to disagree with the Inspector and the Board as to the planning merits of their view, it cannot be said that they failed to consider, and to justify in appreciable detail, permitting a material contravention as to building height. Nor, save as to public transport,[130] has the Board's decision or reasoning as to the satisfaction of the criteria set out in §3.2 of the Height Guidelines for the application of SPPR3 been challenged.

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[125] Inspector's Report §10.7.30.
[126] Inspector's Report §10.7.30.
[127] Inspector's Report §10.7.37 & 38.
[128] Inspector's Report §10.11.3 et seq.
[129] Inspector's Report §10.11.6.
[130] See Ground 2 below.

G1 – Height – Pleadings, Submissions, Discussion & Decision

73. As stated above, Mr Mulloy by his pleadings impugns the grant of planning permission in material contravention of the Development Plan as to building height, contrary to s.9(6) of the 2016 Act (which invokes s.37(2)(b) PDA 2000), which contravention Knockrabo Investments,[131]

i. identified only as to the GLAP – not the Development Plan – and even then, by reference to the (largely inapplicable) Knockrabo Sites Development Guidance.[132]
ii. did not advertise – contrary to s.8(1)(a)(iv)(II) of the 2016 Act.[133]
iii. erroneously sought to justify pursuant to s.37(2)(b) PDA 2000 to the effect that:
   - the Proposed Development satisfied a number of "*upward modifiers*" provided for at §4.8.1 of the Development Plan Building Height Strategy.
   - the GLAP "*was adopted a number of years prior to the referenced higher-level policies and is inconsistent with national policy and section 28 Guidelines*."[134]

74. Mr Mulloy pleads that the Inspector,[135]

- inaccurately stated that Knockrabo Investments considered the GLAP inapplicable.
- considered that the word 'benchmark' imported flexibility into the assessment and that the application of the restrictions to the Site boundaries made no sense in light of existing development.
- considered that the Proposed Development did not contravene the Development Plan as to height.[136]
- noted nonetheless that the height issue had excited public interest and been raised in observer submissions and was a matter of concern to the planning authority.
- considered it open to the Board to invoke s.37(2)(b) (i) and (iii) PDA 2000, given the strategic nature of the site and national policy guidance.
- concluded[137] that permission "*may be considered*" to materially contravene the Development Plan GLAP 2012 as to building height only and would be justified under s.37(2)(b) (i) and (iii) PDA 2000 "*as examined hereunder*."
- concluded[138] that permission "*would be justified under s.37(2)(b) (iii) PDA 2000 having regard to the NPF*[139] *and the Apartment Guidelines*".[140]

I have addressed certain of these pleas above in addressing the Inspector's report.

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[131] I have rearranged these pleas in more sequential order.
[132] GLAP Table 6.3.
[133] (1) Before an applicant makes an application … for permission, he or she shall.— (a) have caused to be published, in one or more newspapers circulating in the area …a notice … (iv) stating that the application contains a statement— (II) where the proposed development materially contravenes the said plan other than in relation to the zoning of the land, indicating why permission should, nonetheless, be granted, having regard to a consideration specified in section 37(2)(b) of the Act of 2000.
[134] §3.3 and citing National and Regional Guidelines on Building Height (§3.2.2), the National Planning Framework (§3.2.2.1), the Apartment Guidelines (§3.2.2.2), the RSES (§3.2.2.4).
[135] Inspector's Report §10.14.2.
[136] §10.14.6.
[137] §10.14.22.
[138] §10.14.24.
[139] Project Ireland 2040 National Planning Framework February 2018.
[140] Sustainable Urban Housing: Design Standards for New Apartments Guidelines for Planning Authorities 2020.

75. Mr Mulloy pleads that

- the Board considered the Proposed Development to be in material contravention of both the Development Plan and the GLAP but would be justified for reasons given.
- However,
  - Knockrabo Investments' MCS had not identified material contravention of the Development Plan as to height – it identified material contravention only of the GLAP. Mr Mulloy cites **Redmond**[141] to the effect that an MCS must identify all material contraventions on pain of invalidation of the planning application and that the 2016 Act "*does not allow the Developer's error to be visited upon the public by undermining their rights of public participation*".
  - the Board breached s.9(6) of the 2016 Act in failing to identify "*which elements of the Development Plan and/or the GLAP were materially contravened"*.

76. The Board pleads and submits essentially that on reading the Impugned Decision in light of, *inter alia*, the application documents, the Inspector's Report, and the objectives and policies of the Development Plan and GLAP as to height, it can be seen that the material contravention identified by the Board was in substance in relation to the height requirements of the GLAP. In both the Development Plan and the GLAP it is apparent that it is in the GLAP that the relevant height limits are to be found. As I have said, I accept this analysis. On this analysis, the Inspector's report, with which the Impugned Decision must be read, adequately identifies the substance of the material contravention found by the Board. And, by virtue of that material contravention of the GLAP, the Proposed Development is also necessarily in material contravention of the Development Plan because the Development Plan, by Policy UD6 and §4 of the Development Plan Building Height Strategy, stipulates that LAPs govern height in the areas to which they apply. In my view, the Impugned Decision must be understood accordingly. The Inspector's report also, correctly, rejects Knockrabo Investments' argument that the GLAP was inapplicable as out of date – while correctly addressing the issue whether subsequent guidance (notably the Height Guidelines 2018) could justify its material contravention as opposed to its inapplicability.

77. The Inspector correctly identified that the applicable height policy was that in the GLAP and as to Block F was that applicable to the Knockrabo Sites and as to the remainder of the Site was the general GLAP policy of 2-storey development. It is also clear that the Development Plan Height Strategy devolved height issues in LAP areas to the applicable LAP – as to this Site, the GLAP. All this is in my view adequate to identify what elements of the Development Plan and the GLAP the Board in its Impugned Decision considered materially contravened as to height – in the case of the Development Plan, Policy UD6 and §4 of the Height Strategy. The position is quite clear on the exercise of even mild curiosity and the Impugned Decision is not deficient in failing to identify the contravened element of the Development Plan.

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[141] Redmond v An Bord Pleanála [2020] IEHC 322, Simons J §40.

Mr Mulloy's complaints that the MCS erroneously sought to justify the material contraventions as to height on the basis that the Proposed Development satisfied "*upward modifiers*" provided for at §4.8.1 of the Height Strategy and erroneously asserted that the GLAP was superseded, are correct as to fact but can be rejected as a ground for certiorari as they clearly did not flow into the Board's decision. The Inspector clearly identified the MCS as erroneous in these regards.

78. Viewing those errors in the MCS from the perspective of public participation, that members of the public were entitled to, and did, disagree with the justification and objected accordingly to the planning application necessarily implies that such members of the public would themselves interrogate that justification. **Connelly**[142] is authority that, where issues are complex, members of the public interrogating a planning application may have to engage with that complexity. And in any event, as I say, nothing flowed from these errors in the MCS, as the Inspector corrected them.

79. That leaves the question whether the MCS (as opposed to the Impugned Decision) adequately identified the material contravention as to height as it relates to the Development Plan as opposed to the GLAP. The fate of the allegation of failure to advertise the material contravention turns also on the determination of that issue, as the duty to advertise is merely to advertise that an MCS identifying the material contravention is available for public inspection

80. It will be apparent from my analysis as set out above that, while significant critique of the SHD planning application documents as the height issue is justified, in my view they sufficed to bring to objectors' attention the issue of material contravention as to height and to facilitate public participation in the planning process in that regard. That sufficiency is, as it happens, illustrated by the objections as to height. And the Inspector correctly, analysed the issue of what planning policy as to building height applied to the Site despite the SHD planning application documents having confused the issue as between, on the one hand, the "Knockrabo Sites" identified in the GLAP and, on the other, the Site.

81. In my view, while the facts are different, the underlying emphasis in Redmond and Jennings on the purpose and efficacy of an MCS in alerting the public, prescribed bodies and the Board to the issue of material contravention as to height applies here. It is clear that one should read planning decisions not as if a statute but "*in the round*", in a "*way that makes sense"*[143] and avoid a "*legalistic over-analysis"*[144] with a view to validating rather than invalidating them where possible.[145] They are given an objective, purposive, contextual and common-sense/pragmatic, rather than a technical, interpretation.[146] The approach is "*careful*

[142] Connelly v An Bord Pleanála [2018] IESC 31 ([2018] 2 I.L.R.M. 453).
[143] Re Comhaltas Ceoltóirí Éireann [1977] 12 JIC 1402, 1975 WJSC-HC 633 (Unreported, High Court, 14th December, 1977; OA v International Protection Appeals Tribunal [2020] IEHC 100, §13.
[144] MR v International Protection Appeals Tribunal [2020] IEHC 41 – the phrase is from a heading in the judgment rather than the operative text but accurately describes the gravamen of that text.
[145] Sweetman v An Bord Pleanála [2021] IEHC 390 §28.
[146] Camiveo Ltd v Dunnes Stores [2019] IECA 138 (Court of Appeal, Costello J, 9 May 2019) §33; Ardragh Wind Farm Ltd v An Bord Pleanála [2019] IEHC 795.

but not legalistic"[147] and they are "*not to be read narrowly and restrictively*".[148] These approaches follow from and are aspects of the **XJS**[149] principles that such decisions should be construed not as complex legal documents drafted by lawyers but as an intelligent layperson without training in law or planning would understand them. And such a person "*is capable of resolving inconsistencies, errors, contradictions and the like in and between planning documents".*[150] While the interpretation of a planning application, as opposed to a planning decision, differs in that no presumption of validity applies, nonetheless these XJS principles apply also to the interpretation of a planning application. That is necessarily so as permissions are interpreted in the context, inter alia, of their underlying planning application documents. Though that is the general law in any event, Condition 1 of a planning permission is almost invariably to this express effect.[151] Applying different interpretive principles to the application and the decision respectively would produce an undesirable – likely unworkable – dissonance in interpreting planning decisions, and to no useful end. This view also accords with the general principle of lay public participation in planning applications – even if planning law and practice has, necessarily, become highly complex. In any event, that planning application documents are interpreted on XJS principles is established in **Dublin Cycling**.[152]

82. One must add the important caution by Charleton J in **Weston**,[153] that "*Planning controls operate within the community on the basis that the developer will make an honest application for planning permission, stating precisely what is proposed.*" I hasten to disavow a finding of dishonesty here, but precision and accuracy are required. That seems to me to apply as much to an MCS as to any other document in a planning application and as much as to the correct identification of applicable planning policy as to description of the proposed development. And, as was said in **Jennings**,[154] it at very least desirable, and arguably necessary in law, that an MCS straightforwardly state "*the professional judgement of its authors, independent of their clients' interest*" to "*enable a clear understanding of the SHD applicant's approach to the issue of material contravention and assist the transparent and properly-informed consideration of the SHD Application*". However, there was no plea or submission here by Mr Mulloy that the MCS or its authors failed such standards: the plea is made in terms simply of error by way of omission to refer to material contravention of, specifically, the Development Plan.

83. I have already explained what I consider to be errors of analysis of the height issue in the MCS. But I take the view, not without some hesitation, that the MCS, though significantly erroneous, served at least the purpose of drawing public and other relevant attention to the view of the planning applicant that there was a material contravention as to height. I repeat my acceptance of the Board's analysis that the applicable substantive local policy as to height was set out in in the GLAP rather than in the Development Plan and that

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[147] Dublin Cycling Campaign CLG v An Bord Pleanála [2020] IEHC 587 §30.
[148] Clonres CLG v An Bord Pleanála [2021] IEHC 303 albeit speaking of development plans, the same general principle applies; cited in Ballyboden TTG v ABP & Shannon Homes [2022] IEHC 7 §120.
[149] In re XJS Investments Ltd [1986] IR 750.
[150] Environmental Trust Ireland v An Bord Pleanála [2022] IEHC 540 §174.
[151] See e.g. Camiveo Ltd v Dunnes Stores [2019] IECA 138 (Court of Appeal, Costello J, 9 May 2019) §28 citing Lanigan v Barry [2016] 1 I.R. 656 §26. Dublin Cycling Campaign CLG v An Bord Pleanála [2020] IEHC 587 §29(e). For an example, see Environmental Trust Ireland v An Bord Pleanála [2022] IEHC 540 §174 et seq.
[152] Dublin Cycling Campaign CLG v An Bord Pleanála [2020] IEHC 587 §29.
[153] Weston Limited v An Bord Pleanála [2010] IEHC 255.
[154] Jennings & O'Connor v An Bord Pleanála & Colbeam 2023 IEHC 14.

the material contravention of the Development Plan flowed from the manner of its cross-reference to the GLAP as opposed to from substantive planning policies of the Development Plan. I consider that the MCS sufficed to serve its statutory purpose of drawing attention to the material contravention of the Development Plan.

84. Standing back from the detail, there is merit in the criticism by counsel for the Board that Mr Mulloy's case is that the MCS is invalid by reference to the building heights issue when, in fact, the issue of building heights is "in lights" in the MCS, enabling full public participation on the issue.[155] In my view, in terms of analogy with precedent, the facts of this case are closer to those of Jennings than to those of Redmond.

85. Accordingly, I reject Mr Mulloy's Ground 1.

GROUND 2 SPPR3 & PUBLIC TRANSPORT CAPACITY

86. Counsel for Mr Mulloy identified his "key point" on this Ground as that Knockrabo Investments (whose obligation was to demonstrate capacity) did not supply, and the Board did not have, the actual capacity of the public transport services serving the Site.[156] Mr Mulloy says that the Inspector identified only a theoretical and unreal capacity.

G2 – SPPR3 of the Height Guidelines

87. As noted above, by S.28(1C) PDR 2000 and s.9(3) of the 2016 Act and as explained in **O'Neill,**[157] there is deciding SHD permission applications a mandatory statutory duty of compliance with an SPPR – and, where their terms so require, SPPRs override local planning policy.[158] In other words, they can require material contraventions of development plans and local area plans. In granting the Impugned Permission despite material contravention as to building height, the Board relied on SPPR3 of the Height Guidelines 2018. SPPR3 provides, as relevant, that "*where*

> *"(A) 1. an applicant for planning permission sets out how a development proposal complies with the criteria above; and*

[155] Transcript Day 3, p46 et seq.
[156] Transcript Day 1, p95 – as to the obligation to demonstrate capacity see p116.
[157] O'Neill v An Bord Pleanála [2020] IEHC 356 §145 – "Section 28(1C) imposes a very clear mandatory requirement that, where specific planning policy requirements are specified in ministerial guidelines, they must be complied with. It is not sufficient merely to have regard to them (which is a relevant requirement in relation to other aspects of the guidelines)."
[158] S. 34(2)(ba) PDA 2000.

2. the assessment of the planning authority[159] concurs, taking account of the wider strategic and national policy parameters set out in the National Planning Framework and these guidelines; then the planning authority may approve such development, even where specific objectives of the relevant development plan or local area plan may indicate otherwise."[160]

88. While one should not overemphasise layout of text in interpreting a document, it is nonetheless notable that, by the use of "*(1)" and "(2)",* SPPR3(A) laid down two distinct requirements:

- First, the planning applicant must set out how its proposal complies with the criteria.
- Second, the Board must "*concur*".

89. §3.2 of the Height Guidelines ("§3.2") sets out *"the criteria above"*. §3.2 is headed **"***Development Management Criteria*" and states that:

- A planning applicant "*shall demonstrate*" to the satisfaction of the Board that "*the proposed development satisfies the following criteria*".[161]

- Where the Board "*considers that such criteria are appropriately incorporated into development proposals*" it "*shall apply*" SPPR3 under s.28(1C) PDR 2000. [162]

90. Amongst the criteria for the application of SPPR3 set by §3.2 is that:

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

I will refer to this as the "§3.2 Public Transport Criterion".

91. The meaning and application of this criterion for applying SPPR3 has been considered in cases including **O'Neill**,[163] a **Ballyboden TTG** case,[164] and **Jennings**.[165] Inter alia, they establish that,

- whether the site of a proposed development is "well-served"
  - is an "intensely practical", not a theoretical, question and
  - relates to the site specifically and not to the general area in which the site is situate.

- Proximity, frequency and capacity of public transport are linked but distinct elements of this criterion.

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[159] Which phrase includes the Board for this purpose.
[160] Emphases added.
[161] p13 – Emphases added.
[162] p15 – Emphases added.
[163] O'Neill v An Bord Pleanála & Ruirside Developments [2020] IEHC 356 §175.
[164] Ballyboden Tidy Towns Group v An Bord Pleanála & Shannon Homes [2022] IEHC 7, §92 et seq.
[165] Jennings & O'Connor v An Bord Pleanála & Colbeam [2023] IEHC 14 §472.

- only present public transport provision is relevant to meeting this criterion – plans for, or prospects of, future improvements of public transport are irrelevant. **O'Neill** is clear: *".. this requirement in the guidelines is expressed in the present tense which clearly requires that the site is currently well served by public transport. A plan for improving the public transport service in the future is not sufficient to satisfy this criterion;"*

- the requirement that the Site be well-served clearly must relate to the demand for public transport likely to be generated by the proposed development. Whether an undeveloped site is well-served by public transport is a pointless enquiry.

92. It is not for the Courts to prescribe precisely how that practical question should be approached. Perhaps, the approach may be affected by the availability of research and data. But what is essential is practicality. I note, for example, that it is routine to estimate, in traffic analysis, the car trips likely to be generated by a development and that was done in the present case.[166]

93. It is important to bear in mind that what is at issue as to public transport and SPPR3 is the satisfaction of a criterion for the statutorily mandated material contravention of local planning policy. It is hardly surprising that the Height Guidelines would set specific criteria for that eventuality. As to application of SPPR3, the issue is specifically satisfaction of those §3.2 criteria[167] – not a more general planning issue as to the adequacy of public transport or an holistic view of that adequacy in the context of the other planning merits and demerits of a proposed development. Those are undoubtedly issues proper for consideration in a planning appeal as to the overall analysis of proper planning and sustainable development. But they are not the issue as to the more focussed question of compliance with §3.2 criteria for the application of SPPR3. In my view, for reasons which will be apparent from what follows, it is highly desirable that even at the cost of some overlap and repetition, Inspectors' reports deal separately with these distinct criteria, as opposed to a more general planning view, so as to clearly avoid consideration of irrelevancies (such as, for example, prospects of future improvements in public transport services) when considering satisfaction of §3.2 criteria for the application of SPPR3. Indeed, that is a general observation as to the satisfaction of criteria for the application of SPPRs.

94. Finally, returning to the developer, an obligation to "demonstrate" and to "set out how" something is the case cannot be satisfied by merely, in the planning application, asserting it to be the case and awaiting a counter-assertion or even a counter-demonstration by an objector before having to go beyond assertion to demonstration. And while it would be so in any case, that the developer's obligation of demonstration crystallises in its planning application and before even objectors have opportunity to object, is particularly

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[166] Traffic & Transport Assessment §16. Conclusion: "It is estimated that the proposed Phase 2 development will generate a total of 62 peak hour car trips during the AM (11 inbound and 51 outbound) and 40 during the PM (27 inbound and 13 outbound). With the inclusion of the trips generated by the recently constructed Phase 1 & 1A developments, it is estimated that the overall development will be producing a total of 108 peak hour car trips during the AM (22 inbound and 86 outbound) and 76 during the PM (51 inbound and 25 outbound)."
[167] There are many others than that as to public transport but they are not here relevant.

clear in the "one-stop" and "front-loaded" SHD application system which will have been informed by pre-application consultation with the planning authority and the Board.

G2 – Public Transport – what do "Proximate" and "Frequent" mean?

95. For a Site to be well-served by public transport it is obvious that it must be accessible nearby – proximate. **O'Neill** is authority that *"proximity of the development to public transport connections …. is an express requirement that must be fulfilled if the criteria set out in para. 3.2 of the Guidelines are to be satisfied."* Also, and as has been seen, §3.2 requires that public transport serving a site be "frequent" before SPPR3 can apply. The Height Guidelines do not indicate, as to public transport, what is meant by "frequent" or what is proximate. One must interpret those concepts in context.

96. As to context, the Height Guidelines cite at §3.1, Development Management Principles, the need for "*good public transport accessibility*". As to identifying Intermediate Urban Locations where medium density residential development in excess of 45 residential units per hectare would be appropriate, the Height Guidelines envisages consideration of "*Proximity to high quality public transport connectivity*".[168] At §3.2, they require that the public transport be "*high capacity*". As has been said, capacity and frequency are distinct but linked criteria. While "high frequency" is not explicitly required, given the link and given each bus or Luas is inherently limited by a fixed capacity, the requirement of high capacity necessarily implies a frequency sufficient to deliver that high capacity. In reality, frequency is a precondition to high capacity. So, without being rigidly prescriptive, at least in general terms frequency will inevitably need to be at the higher rather than the lower end of the scale to satisfy the §3.2 criterion. To satisfy the §3.2 criterion will also require assessment by reference to existing spare capacity given existing demand and quantification of the demand likely to be generated by the proposed development.

97. As to context also and importantly in this case, one must read the ministerial planning guidelines together as coherent.[169] The Apartment Guidelines 2020[170] assist in understanding these concepts. Not least, they do so in guidelines specific to the type of development at issue here – apartments. Entirely predictably, the Apartment Guidelines[171] are identified in the Height Guidelines as "complementary".[172]

98. The Apartment Guidelines consider proximity to public transport in terms of walking distance.[173] As to proximity and frequency, they instance Sites within:

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[168] §2.12.
[169] Fernleigh Residents Association v An Bord Pleanála [2023] IEHC 525 §§47, 74, 110. This case was decided after trial of the present case but, as in that case, the principle that planning guidelines are expected to be coherent as between each other is an obvious one on first principles.
[170] Sustainable Urban Housing: Design Standards for New Apartments Guidelines for Planning Authorities 2020.
[171] Albeit the 2018 version – but identical in this respect.
[172] Height Guidelines §1.12.
[173] §2.4 in both the 2018 and 2020 versions. For the purpose of characterising sites as, Central and/or Accessible Urban Locations, Intermediate Urban Locations or Peripheral and/or Less Accessible Urban Locations.

- easy walking distance (i.e. up to 5 minutes or 400-500m) of reasonably frequent (min 15 minute peak hour frequency) urban bus services.

- reasonable walking distance (i.e. between 5-10 minutes or up to 1,000m) of high frequency (i.e. min 10 minute peak hour frequency) urban bus services.

- reasonable walking distance (i.e. up to 10 minutes or 800-1,000m) to/from high capacity urban public transport stops (such as DART or Luas).

- walking distance (i.e. between 10-15 minutes or 1,000-1,500m) of high capacity urban public transport stops (such as DART, commuter rail or Luas).

99. So, one can see that, according to the Apartment Guidelines,:

- “easy walking distance” is up to 500m.

- “reasonable walking distance”, beyond easy, is up to 1,000m. This includes distance to the Luas.

- “walking distance”, beyond reasonable, is up to 1,500m.

- “high frequency” urban buses operate at a minimum frequency of 10 minutes in peak hours.

- “reasonably frequent” urban buses operate at a minimum frequency of 15 minutes in peak hours.

100. This understanding of what high frequency means for buses had been prefigured in the GDA Transport Strategy 2016[174] – on which, indeed, the Board relies in other respects. It says, “*Radial bus services on the routes forming the Core Radial Bus Network will be operated at a high frequency, generally at a ten minute frequency during peak hours and a fifteen to twenty minute frequency for most off-peak hours.”*

101. Notably, and despite policy encouraging cycling – the Apartment Guidelines do not categorise the proximity of public transport by reference to cycling times. Perhaps this is because cycling is an uncommon means of catching buses and as, despite its recent burgeoning, cycling remains a minority taste. Whatever the reason, cycling does not form part of this analysis in the Apartment Guidelines. This omission must be presumed deliberate.

[174] Transport Strategy for the Greater Dublin Area 2016 – 2035 §6.1.

102. Though the §3.2 criterion as to public transport for the application of SPPR3 does not limit its satisfaction to sites within a public transport corridor, it is nonetheless notable that the Sustainable Residential Development Guidelines,[175] to underpin public transport efficiency, prescribe minimum net densities of 50 dwellings per hectare for sites within a "*public transport corridor*" – that is *"within 500 metres walking distance of a bus stop or within 1km of a light rail stop or a rail station."* This chimes with the Apartment Guidelines categories of easy walking distance of a bus stop and reasonable walking distance of a Luas stop.

103. The coherence and consistency of the GDA Transport Strategy, Sustainable Residential Development Guidelines and the Apartment Guidelines is notable in the foregoing as to what, in quantified terms, constitutes frequency and proximity of public transport to residential development.

104. Finally, the Development Plan's Sustainable Community Strategy, in allowing for higher density "*within circa 1 kilometre pedestrian catchment of a rail station, Luas line, BRT, Priority 1 Quality Bus Corridor and/or 500 metres of a Bus Priority Route*"[176] is consistent with the relevant Guidelines. Also, and while I do not suggest that §3.2 of the Height Guidelines requires that the Site be served by exceptional public transport and while I am also of the view that the Development Plan upward modifiers as to height do not apply to this Site[177] it is at least notable, as presumably reflecting a broad and expert view of proper planning, that §4.8.1 of the Development Plan, for the purpose of applying those upward modifiers (which would not attain the building heights proposed even if applicable), defines areas with exceptional public transport accessibility as those within a 500m walk of the Luas, DART and N11 and within a 100m walk of a QBC. The Site is treble those distances from the Luas, and N11 and far more again from the DART and the QBC. While my present decision does not turn on these observations as to the Development Plan, I am reassured by them as bolstering my view of a generalised and quantified understanding in planning policy and guidelines of the concepts of frequency and proximity of public transport to residential development.

<u>G2 – SPPR3 & Public Transport – The Planning Application</u>

105. Knockrabo Investment's MCS addresses the §3.2 Public Transport Criterion as follows:

> *"The site is c. 1.8km (22-minute walk) from Dundrum Luas Stop. Bus Routes No. 11 and No. 175*[178] *directly serve the subject site and are located within a 5-minute walk. The No. 11 is a high frequency route with buses every 10-15 minutes at peak hours. This connects the site with Dublin City (7km/35 minutes bus journey) and Sandyford Business District (4.2km/19 minute bus journey) which is also a large employer in the County. Additionally, the development is 1.5km (15*

[175] Guidelines on Sustainable Residential Development in Urban Areas 2009.
[176] §2.1.3.3 Policy RES3: Residential Density.
[177] See above.
[178] As the reports reveal, it operates from/to UCD to/from Kingswood Avenue (Citywest) through Mount Anville Road with a weekday frequency of 30 to 45 minutes in both directions.

mins walk) from a Quality Bus Corridor (QBC) with services to the city centre running every 6 minutes and similarly close to the Dundrum LUAS stop with services running every 7 minutes to the city centre."

Notably, this passage,

- addresses proximity and frequency of public transport.
- does not address, distinctly, capacity of public transport.
- does not attempt to estimate the demand for public transport likely to be generated by the Proposed Development.
- identifies the #11 bus as central to satisfaction of the §3.2 Public Transport Criterion.
- erroneously asserts that the #11 is a high frequency route with buses every 10-15 minutes at peak hours. As has been seen, and by the applicable Apartment Guidelines standard, that is not high frequency.
- erroneously asserts that the #11 connects the Site with Dublin City at peak hours at a frequency of every 10-15 minutes. In fact, as determined by the Inspector on foot of Knockrabo Investments' own Travel Plan,[179] it connects the Site with Dublin City only at a frequency of every 20-25 minutes in both directions. That is not even reasonably frequent by the applicable Apartment Guidelines standard – indeed, it is considerably less than reasonably frequent.
- does not mention the #17 bus.

106. Knockrabo Investment's Statement of Consistency & Planning Report specifically addresses the §3.2 Public Transport Criterion as follows:

"The subject site is 1.5km (c. 15 mins walk) from a Quality Bus Corridor (QBC) with services to the city centre running every 6 minutes and c.19 mins walk to Dundrum Luas Stop with services running every 7 minutes to the City Centre. Bus stops served by routes 11 and 17 are located within 6 and 7 minute walking from the site, respectively, with frequencies of 15-30 minutes. Go-ahead Bus Route 175 operates along Mount Anville Road (just outside the proposed development site) with a frequency of 30 to 45 minutes in both directions during the whole day.[180] The proposed development is located approximately 30 minutes outside of the City Centre by cycle. In addition, the Luas Green Line Capacity Enhancement and the BusConnects projects currently being promoted by the National Transport Authority (NTA) will improve the public transport service in Dublin City by increasing capacity and frequency for all customers. The Luas Green Line Capacity Enhancement project will provide extra capacity on the Luas Green Line and will cater for the growing demand on the line in the short to medium term by purchasing and introducing 26 new trams with 55 metre in length. According to NTA, an extended tram increases passenger capacity by 30%. The first extended tram was introduced on Luas Green Line in October 2019, with the other 25 new trams to become operational in the following months.
According to BusConnects, the benefits of the network redesign include an overall increase in bus services of 25%, increased peak hour capacity, increased evening and weekend services, 24-hour

[179] See below.
[180] As the reports reveal, it operates from/to UCD to/from Kingswood Avenue (Citywest) through Mount Anville Road with a weekday frequency of 30 to 45 minutes in both directions.

operations on some routes, a 16% increase in the number of residents located within 400m of a frequent bus service to the City Centre, new connections to schools, hospitals and other essential services and increased access to jobs and education.'"

Notably, this passage invokes irrelevancies to satisfaction of the §3.2 Public Transport Criterion – cycling and future public transport upgrade prospects. Also and as compared to the MSC,

- the frequency of the #11 bus is down from "every 10-15 minutes at peak hours" to "frequencies of 15-30 minutes."
- Dundrum Luas Stop is now a 19-minute walk away rather than 22 minutes.

However, elsewhere in this report[181] the passage from the MCS set out above is repeated verbatim.

107. Both the MCS and the Statement of Consistency & Planning Report cite the Apartment Guidelines' standards as to service of sites by public transport.

108. Knockrabo Investment's Traffic & Transport Assessment ("TTA") dated October 2021 does not in terms address the §3.2 Public Transport Criterion (nor do I suggest that it should have) but it does describe the "Existing Public Transport"[182] as follows:

"The proposed development is well served in terms of public transport provision. The number 11 Dublin route travels along Kilmacud Road/Goatstown to the east of the proposed development. Furthermore, route number 17 travels along Fosters Avenue and Roebuck Road linking to Blackrock Station.[183] Dublin Bus route 75 travels along Kilmacud Rd Upper and is accessible within approximately 1200m (c. 12-minute) walking distance to the southwest of the subject site. Dublin bus route numbers 116, 118, 145, 17, 46A, 46E, 7B, and 7D also operate along Stillorgan Road (N11) corridor as located to the east of the subject site.
The closest bus route to the proposed development is route number 11 operating along Kilmacud Road/Goatstown Road. It is approximately 500m walking distance (6-minute) from the site. Figure 1 below provides the nearest bus stop and walking distance in minutes. Route number 17 operating along Fosters Avenue is within 670m (7-minute) walking distance of the subject site.
The remaining bus services introduced above are accessible within 1500m (15-minute) walking distance of the subject site. ………. The majority of the Dublin Bus services operate daily and offer relatively frequent services summarised in Table 2. ………. In addition to the Dublin Bus routes outlined above, the proposed development is also directly served by Go-ahead Bus Route 175. It operates from/to UCD to/from Kingswood Avenue through Mount Anville Road with a weekday frequency of 30 to 45 minutes in both directions."

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[181] P19.
[182] §3.2
[183] i.e. the DART.

109. However, the TTA provides a table[184] which puts the #11 bus at a frequency, not of "*every 10-15 minutes at peak hours*" or *"frequencies of 15-30 minutes"* but simply as "*30 minutes*". Appended to the TTA is the TTA submitted in the application which resulted in Planning Permission D17A/1124 for Phase 2. Its equivalent table is to the same effect – i.e. "*30 minutes*".[185]

110. The TTA[186] identifies the Dundrum and Balally LUAS Stops at about 1.6km away – a 19-minute walk and a 5-minute cycle. Dundrum LUAS Stop offers 10 bike lockers and 25 bike racks. It states that generally, the Luas operates at a frequency of 4 – 6 minutes at peak hours.

111. Knockrabo Investments also submitted a "Travel Plan" – by the same consultants as produced the TTA and also dated October 2021. It does not in terms address the §3.2 Public Transport Criterion (nor do I suggest that it should have).[187] Indeed, it sets targets "*against the background of expanding public transport capacity*." But it does describe the "*Existing Public Transport*"[188] in terms similar to those in the TTA save that:

- it records that the nearest train station is the Booterstown DART station, about 3km from the Site, (a c. 35-minute walk or c. 10-minute cycle).
- Dundrum Luas Stop is now down to an 18-minute walk away rather than 22-minutes per the MCS.

It asserts that *"The surrounding area is well served by public transport with many bus routes and the Luas Green Line within walking and cycling distance of the development."*[189]

112. For present purposes, what is most notable is that the Travel Plan table[190] equivalent to that in the TTA,[191] which put the #11 bus at a frequency of 30 minutes, puts its frequency as follows:

Route No.	**From**	**To**	**AM Weekday frequency**	**AM Weekday frequency**
			(07:00 to 09:00)	***(17:00 to 19:00)***
11	Wadalei Park	Sandyford Business District	Every 10-15 minutes	Every 20 minutes
	Sandyford Business District	Wadalei Park	Every 20-25 minutes	Every 20-25 minutes

[184] §3.2.1 Table 2: Bus Route Frequency p9.
[185] Table 2.1: Dublin Bus Routes, p14.
[186] §3.2.2
[187] §1.3 states: Scope This Travel Plan has been prepared to provide guidance on how to create a positive atmosphere for residents, staff and visitors to the proposed development with regards to transportation and accessibility, and this Travel Plan will be a key operational feature of the development. The management company will implement a Travel Plan on an ongoing basis with the triple objectives of promoting sustainability, enhancing the use of public transport and reducing dependency on the use of the private car. This Travel Plan is intended to deal with the typical day-to-day operational conditions at the development. The targets set out in the plan will be achieved against the background of expanding public transport capacity.
[188] §3.4.
[189] P20.
[190] Table 1 | Dublin Bus/Go-ahead AM and PM Weekday Frequencies.
[191] §3.2.1 Table 2: Bus Route Frequency p9.

113. In other words, on the version provided in this table, the #11 bus runs at most at a frequency of every 10-15 minutes – and then only in the AM peak and only out of the city. Even that is not high frequency as envisaged in the Apartment Guidelines – i.e. a minimum[192] of every 10 minutes. At both peaks it links the Site and the city centre only every 20-25 minutes. That is well outside both the high frequency and reasonable frequency scope of the Apartment Guidelines.[193] Certainly, as to the #11 bus and by reference to this table and the standards set in the Apartment Guidelines, it is impossible to see how the §3.2 Public Transport Criterion requirement that public transport be "*high capacity and frequent*" can be said to have been met.

114. This Travel Plan table does not mention the #17 bus[194] but the TTA table,[195] if reliable,[196] ascribes to it a frequency of 15-30 minutes. Indeed, the Inspector says 20-30 minutes.[197] Whichever is correct, it is clearly not high frequency by Apartment Guidelines standards. And it is particularly not so in the role for which the Board mentioned it – access to a further form of public transport at Blackrock Rail Station for onward travel to a destination – most obviously the city centre.

115. At one level, it is difficult to know what to make, or what the Board could have made, of all this confused and confusing account by Knockrabo Investments of public transport serving the site. None of Knockrabo Investments' planning application documents, as recited above, are entirely consistent with each other and the Statement of Consistency & Planning Report is internally inconsistent. While some discrepancies could be called minor, one would imagine they would be picked up at final cross-checking before the application is filed. However, that the asserted frequency of the #11 bus ranges between 10 and 30 minutes – in which regard I note that these figures were asserted without reference to particular times of day – is striking. I would be inclined to infer that the table in the Travel Plan is the most accurate – if only because it is the most detailed – but it is not my place to do so. However, the Inspector does so: "*Table 1 of the submitted Travel Plan correctly states the peak and off-peak frequencies for the no.11.*"[198] And as I have observed, its content is, as to the #11 bus, inconsistent with satisfaction of the §3.2 Public Transport Criterion by reference to the standards set in the Apartment Guidelines.

116. What can also be said – indeed more importantly – is that Knockrabo Investments make no attempt to assess capacity of public transport – either estimating existing unused capacity or its adequacy to cater for the quantified demand for public transport likely to be generated by the Proposed Development.

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192 Emphasis added.
193 See below.
194 Route: Rialto – Kimmage Rd. – Churchtown Rd. – UCD Belfield – Blackrock Rail Station.
195 §3.2.1 Table 2: Bus Route Frequency p9.
196 Given its inaccuracy as to the frequency of the #11 bus.
197 Inspector's report §10.12.8.
198 Inspector's report §10.12.8.

117. For these reasons, and applying the law as I describe it in the next section of this judgment, I do not consider that it was possible in this case, by reference to the §3.2 Public Transport Criterion for the application of SPPR3(A) of the Height Guidelines, to conclude that Knockrabo Investments had, as to capacity:

- Demonstrated satisfaction of that criterion.
- Set out how its proposal satisfied that criterion.
- Appropriately incorporated satisfaction of that criterion into its development proposals.

G2 – SPPR3 & Public Transport – Developer's Duty to Demonstrate Compliance – the Law

118. Having considered Knockrabo Investments' planning application, is convenient to pause to consider the law as to developers' obligations as to the satisfaction of §3.2 criteria.

119. As stated above, it is notable that, by the use of "*(1)" and "(2)",* SPPR3(A) laid down two distinct requirements:

- First, the Planning Applicant must set out how its proposal complies with the criteria.
- Second, the Board must "*concur*".

In **O'Neill**, McDonald J held that the application of SPPR3 depends on satisfaction distinctly of each requirement:

> *"It is clear from the text of SPPR 3(A) that its application is dependent upon (a) an applicant for planning permission setting out how a development proposal complies with the "criteria above " and (b) an assessment by the Board concurring with that conclusion. The relevant criteria for this purpose are set out in para.3.2 of the Building Height Guidelines."*

120. That, expressly by §3.2, a planning applicant must "*demonstrate*" satisfaction of the §3.2 criteria is entirely consistent with,

- the further express requirement of §3.2 that SPPR3 is to be applied where the §3.2 criteria *"are appropriately incorporated into development proposals"* – which, of course, emanate from the developer.
- the requirement of SPPR3(A) itself that the planning applicant must "*set out how*" its proposal complies with those criteria.

In effect, the same requirement of the developer is expressed three times in the Guideline.

121. I pause to remind myself that Planning Guidelines are to be interpreted on **XJS** principles as if by an intelligent informed layperson and not as if commercial contracts or statutes. Highly legalistic parsing is not

the correct approach. Collins J in **Spencer Place**[199] agrees that **XJS** principles apply but observes that Guidelines issued under s.28 PDA 2000,

> *"….. particularly those which contain SPPRs, may impact significantly on the performance by planning authorities and ABP of their functions under the PDA and may have broad and significant planning and development implications for the wider public. It therefore appears reasonable to expect that they should be drafted with care, that the nature and scope of the requirements thereby imposed on planning authorities and ABP should be specified clearly and that they should be capable of operating consistently with the PDA."*

122. In that context I consider that the intelligent informed layperson, on perusing §3.2 and SPPR3, would be readily struck by its repetition of the obligation on the developer to demonstrate compliance with the §3.2 criteria. For reasons which here follow, my view to that effect is amplified by the observation by Collins J that:

> *"The reasonably informed reader of SPPR 3 would also be alive to the distinction between development plans and planning schemes and, in particular, would appreciate the significant difference in the nature and scope of the assessment involved in determining ordinary applications for planning permission and that involved in relation to scheme applications. In that context, it seems to me, the reader would, in general, readily understand why developments plans and planning schemes might be considered to warrant differential treatment in this context and would, specifically, appreciate the significant difficulties that would arise for planning authorities if SPPR 3(A) was to apply to scheme applications."*

While this observation by Collins J does not precisely apply, a broadly similar observation can be made here of the insight – even if only broad and general – of the reasonably informed reader into the place and function of an SPPR in the planning process as shedding light on why it is that developers must actively and positively demonstrate compliance with the §3.2 criteria.

123. The matter goes further. The Board must "concur" with the Developer's conclusion that the Site is well-served by high capacity and frequent public transport. Concurrence is agreement. Both are concepts which necessarily relate back to the matter with which concurrence or agreement is expressed.

124. At first glance, this "double lock"– the content of the developer's application as to satisfaction of the §3.2 criteria and the Board's concurrence – may seem surprising. Why should it matter what the planning applicant had said if the Board draws the required conclusion? Why should this be an exception to the usual principle that a planning applicant's error is not fatal to a planning decision if it did not "flow into" that decision?

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[199] Spencer Place Development Company Limited V Dublin City Council [2020] IECA 268; [2020] 10 I.C.L.M.D. 96 §71 et seq.

125. It must be remembered that the effect of the applicability of an SPPR is that, unlike an ordinary provision of a planning guideline to which regard need merely be had, the SPPR must be applied. And it must be applied, if needs be, to overthrow the application of the otherwise applicable and democratically-adopted development plan or local area plan – plans which are, in the ordinary way, *"a critical element of the planning regime"* and *"the primary reference point for …. assessment and determination"* of planning applications – **Spencer Place**.[200] In that light, the planning applicant's obligation makes sense. Inter alia, it facilitates fairness of public participation in the planning process by alerting the public so it can respond to the prospect of application of an SPPR in derogation from local planning policy – which, otherwise, represents the "*solemn representation*" "*justified by the common good and answerable to public confidence*", that the planning authority will discharge its statutory functions, including making planning decisions, strictly, openly and transparently in accordance with the published plan – **Byrne**.[201] While in practice, material contravention of development plans in accordance with law is not uncommon, speaking generally, its legal moment is undiminished. In that context, and while I do not decide that it was legally necessary, that guidelines should stipulate strict criteria for the application of an SPPR is entirely unsurprising.

126. While SPPRs may apply to all planning decisions, this facilitation of public participation seems notably important to the fairness of the "one-stop" SHD process. As McDonald J observed in **O'Neill**[202] – as to the issue of reasons but in more general terms of fairness: *"…. in the context of the fairness of any particular process … the existence of an appeal from the deciding body is relevant."*[203] There is no appeal from an SHD planning permission decision. Again as to reasons, but in my view in an observation generally relevant to issues of fairness in public participation, McDonald J observed that reasons were "*especially*" required *"in the context of an application under the 2016 Act which gave the local residents only one opportunity to have their concerns and objections considered by an expert planning body".*[204] So, as compared to the normal planning process, the public, in making submissions in an SHD planning application, is denied,

- first the opportunity of further submissions within the first instance planning process (an opportunity ordinarily and notably governed by the requirements of the interests of justice and fair procedures[205]).
- second, the opportunity, after the decision of the planning authority, of making further submissions in an appeal to the Board.

In the normal planning process the public, in availing of those further opportunities, will have been incrementally better informed, by the process, of the planning issues at stake (such as the application of an SPPR) and will have the opportunity to respond accordingly. The Oireachtas saw good reasons for denying the public of those opportunities – not least the housing crisis. But safeguards in mitigation should come as no surprise.

[200] Spencer Place Development Company Limited v Dublin City Council [2020] IECA 268; [2020] 10 I.C.L.M.D. 96, Collins J. §10.
[201] Byrne v Fingal County Council [2001] 4 IR 565.
[202] O'Neill v An Bord Pleanála [2021] IEHC 58 §75.
[203] Citing Crayden Fishing Co. Ltd v Sea Fisheries Protection Authority [2017] 3 I.R. 785 O'Donnell J., at p. 806.
[204] O'Neill v An Bord Pleanála [2021] IEHC 58 §75.
[205] E.g. s.131 PDA 2000 & Wexele v An Bord Pleanála [2010] IEHC 21.

127. So, it is understandable that the drafters of the SPPR would have envisaged the necessity that, in availing of its single opportunity of participation, the public will have been fully informed by the developer of "*how*" its proposal "*complies with the criteria*" for the application of an SPPR which will overthrow local, democratically adopted, statutory planning policy. Such a view seems to me entirely of a piece with the premise of the SHD process that, having had the advantage of pre-application consultation with the planning authority and the Board (in which, one would expect, the prospect of the application of SPPRs will have been discussed), the developer will "front load" its preparation to ensure that the planning application and enclosed documents are as complete as possible when the application is made – **Crekav**.[206]

128. Since the hearing of this case, judgment has been given in yet another **Ballyboden TTG** case.[207] It considered, inter alia, a challenge to a planning permission alleging the developer's failure to demonstrate transport capacity for the purposes of §3.2 and SPPR3 of the Height Guidelines. Humphreys J quashed the permission explicitly applying the decision in an earlier **Ballyboden TTG** case.[208] He said:

> *"68. The problem for the board is that the developer addressed frequency but not capacity, contrary to what is envisaged by the 2018 guidelines. Here the board admitted that the information from the developer was "not great".*
>
> *69. The critical point is that there was no compliance with the requirement that "the applicant shall demonstrate to the satisfaction of the Planning Authority/ An Bord Pleanála, that the proposed development satisfies the following criteria: At the scale of the relevant city/town … The site is well served by public transport with high capacity …".*
>
> *70. In the absence of such compliance the board could not have lawfully gone on to apply SPPR3 or to rely on s. 37(2)(b)(iii) on the basis of compliance with SPPR3.*
>
> *71. The inspector supplied figures of his own, perhaps understandably so at a human level given that the legislation didn't allow him to seek further information from the developer. But that doesn't constitute compliance with SPPR3, and nor is it really the role of the board to swoop in to save applications for development where the developer fails to meet statutory requirements. Doing so pushes at the boundaries of the vaunted quasi-judicial role of the board.*
>
> *72. Even if SPPR3 envisaged that the board could provide the necessary information where the developer failed, which it doesn't, the inspector's report implies an assumption for the purpose of his figures that virtually all buses will be virtually empty on arrival at the relevant bus stop. The basis for that is inferentially the location of the terminus, but that in itself doesn't guarantee virtual emptiness. Compounding all of this, the inspector erroneously put the onus on those participating in*

[206] Crekav Trading GP Ltd v An Bord Pleanála [2020] IEHC 400 §§257 & 258.
[207] Ballyboden Tidy Towns Group v An Bord Pleanála & McCabe Durney Barnes [2024] IEHC 66. §62 et seq.
[208] Ballyboden Tidy Towns Group v An Bord Pleanála & Shannon Homes [2022] IEHC 7, [2022] 1 JIC 1001.

the process to demonstrate lack of capacity, rather than addressing his mind to the prior and more fundamental obligation of the developer to demonstrate the existence of capacity, as set out expressly in the 2018 guidelines themselves which the board was purporting to apply – a point already made to the board by Holland J in Ballyboden I, albeit without noticeable effect on its litigation strategy here.

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

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

129. While that decision[209] post-dates the hearing in the present case, it consists in the application of the principles stated in the earlier **Ballyboden** case and in my view also flows from the identification in **O'Neill** of what I have called the "double lock". It does not make new law. It merely assists in pithily expressing prior authority. I have therefore not considered it necessary to revert to the parties in this regard. However, and perhaps regrettably given my part in it, there is another line of recent authority to somewhat different effect.

130. I have already, above and as to the identification of the local policy as to height, held that Knockrabo Investment's error did not flow through into the Board's decision in the sense recently considered in **Walsh**[210] and **Fernleigh**.[211] It could be suggested that a similar issue arises here as to Knockrabo Investment's obligation to demonstrate and set out how satisfaction of the §3.2 Public Transport Criterion was incorporated in its development proposal.

131. In **Walsh**, the Board granted an SHD permission in material contravention of the applicable development plan as to building height. By s.9(6) of the 2016 Act, the validity of that permission depended on satisfaction of the requirements of s.37(2)(b) PDA 2000. S.37(2)(b)(iii) allows permission having regard to planning guidelines. The judgment in Walsh addresses a question of satisfaction of development management criteria set out in the Building Height Guidelines. It is clear from the context that these are the §3.2 criteria. Though it is not stated in the judgment, it follows that the case was one in which the Board had invoked SPPR3 in granting permission – the activation of SPPR3 is the function of satisfying the §3.2 criteria. The §3.2 criterion at issue was not that as to public transport. It was as to maximising daylight in the apartments. Mr Walsh alleged that the "*developer failed to provide the Board with material from which the board could come to a conclusion of compliance with the development management criteria*". Though it is

[209] Ballyboden Tidy Towns Group v An Bord Pleanála & McCabe Durney Barnes [2024] IEHC 66. §62 et seq.
[210] Walsh v An Bord Pleanála & St. Clare's GP3 Ltd [2022] IEHC 172 (High Court (Judicial Review), Humphreys J, 1 April 2022).
[211] Fernleigh v An Bord Pleanála & Ironborn [2023] IEHC 525 §65 & 66.

not stated in the judgment, it follows that Mr Walsh's case was that the criteria for applying SPPR3 had not been satisfied. The judgment states:

> *"But a failure by a developer to provide material, in and of itself, is not generally a basis for certiorari. It is true that in certain contexts such as a defect in the application form itself or some other document essential to jurisdiction, any failing by the developer or applicant in a process might be a ground for certiorari as such, but in the context here, any shortcomings in the developer's material would only become a problem if they flow through into the decision-maker's analysis. Thus it is the approval of the application by the decision-maker without adequate material, not a failure by the developer to furnish material, that is a ground for certiorari[212] ……. Applicants seem to misunderstand this conceptual point with almost predictable regularity, and the present case furnishes no exception."*

132. In Fernleigh, I rejected a submission that this observation by Humphreys J was a "side-wind". I remain of that view but should say that the observation by Humphreys J cited above was obiter. Despite it, Humphreys J did quash the permission impugned in Walsh for the Board's failure (as opposed to the Developer's failure) to properly address the §3.2 criterion as to daylighting.

133. In Fernleigh, considering an issue of satisfaction of the §3.2 daylighting criterion for application of SPPR3, and citing Walsh, I stated as follows:

> *"It seems to me that the underlying rationale of the requirements of the Developer specifically made in SPPR3 and §3.2 is to ensure that the Board has adequate materials and reasoning before it. A developer who fails to meet those requirements clearly runs a risk of an adverse decision by the Board. But if by other means the Board has adequate materials and can engage in reasoning adequate to support a decision to grant permission, such that the shortcomings in the developer's materials do not flow into the Board's analysis and if those shortcomings have not resulted in procedures unfair to other participants in the process (for example by way of their not being position to respond to materials and reasoning not proffered by the developer), I respectfully agree with Humphreys J, that the developer's failure is not a ground for certiorari. The requirements of fair procedures vary with circumstances and certiorari would require demonstration of real and substantive, as opposed to formal, unfairness –* ***Wexele****.[213] While I do not rule out the possibility of exceptions, it is difficult to see how, generally, justice would require certiorari where the developer's error has not flown into the Board's analysis."*

[212] Humphreys J cites Conway v An Bord Pleanála [2022] IEHC 136.

[213] Wexele v An Bord Pleanála [2010] IEHC 21. At §20, Charleton J said: "Fundamentally, if a complaint is made that an applicant was shut out of making a submission, that party must show that they have something to say. What they have to say must not be something that has already been said. Nor can it be a reiteration in different language of an earlier submission. If a party is to meet the onus of alleging unfairness by the Board in cutting them out for making a submission they must reveal what has been denied then, what they have to say and then discharge the burden of showing that it had been unjust for the Board to cut them out of saying it."

However, in Fernleigh I quashed the impugned decision in any event for non-satisfaction of the criterion as to daylight provision set by §3.2 of the Height Guidelines 2018 for the application of SPPR3. So my foregoing observation is also obiter.

134. As will be seen, in the present case I am in a position to decide this ground by reference to the Inspector's analysis of the question of satisfaction of the §3.2 Public Transport Criterion. Knockrabo Investments' failure to demonstrate that satisfaction and set out how current public transport service to the Site is "high capacity" did flow into, or at least was repeated in, the Board's Impugned Decision. Accordingly I need not, on this occasion, resolve the difference of authority to which I have referred. I therefore leave to another case a firmer view on the question of circumstances in which a planning applicant's failure to meet its §3.2 requirements of demonstration might ground certiorari even though the error did not flow into the Board's decision.

G2 – SPPR3 & Public Transport – Objections & DLRCC view

135. Mr Mulloy's objection to the Board included the following:

> *"Very limited or accessible Public Transport Infrastructure to support these increased numbers. Two infrequent bus routes (11 & 175) within 5-15 minutes' walk and the nearest Luas or Dart station is 20 - 30 minutes' walk …"*

136. The DLRCC CE Report records the elected members' views and objections by members of the public to the Proposed Development as including that:

- Public transport in the area is limited.
- The Luas is already at capacity.
- Irregular bus routes in the area, not within walking distance of good public transport.
- The site is only served by 2 infrequent buses (11 and 175). There is no bus corridor for the #11 bus.
- The #11 bus departs Glasnevin[214] at a 15-minute interval between 07:00 and 09:00 and at a 20-minute in the evenings. It departs Sandyford[215] at a shortest interval of 20 minutes in the morning and evening peaks.

I observe that this account of the frequency of the #11 bus is very similar to that in the table in Knockrabo Investment's Travel Plan – as opposed to those in its other planning application documents.

137. Nonetheless, neither the DLRCC CE Report, though recommending refusal of permission for failure to satisfy the §3.2 criterion as to effect on visual amenity for applying SPPR3 and so having §3.2 in view, nor its appended Transportation Planning Report, articulated concerns as to adequacy of public transport

[214] Specifically Wadelai Park. i.e. from the Site, south, to Sandyford.
[215] i.e. from the Site, north, to the city.

services to the Site – either generally or as to satisfaction of the §3.2 Public Transport Criterion for applying SPPR3. However, the DLRCC CE Report does, in principle, welcome a density of 83 units per hectare[216] – *"noting the positioning of the site in relation …. public transport …".* But it is also clear that DLRCC did not record any assessment of satisfaction of the §3.2 Public Transport Criterion. That is not a criticism of DLRCC and it is clear that, in general terms, DLRCC saw no issue as to the adequacy of public transport. But it does deprive the Board of material compensating or substituting (if that is permissible) for the developer's failure to demonstrate satisfaction of the §3.2 Public Transport Criterion.

G2 – SPPR3 & Public Transport – Board Decision and Inspector's Report

138. As recorded earlier, the Board considered that a grant of permission would materially contravene the Development Plan and GLAP. But it considered that such a permission would be justified, inter alia, with regard to s.37(2)(b)(iii) PDA 2000 as the height of the Proposed Development complies in particular with SPPR3. By virtue of the Board's adoption of its Inspector's report, the Board's reasoning is to be found in that report.

139. The Inspector addresses density, including reference to the §3.2 Public Transport Criterion, as follows:

Inspector's Report as to Density[217]
• The Site is within a "*public transport corridor*"[218] by virtue of 2 bus stops within 500m.
Comment: This is undoubtedly correct. Though, as a separate matter, the Site is clearly well outside the 1,000m Luas public transport corridor as identified by reference to the Sustainable Residential Development Guidelines.
• §3.2 of the Height Guidelines requires, if SPPR3 is to be applied, that a proposed development be '*well served by public transport with high capacity, frequent service and good links to other modes of public transport'*.
• Observers had raised concerns as to the capacity and frequency of public transport in this area.
• Capacity is intrinsically linked to frequency.
Comment: This is correct and correctly does not equate them.
• The site is c.480m from the 11 bus on Mount Anville Road and c.100m from the #175 bus stop on Goatstown Road. • The #11 has a frequency of 15-20 minutes in peak hours and no. 175 has a frequency of 30 minutes.

[216] Recalculated across the overall site to which permission D17A/1124 relates. See note on density above.
[217] Inspector's report §10.5.7 et seq. as to Density. I have amended layout for purposes of exposition but have not altered text.
[218] Within the meaning of the Guidelines on Sustainable Residential Development in Urban Areas 2009.

Inspector's Report as to Density[217]
Comment • By reference to the categorisation of frequency in the Apartment Guidelines,[219] and as best can be discerned from Knockrabo Investments' Travel Plan Table: o the #11 frequency, ▪ is never high (i.e. minimum 10 minute frequency at peak hour). ▪ is reasonable – 15-20 minutes – only in the morning peak and only in the Sandyford direction. ▪ is never even reasonable to and from the City and is not reasonable from Sandyford in the evening peak. • the #175 bus is never reasonably frequent.
• Based explicitly on the empty capacity of a double decker bus, the Inspector calculates the hourly am peak capacity of the #11 bus at a peak frequency of 15-20 minutes at c.320 passengers, and that of the #175 bus at c.160 passengers.[220]
Comment: • While, in the absence of other information, this attempt at calculation may have been an understandable reaction by the Inspector, it in substance amounts to an attempt to remedy part of the planning applicant's failure to demonstrate, as the §3.2 Public Transport Criterion requires, the true capacity of those bus routes. • I say "part" as even this calculation does not attempt to estimate the demand for public transport likely to be generated by the Proposed Development. • This calculation is highly theoretical and inevitably overestimates actual capacity as it assumes every bus arrives empty in peak hours. I can take judicial notice that this is unlikely in practice. • Though this error is self-evident, as it happens it is the same error as that identified in the recent **Ballyboden TTG case**[221] – the *"inspector's report implies an assumption for the purpose of his figures that virtually all buses will be virtually empty on arrival at the relevant bus stop."* • However, even as a theoretical calculation, and assuming the accuracy of Knockrabo Investments' Travel Plan Table,[222] the figure of c.320 passengers incorrectly assumes the frequency in all peak hour vectors of the frequency of the #11 bus to Sandyford in the morning peak. It very clearly, and significantly given the Apartment Guideline's categorisation of frequencies, understates frequency as to 3 of the 4 peak hour vectors. It does not reflect peak hour frequency or even theoretical capacity to and from the City Centre or from the Sandyford in the evening peak.
• In addition to the immediate bus stops, the site is also accessible to the #17 on Roebuck Road (which links to the DART and is c.670m/7min walk) and 1500m (15min walk) will allow access to a range of high frequency services on the N11 linking to the city centre along a QBC.

[219] See above.
[220] §§10.5.8. See also §10.12.7.
[221] Ballyboden Tidy Towns Group v An Bord Pleanála & McCabe Durney Barnes [2024] IEHC 66. §72
[222] Table 1 | Dublin Bus/Go-ahead AM and PM Weekday Frequencies.

Inspector's Report as to Density[217]
• The site is also proximate to two Luas stops, c. 1.6km from the site (16min walk) and I note the no. 175 also stops proximate to the Dundrum Luas stop.
• The Inspector notes that a number of observers refer to the lack of public transport in the area. • She disagrees "*as the bus service, existing and proposed (BusConnects), the Luas, and links to the DART, are in my opinion of high frequency and high capacity, suitable for the immediate area. I consider the services suitable to accommodate the proposed development, in particular noting the scale of the development in the context of the existing population. I discuss public transport in more detail in Section 10.12 hereunder.*"
• Citing the Apartment Guidelines,[223] the Inspector states that the Site is o 1.6km from each of two high capacity Luas stops (marginally beyond the 1.5km recommended walking distance). ▪ She later states[224] that the increased distance is "*marginal and the proximity to the Luas will serve the site well*." o proximate to high frequency bus services (guidelines also state, '*or where such services can be provided*' and given this site is already serviced by Dublin Bus, it is clear that it is possible to increase the services at this location with increased demand, and this is the NTA strategy across Dublin for bus based public transport, and capacity and frequency are intrinsically linked).
Comment: • It is important to note that these passages are not intended by the Inspector to address the §3.2 Public Transport Criterion. That explains her perfectly proper reference to the prospect of improved public transport services – which prospect is irrelevant to that criterion. • However, these passages do cite §3.2 and purport to quantify capacity issues. So my comments at this point should be borne in mind when considering the issue of compliance with §3.2. • The Inspector describes the Luas stops, at 1.6km, as marginally beyond the 1.5km recommended walking distance. This appears to be a reference to the "walking distance" identified in the Apartment Guidelines. By reference to the "well-served" requirement of the §3.2 Public Transport Criterion, she does not address the facts that the Site, o is not within the "easy" or even the "reasonable" walking distance of 800 – 1,000m recommended by the Apartment Guidelines. o is over half again beyond the 1,000m Luas public transport corridor as identified by reference to the Sustainable Residential Development Guidelines. o distance from the Luas is variously described in the planning documents as at an 18-, 19- and 22-minute walk away and, perhaps more significantly, at 1.8km,[225] as against, for example, a "reasonable" walking distance of 800 – 1,000m. • For reasons which I hope will be by now apparent, as to quantification and classification of frequency and capacity by reference to the applicable standards, it is difficult to see a basis in these passages, for a conclusion, as to present public transport services, that the Site is well served by "*high frequency and high capacity" public transport.*

[223] The Sustainable Urban Housing Design Standards for New Apartment Guidelines (2020).
[224] Inspector's report §10.12.26.
[225] Knockrabo Investment's MCS.

140. The Inspector specifically addresses the §3.2 Public Transport Criterion as follows:

Inspector's Report as to Section 3.2 Criteria.[226]
• The site is 1.6km from two Luas stops and adjoins a bus stop on Mount Anville Road (#11 – 30 min frequency) and there is a bus stop within 500m on Goatstown Road (# 175 – 15/20 min peak frequency).
Comment: • As to distance from the Luas, see my comments above. • As to the 30-minute frequency of the #11 bus, 30 minutes seems to be an understatement in light of the inconsistent material in the planning application documents. Indeed the inspector herself later describes it as inaccurate.[227] However, taking this passage on its face, in light of the frequency standards in the Apartment Guidelines it is difficult to see how a 30-minute frequency could much contribute to satisfaction of the §3.2 criterion. • And as has been shown, correcting that frequency to that asserted in the Knockrabo Investments' Travel Plan Table does not advance the case for satisfaction of the §3.2 Public Transport Criterion.
• Both the Mount Anville and Goatstown Roads are identified on the Development Plan maps as '*proposed quality bus/bus priority routes*'.
Comment: This is irrelevant to the analysis of satisfaction of the §3.2 Public Transport Criterion – which is confined to analysis of present public transport services.[228]
• The #11 connects the site with Dublin City (7km/35 minutes bus journey) and Sandyford Business District (4.2km/19 minute bus journey) which is a large employer in the County.
• There are additional bus services on the N11, which is 1500m (15 min walk) to the northeast. While a further walk/cycle from the site than the other two routes, this route is a Quality Bus Corridor and offers an additional variety of bus services with a particularly high frequency of certain services, specifically the 46A bus (every 7-8 mins).
• I note as well as being proximate to the Luas and bus routes along Mount Anville and Goatstown, the accessibility of the site also supports the more active modes of walking and cycling, with cycling facilities available at the Luas stops and along the N11.
Comment: • As to satisfaction of the §3.2 Public Transport Criterion: o Walking and cycling are irrelevant as modes of transport in their own right as they are not modes of public transport. o It is difficult to understand the reference to

[226] Inspector's report §10.7.16 et seq.
[227] §10.12.8.
[228] O'Neill v An Bord Pleanála & Ruirside Developments supra.

<table>
<tr><th>Inspector's Report as to Section 3.2 Criteria.[226]</th></tr>
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▪ cycling facilities along the N11.
▪ walking, as that is the default method of getting to public transport.
o See my comments above as to proximity to the Luas by reference to Guideline standards.
• I interpret the reference to cycling facilities at the Luas stops as facilitating access to the Luas from the Site. But the Apartment Guidelines do not identify cycling distance to public transport as a proximity criterion.
• Accordingly, it is difficult to see, as to a criterion, for mandatorily overriding a Development Plan or Local Area Plan, that the site be 'well served by public transport with high capacity, frequent service", and as a matter of the proper interpretation of that criterion, that the Luas is "proximate" to the Site or that those Luas stops or a QBC and its bus services on the N11, 1.5km away, can appreciably contribute to the satisfaction of the §3.2 Public Transport Criterion.
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• Both the Mount Anville and Goatstown routes are furthermore capable of accommodating greater frequency urban bus services should they be required as the population in this area increases (the capability of a route to accommodate frequent urban bus services is referenced as a criteria for intermediate urban locations in the Apartment Guidelines). There are notable plans for increasing public transport frequency and capacity in this area under BusConnects (see Section 10.12 hereunder), which is not to say the existing site is not well served by public transport, but merely noting it will be further enhanced.
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Comment:
• To the comment which follows there is one caveat: the words "which is not to say the existing site is not well served by public transport," are significant.
• However, in a part of the Inspector's report expressly devoted to the question of satisfaction of the §3.2 Public Transport Criterion, this content is clearly irrelevant to a criterion confined to analysis of present public transport services.[229] At very at least, it confuses the issue.
• The present position, as to the #11 and the #175 bus, is that neither is even "reasonably frequent", much less "high frequency" as those concepts are established by the Apartment Guidelines.
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• I consider the site is ideally located and well serviced with options to access existing high frequency high capacity public transport routes, with links between modes,
• as well as increased access and connections available through more active modes of walking/cycling, with a vast array of services, amenities, and high employment areas within walking and cycling distance.
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Comment:
• The first part of this passage is relevant and the second is irrelevant to the satisfaction of the §3.2 Public Transport Criterion.
• Though relevant, I find the first sentence difficult to understand. By reference to the standard of the Apartment Guidelines, those services which are proximate to the Site (the #11 and the #175 bus) are
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[229] O'Neill v An Bord Pleanála & Ruirside Developments supra.

Inspector's Report as to Section 3.2 Criteria.[226]
not frequent and those which are frequent (the Luas and bus services on the N11/QBC) are not proximate.
• All road networks comprise a limited capacity in terms of accommodation of the private car and it is only through increasing the population at locations such as this which are well serviced by public transport and which have the capability of increasing services as demand requires, will sustainable communities be developed.
• The capacity of the bus service (as with rail) adapts to demand, which to a large extent reflects the prevailing state of the country's economy and as such can decrease as well as increase. This is monitored by the NTA and additional services and as such increased capacity is provided where demand exists.
Comment: This content is irrelevant to the analysis of satisfaction of the §3.2 Public Transport Criterion – which is confined to analysis of present public transport services.[230]
• There is no documentary evidence, including on foot of review of NTA publications, to support observer claims that there is a lack of capacity in the existing services.
Comment: This is a perfectly reasonable observation. But it should not obscure (and I do not say it did) that, by §3.2 and SPPR3 of the Height Guidelines, it is for the developer to positively "demonstrate" and "set out", and for the Board to positively concur in, satisfaction of the §3.2 Public Transport Criterion.
• Overall, I am satisfied that the level of public transport currently available is of a scale that can support this future population, • with alternative options of walking and cycling also of value given the proximity of the site to services/ amenities/ education/ employment zones. • Additional planned services in this area by way of BusConnects, will be supported by providing for developments such as this which will support a critical mass of population at this accessible location within the Metropolitan area, in accordance with national policy for consolidated urban growth and higher densities.
Comment: • In its own terms and leaving aside the adequacy of the basis for it, as an expression of a general and contextual planning view regarding the adequacy of public transport this passage is entirely sensible. • However, as a conclusion regarding the satisfaction of the §3.2 Public Transport Criterion for the application of SPPR3 it is confused and in part irrelevant. Indeed, the only relevant part is "*that the level of public transport currently available is of a scale that can support this future population*". And even that is notably anaemic as to a criterion that the *"site be well served by public transport with high capacity, frequent service and good links to other modes of public transport."*
Comment:

[230] O'Neill v An Bord Pleanála & Ruirside Developments supra.

Inspector's Report as to Section 3.2 Criteria.[226]
• By way of general observation, nowhere in this section of her report – that concerned with satisfaction of the §3.2 Public Transport Criterion – does the Inspector address, from a practical point of view, whether the Site is, in real and practical terms well-served by high capacity public transport. • She had set out to do so as to the #11 bus earlier in the report but, as demonstrated above, in an entirely theoretical manner - assuming that, at rush hour, every bus arrives empty to the bus stop - and by reference to a frequency which was significantly incorrect in 3 of the 4 relevant vectors. • Nor is there any analysis of the demand for public transport likely to be generated by the Proposed Development.

141. Later in her report, the Inspector assesses the more general topic of "*Traffic, Transportation and Access"*.[231] Notably, beyond content already noted above and as relevant to satisfaction of the §3.2 Public Transport Criterion, she,

- notes observers' concerns as to the level of public transport and of road congestion in the area.[232]
- identifies the #11 bus frequency in terms of Knockrabo Investments' Travel Plan Table[233] as correctly stating the peak and off-peak frequencies of the #11. She identifies the alleged 30-minute frequency – which she had assumed in her §3.2 analysis – as inaccurate.[234]
- states "*While concerns exist in relation to existing public transport capacity, I note the wide range of options open to people in this area and I am satisfied that the service as it exists is high capacity and is high frequency."*

142. As to this last observation, given the analysis set out in this judgment above and that the Inspector's observation is preceded in considerable degree by reference to the possibility of better services, it is not apparent on what factual precise basis this observation is properly based. As to the "concerns", it is unclear whether the Inspector is merely noting the concerns of others or agreeing that they are to any degree justified. Reading the report as a whole, I infer the former on balance.

143. The Inspector concludes that she sees no evidence "*such as would warrant a restriction of development on zoned residential land within the Dublin City and Suburbs area at a time of a housing crisis which national and local policy is seeking to address. Neither the PA or the TII have raised concerns in this regard. The site is appropriately located in terms of access to …… public transport*."[235] It is important to understand this as what it is – a perfectly proper conclusion as to the general planning merits of the Proposed Development. It is not, and does not purport to be, a conclusion as to satisfaction of the §3.2 criteria for application of SPPR3 – for example, it encompasses expectations as to future improvement of public transport.

[231] Inspector's report §10.12. It could be read as relating to impacts during construction only but that is not how I read it.
[232] Inspector's report §10.12.2.
[233] Wadelai Park to Sandyford Business District, with a peak frequency of 10-15 min in the am peak (20min in reverse direction), 20 mins in the evening peak (in both directions), with off peak frequency of 20-30 min.
[234] Inspector's report §10.12.8.
[235] Inspector's report §10.12.8.

Concluding Comment on the Inspector's report.

144. As will have been seen, I have considerable difficulties with the Inspector's analysis of the satisfaction of the §3.2 Public Transport Criterion for application of SPPR3. As to frequency and proximity, they are probably best encompassed in my observation above that, by reference to the standard of the Apartment Guidelines, those services which are proximate to the Site (the #11 and the #175 bus) are not frequent and those which are frequent (the Luas and bus services on the N11/QBC) are not proximate.

145. However, whatever about frequency and proximity, it is clear that to whatever extent the Inspector addressed capacity, and given the considerable dependence of her conclusion on the #11 bus, she failed to address capacity in the practical, as opposed to theoretical, sense required by the caselaw:

- First, she assumed a frequency which applied to only one of the four peak-hour parameters and to neither of those relating to travel between the Site and the City Centre.
- Second, she assumed all buses arrived empty at the nearest bus stop – which clearly will not be the case at peak hours.
- Third, she did not at all consider the quantum of demand for public transport likely to be generated by the Proposed Development.

146. As was said in **Ballyboden TTG**:[236]

> *"…. from their frequency and knowledge of the capacity of a bus when empty, an Inspector can draw some conclusions about theoretical capacity. However, practical conclusions are a different matter and are what matters and are what the Board must address. The obvious question is as to what extent the theoretical capacity is already taken up by the needs of the population already using the busses in question and by the expected populations of developments already permitted in reliance on existing public transport ... Perhaps precision is unattainable in this regard but neither, it seems to me, can the issue be ignored when the guidelines clearly require that it be addressed."*

147. In that regard I note and reject, as contrary to authority, the Board's position as evident in the following exchange at trial as to satisfaction of the §3.2 Public Transport Criterion as to capacity:

> *"[Judge]: ……. there has been absolutely no attempt to assess whether that capacity is in fact available, any of that capacity is available in practical terms to this site.*

[236] Ballyboden Tidy Towns Group v An Bord Pleanála & Shannon Homes & Shannon Homes [2022] IEHC 7.

> *[Counsel]: My proposition of law is, having done that,[237] the Inspector did not have to do what the Court just said …."*

To be clear, I reject the Board's argument in the present case that this view – that a practical as opposed to a theoretical view of capacity is required - is wrong. The consequences of planning decisions are practical not theoretical. As O'Donnell J said in **Balz**,[238] and MacMenamin J repeated in **NECI**,[239] they are decisions with the consequences of which people have to live – the occupants of the development as well as its neighbours. As their consequences are practical, the analysis which informs them must be practical. That approach is necessary to the public trust in the expertise, independence and impartiality which was the raison d'etre of the Board at its foundation in the 1970's and remains so as recognised by O'Donnell J in **Balz**.

<u>G2 – SPPR3 & Public Transport – Mulloy Pleadings & Submissions</u>

148. Mr Mulloy's core plea is that the Impugned Decision contravenes SPPR3 as the Board failed to assess whether the Site was, within the meaning of §3.2 of the Height Guidelines, well served by high capacity public transport before granting permission in material contravention of the Development Plan. By way of particulars, he pleads,

- the §3.2 Public Transport Criterion for application of SPPR3.
- the relevant content of the Knockrabo Investments' MCS[240] and TTA.[241]
- the Inspector's assessment of satisfaction of the §3.2 Public Transport Criterion – including,
  - her theoretical identification of the hourly a.m. peak capacity of the #11 bus at c.320 passengers and of the #175 at c.160 passengers, in a total of 480 for both routes [242] and
  - her mooting of future capacity upgrades.

149. Mr Mulloy pleads that,

- none of this demonstrates that there is in fact capacity in the public transport network. Theoretical capacity is no use to a potential commuter if a bus or Luas is full by the time it arrives at their stop.
- the Inspector erred in considering mooted future capacity upgrades for the Luas and the Bus Connects network.
- Knockrabo Investments and the Board erred in that they failed to assess how the §3.2 Public Transport Criterion was satisfied as to capacity. Knockrabo Investments did not supply any information indicating

[237] Counsel had said: "The submission, Judge, here is that in this case the developer has satisfied the Board of the existence of high capacity, high frequency public transport that well serves this site. Now, that has been done to the satisfaction of the Inspector who has analysed the distance to the Luas, the distance to the various buses, the distance to the DART and the connection to the DART. The Inspector has looked at the carrying capacity of those buses. The Inspector is aware of the existence of the Luas and the DART, and collectively in this case that satisfies the criteria that there are, well serving the site, transport links of high capacity." It is important to understand this passage in terms of the type and extent of capacity assessment in fact done as recorded above in this judgment.
[238] Balz v An Bord Pleanála [2019] IESC 90, [2020] 1 I.L.R.M. 367.
[239] Náisiúnta Leictreach Contraitheoir Éireann (NECI) v Labour Court [2021] IESC 36, [2021] 2 I.L.R.M. 1.
[240] P20.
[241] P42.
[242] §§10.5.8. See also §10.12.7.

the actual capacity (as opposed to the frequency) of the public transport services serving the Site, and there was no such information before the Board.

150. Mr Mulloy in submissions emphasised that:

i. Satisfaction of the §3.2 Public Transport Criterion for the application of SPPR3 must, by the explicit terms of §3.2, be "*demonstrated*"[243] and "*set out*"[244] by Knockrabo Investments in its planning application before any question even arises of objectors or the planning authority raising the issue and whether or not they do so. He cites **O'Neill** as cited in **Ballyboden TTG**.[245] Knockrabo Investments failed to demonstrate how the high capacity requirement was satisfied.

ii. The Board repeated that error – no information before it indicated the actual capacity (as opposed to the frequency and the theoretical capacity) of the public transport serving the Site. There is no assessment of capacity in the materials submitted by Knockrabo Investments and the Board identifies none.[246]

iii. What evidence there was established that public transport serving the Site is very poor. He cites the observations to the Board of the DLRCC elected members[247] and Observers[248] and his own.[249]

iv. As identified in **O'Neill**,[250] the §3.2 Public Transport Criterion is that the Site currently be well served by high capacity public transport. A plan or prospect of improved public transport is irrelevant and their citation by the Inspector as contributing to satisfaction of the §3.2 Public Transport Criterion is an error of law.

v. The Impugned Decision fails to comply with the law generally set out in **Ballyboden TTG**[251] as to satisfaction of the §3.2 Public Transport Criterion. I refer the reader to that decision but from it, Mr Mulloy relies notably on the following:

- Public transport "capacity" and "frequency" are linked but distinct concepts. The answer to the frequency question, while relevant, is not per se the answer to the capacity question. Both must be addressed before the §3.2 Public Transport Criterion can be considered satisfied. Otherwise the analysis is merely theoretical and superficial as opposed to practical.

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[243] §3.2.
[244] SPPR3.
[245] O'Neill v An Bord Pleanála & Ruirside Developments [2020] IEHC 356 as cited in Ballyboden Tidy Towns Group v An Bord Pleanála & Shannon Homes [2022] IEHC 7 §90.
[246] Citing the Inspector's report §10.7.16 et seq.
[247] DLRCC CE Report p15. See above.
[248] DLRCC CE Report p9
[249] Mr Mulloy's submission to the Board 2 December 2021.
[250] O'Neill v An Bord Pleanála & Ruirside Developments [2020] IEHC 356 §157 et seq. See also Ballyboden Tidy Towns Group v An Bord Pleanála & Shannon Homes [2022] IEHC 7 §95.
[251] Ballyboden Tidy Towns Group v An Bord Pleanála & Shannon Homes [2022] IEHC 7 §93 et seq.

- As to a particular planning application, public transport capacity is an intensely practical – as opposed to a theoretical – issue. That buses are frequent is no consolation to the commuter standing at peak hour on the way to or from work at a bus stop at which buses pass every 15 minutes or more frequently if all are already full, or even if the first two are full.

- The criterion is that the site itself[252] be *"well served"* – actually as opposed to theoretically – and not just that the public transport corridor generally is well served.

- From his or her frequency and knowledge of the capacity of an empty bus, an Inspector can draw some conclusions about theoretical capacity. However, practical conclusions are a different matter and are what matters and are what the Board must address.

- The obvious question is as to what extent the theoretical capacity is already taken up by the needs of the population already using the buses in question and by the expected populations of developments already permitted in reliance on existing public transport. Perhaps precision is unattainable in this regard but neither, can the issue be ignored when the Height Guidelines clearly require that it be addressed.

G2 – SPPR3 & Public Transport – ABP Pleadings & Submissions – & Some Commentary

151. The Board pleads and submits[253] that,

i. to fully understand the approach of the Developer, the Inspector and the Board – who considered that there was both high frequency and high capacity public transport services to accommodate the Proposed Development – it is necessary to refer to the context, which includes how relevant plans/policies interact with/influence public transport capacity in the area.

ii. public transport available at/proximate to the Site includes bus and Luas services and, via interchange/linked services, the DART.

iii. the Height Guidelines follow the strategic objectives of the NPF. The NPF states that the NTA[254] is responsible for preparing a Transport Strategy[255] for the Greater Dublin Area ("GDA"). The GDA Transport Strategy 2016 – 2035[256] highlights national policy to provide for additional capacity to meet demand. It provides:

- a framework for transport infrastructure delivery in the GDA over those two decades.

[252] Emphasis in original.
[253] It is no criticism of them to say that the Board's submissions are highly repetitive of its pleas.
[254] National Transport Authority. See Appendix to this Judgment: A note on statutory bodies with responsibility for transport.
[255] S.2 PDA 2000 defines "transport strategy" as having the meaning assigned to it by section 12 of the Dublin Transport Authority Act 2008.
[256] Transport Strategy for the Greater Dublin Area 2016-2035.

- a clear statement of transport planning policy for the GDA, around which other agencies,[257] can align their investment priorities.

iv. As the Inspector noted,[258] Development Plan policies as to public transport, reflect national policy to upgrade capacity to meet demand and include, in Chapter 2, entitled "*Sustainable Communities Strategy*", the following:

- Policy ST3: Development of Sustainable Travel and Transportation Policies.[259] This policy is *"to promote, facilitate and cooperate with other transport agencies in securing implementation of …. the Draft[260] GDA Transport Strategy 2016-2035.[261] Effecting a modal shift from the private car to more sustainable modes of transport will be a paramount objective ….."*

- Policy ST15: Luas Extension.[262] This policy is to promote, facilitate and co-operate with other agencies in securing the extension of the Luas network in the County as set out in the Draft GDA Transport Strategy 2016-2035 – including any future upgrade to a Metro.

- Included in the Draft GDA Transport Strategy 2016-2035 is a proposal: "*To upgrade passenger capacity on the existing Luas Green Line, as required to meet demand*."[263]

I observe that this last plea is laid out in a way capable of being understood as though the Inspector had explicitly recorded the content of page 61 of the Development Plan in the sentence recited above. She did recite policies ST3 and ST15 but not that sentence.

v. The Inspector refers to the Draft GDA Transport Strategy 2016-2035 "*which describes certain public transport services as, **by definition,**[264] "high capacity". Same provides:*

> *"Heavy rail (DART and Commuter Rail) provides the core high capacity infrastructure and services that are central to the Greater Dublin Area's public transport system.[265]*
> *…*
> *The Dublin Light Rail system (Luas) consists of two lines… These lines provide a high frequency, high capacity service along these corridors, with trams operating at a frequency of up to every 3 minutes at peak hours …"[266]*

[257] Involved in spatial planning, environmental protection, and delivery of other infrastructure such as housing, water and power.
[258] Inspector's report p17.
[259] Development Plan Chapter 2 §2.2.6.3 p54.
[260] The GDA Transport Strategy 2016-2035 was still in draft when the Development Plan was adopted. Only the adopted version was exhibited. No-one has suggested that the Strategy adopted was materially different to that draft for purposes of the present proceedings.
[261] Also, the Department of Transport's document 'Smarter Travel, A Sustainable Transport Future 2009 –2020'.
[262] Development Plan Chapter 2 §2.2.8.5 p61.
[263] Development Plan Chapter 2 §2.2.8.5 p61. Emphasis added by the Board.
[264] Emphasis added by me.
[265] §3.2.1 GDA Transport Strategy 2016-2035.
[266] §3.2.2 GDA Transport Strategy 2016-2035. Emphasis added by the Board.

I observe that this plea could be read as asserting that the Inspector had explicitly recorded the foregoing content of the Draft GDA Transport Strategy 2016-2035. She did not. The plea should be read in the following sense.

> *"The Inspector refers to the Draft GDA Transport Strategy 2016-2035. That Strategy describes certain public transport services … etc".*

vi. The Draft GDA Transport Strategy 2016-2035, to which the Inspector refers, states:

(a) As to bus services: "*as passenger demand increases, additional capacity will be added to the bus network where it is required…*"[267]

(b) As to rail services: [268]

- *"[m]etro services will be introduced as demand increases and the infrastructure and rolling stock are commissioned*";
- "*DART services will operate to a high frequency with adequate capacity to cater for the passenger demand*";
- "*[s]ervices on the Luas / Metro network will be operated in alignment with passenger demand, and are likely to operate on a 3 minute frequency in peak hours*".

(c) As to *"optimising interchange and transport facilities", "It is intended to provide high quality passenger interchange points, which facilitate convenient transfer between public transport services…"*[269]

Again, this plea requires a gloss. The inspector did refer to the Draft GDA Transport Strategy 2016-2035 but did not specifically invoke the pleaded content.

vii. "*It is also noted, as referred to by the Inspector, that the Apartment Guidelines*[270] *consider the Luas to be "high capacity urban public transport*".

This plea is unfortunately framed. It gives the impression that the Inspector referred to the content in question. She did not. She referred to the Apartment Guidelines but not to this specific content.

viii. It is apparent from, inter alia, the GDA Transport Strategy 2016-2035 and the Development Plan, that a flexible approach is adopted in respect of capacity to cater for greater demand if and when it arises. This approach applies to the area of the Site.

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[267] §6.1 GDA Transport Strategy 2016-2035.
[268] §6.3 GDA Transport Strategy 2016-2035.
[269] §6.6 GDA Transport Strategy 2016-2035.
[270] Sustainable Urban Housing: Design Standards for New Apartments Guidelines for Planning Authorities 2020 at p6.

ix. In considering the issue of transport capacity, "*taking account of the wider strategic and national policy parameters*", it can be observed that national policy is to increase capacity as required to meet demand – as the Board's submissions put it, policy is that *"when demand arises, it will be met".*

152. Importantly, the foregoing pleas set policy context at a strategic level. In considering a planning application that strategic policy context is undoubtedly relevant to a general appraisal of the relevance of public transport to the merits and demerits of the proposed development. However, and in some contrast, if it comes to materially contravening the Development Plan via SPPR3, the §3.2 Public Transport Criterion is quite specific. Much of the foregoing pleas and submissions is irrelevant unless **O'Neill**[271] and **Ballyboden TTG**[272] are wrong in holding that it is the present, actual and practical public transport service which matters to the question whether the Site, as it is proposed to be developed, is at present well-served by high capacity and frequent public transport such that the relevant Development Policy or Local Area Plan may be materially contravened.

153. In my view, that the Board's concurrence that §3.2 criteria are satisfied is, by SPPR3, to "*take account of the wider strategic and national policy parameters set out in the National Planning Framework and these guidelines*" does not allow the Board to assess satisfaction of the §3.2 Public Transport Criterion by reference to future, as opposed to present, public transport provision. An intelligent layperson reading SPPR3 in light of §3.2 would not need to observe that generalia specialibus non derogant in order to conclude that this phrase in SPPR3, applicable as a generality to all the many criteria set in §3.2, is not intended to overthrow the clear text of the §3.2 Public Transport Criterion as limited to current public transport provision. In this light, I observe the irrelevance, for example, of the Board's pleading a non-existent metro. These pleas represent, as of September 2022,[273] a failure by the Board to accept the law as stated in **O'Neill** over two years earlier – while not asking that I overrule O'Neill or even explicitly suggesting that O'Neill was in error and in any event not invoking a **Worldport**[274] basis for departing from O'Neill. The effort to distinguish O'Neill as dependant in this regard on inconsistencies in the Inspector's findings is simply unconvincing. **O'Neill** binds me. In any event, I agree with it. Only present public transport services are relevant to the satisfaction of the §3.2 Public Transport Criterion. Of course, more generally, the prospect of better public transport services is often a relevant planning consideration – indeed, often very relevant. But here we are concerned only with the satisfaction of the § the §3.2 Public Transport Criterion such as to permit – indeed require – via SPPR3, material contravention of the Development Plan and Local Area Plan.

[271] O'Neill v An Bord Pleanála & Ruirside Developments [2020] IEHC 356.
[272] Ballyboden Tidy Towns Group v An Bord Pleanála & Shannon Homes [2022] IEHC 7.
[273] The date of the Board's Statement of Grounds.
[274] Re Worldport Ireland Limited (In Liquidation) [2005] IEHC 189.

154. Finally, I may I think be permitted to observe that **O'Neill** has been the authoritative interpretation of the §3.2 Public Transport Criterion since July 2020. That criterion has not been amended since to encompass consideration of plans and prospects to upgrade public transport provision.

155. I return to the Board's pleas and submissions.

x. The Developer, as part of the application, wrote[275] to TII,[276] the NTA[277] and the Minister for Transport.[278] None raised public transport capacity issues. Nor does the DLRCC CE Report.

xi. The Developer's application documents included the TTA, Travel Plan, Statement of Consistency & Planning Report and Material Contravention Statement, certain of the content of which it recites.

Inter alia these pleas could be read as suggesting that the TTA and/or the Travel Plan quantified public transport capacity and/or the public transport demand likely to be generated by the proposed development. That may not have been the intent of the plea but for the avoidance of doubt I was referred to at trial and have found no such quantification.

xii. The Inspector's report as to transport capacity considers public transport, including frequency and capacity, repeatedly.[279]

xiii. It is apparent from the foregoing that, based on the evidence presented and the information available including relevant policies and national guidance, the Inspector concluded that there was no issue with public transport capacity as a result of the proposed development and that the Site was well served by same. The Inspector found that the relevant criterion under the Height Guidelines was satisfied. The Board agreed.

xiv. Mr Mulloy raised no issue with public transport capacity in his submission to the Board.

In my view this plea is factually incorrect. As recorded above, while he specifically identified the infrequency of the buses, he more generally asserted "*Very limited or accessible Public Transport Infrastructure to support these increased numbers.*" In any event, while capacity and frequency are distinct concepts and one can have frequent service and yet lack capacity, the converse is not true: one cannot have high capacity without frequency. A plea of infrequency is in effect a plea of incapacity. Also, a bus may be frequent but inaccessible by reason of lack of capacity. I will not split the hairs of Mr Mulloy's objection.

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[275] Pursuant to Art. 295(1)(k) – (o) PDR 2001.
[276] Transport Infrastructure Ireland – see appendix to this judgment.
[277] National Transport Authority – see appendix to this judgment.
[278] Properly, the Minister for Transport, Tourism and Sport.
[279] I have considered that content above.

Also, it is clear from the scheme of §3.2 and SPPR3 of the Height Guidelines, in any event but especially as applied in the "one stop" and "front-loaded" scheme of the 2016 Act, that if local planning policy[280] is to be compulsorily overruled by the application of SPPR3, the planning applicant, must before the public is heard and in any event regardless of public objection, "demonstrate" and "set out how" the §3.2 Public Transport Criterion is satisfied. And the SPPR3 may not be applied unless the Board, of its own motion obligation, concurs. There is no question here of the Board being "gaslit"[281] by Mr Mulloy's Ground 2 as to public transport capacity.

xv. There was no expert evidence before the Board to suggest there was inadequate public transport capacity for the given area.

That is correct and would not be irrelevant had there been material before the Board from which it could positively discern public transport capacity. But here it is ultimately beside the point. Knockrabo Investments had a positive duty of demonstration of capacity (which it did not meet) and the Board had a positive duty to establish capacity sufficient to satisfy the §3.2 Public Transport Criterion before it might properly apply SPPR3.

xvi. If Knockrabo Investments failed to "assess" capacity (which is denied) – such failure should not result in certiorari given the Board's demonstration of capacity to satisfy §3.2 of the Height Guidelines.

While it is not a major issue, Knockrabo Investments' assigned task was not to "assess" capacity but to demonstrate it. It did not do so. Nor did the Board.

156. Counsel for the Board at trial[282] submitted that the §3.2 Public Transport Criterion, interpreted in light of the NPF and the GDA Transport Strategy 2016,

- does not require what he termed an "empty seats" analysis – of transport capacity.
- deems the Luas to be of high capacity – such that its actual capacity to serve a particular site is to be ignored.
- recognises that demand for predates supply of transport capacity. As he submitted, "*demand comes first*".[283]

157. As he had to in order to make these arguments, Counsel said that **O'Neill** and **Ballyboden TTG**[284] can be distinguished. I respectfully disagree. Notably, he did not make a **Worldport** argument that I should depart from them. O'Neill clearly decides that only present transport capacity is relevant to the satisfaction

[280] The Development Plan and/or the GLAP.
[281] See, as to 'gaslighting' principles, inter alia, North Great George's Street Preservation Society v An Bord Pleanála [2023] IEHC 241, §30.
[282] Transcript Day 3 p62 et seq.
[283] Transcript Day 3 p63.
[284] Ballyboden Tidy Towns Group v An Bord Pleanála & Shannon Homes [2022] IEHC 7.

of the §3.2 criterion. Ballyboden TTG clearly decides that capacity must be distinctly assessed and assessed as an intensely practical issue as to services to the site in question.

G2 – SPPR3 & Public Transport – Discussion and Decision

158. By way of general observation, and while I hasten to disavow any suggestion of discreditable attempt in pleading the present case, it will be apparent from observations above that pleadings should be precisely and accurately phrased. If it is intended to rely on the referral by an author of a document – for example the Inspector – to another document and intended to rely also on specific content of that other document to which content that author did not explicitly refer, that should be clear on the pleadings. In making that observation, I do not intend to suggest that any particular legal consequences flow in this case as to a party's reliance on such content. Nor am I unmindful of the effect of incorporation by reference. My concern is that, as a matter of general practice, the factual position be accurately and precisely pleaded. Pleadings must be clear as to exactly what document is being cited at any point and what exactly that document says. For example, reliance on incorporation verbatim and incorporation by reference should be distinctly recognisable on the pleadings.

O'Neill

159. As stated earlier, **O'Neill** is authority that, by the §3.2 Public Transport Criterion, proximity to public transport is a precondition to the application of SPPR3. It is of some interest that, in **O'Neill,** the Board's inspector's the §3.2 Public Transport Criterion analysis was that a site within 1.2km of a Luas and rail station was "*not particularly accessible by rail".* That is not of course, to say that it follows merely from that analysis that the Inspector in this case was wrong in regarding a Luas at 1.6km, or 1.8km (it is not clear which and she did not determine the issue) as a significant contributor to a finding that the Site is well served by high capacity frequent public transport. Of course, Inspectors are free to differ in their planning judgments, as is the Board free to differ with its inspectors. But in terms of the predictability and consistency desirable in the application of quantified standards, the difference is at least somewhat disappointing. McDonald J in **O'Neill** characterised the inspector as having identified the *"the lack of a readily accessible rail link"* and in that context, and in the context also of the inspector's view about poor capacity on the existing public bus route, he considered that the Board had failed to explain how the §3.2 Public Transport Criterion had been satisfied.

160. It was in this context that McDonald J said that the public transport criterion of §3.2 *"is expressed in the present tense. Thus, the site must, currently, be well served by public transport with high capacity and must, currently, have good links to another form of transport."*

161. O'Neill is also authority that if SPPR3 is to be applied, as it was in this case, satisfaction of §3.2 criteria is a discrete, specific and mandatory requirement. It is not a matter "in the mix" as it were - to be weighed or balanced with other planning desiderata such as the urgency of housing provision or higher density. That is the specific significance of a criterion. McDonald J said:

> *"While …. the Inspector suggests that the concerns of local residents in relation to the existing quality and availability of the bus service were outweighed by the perceived need to further "densify" a brownfield site of this nature, the fact remains that, if this element of the para. 3.2 criteria is to be satisfied, the site must currently be well served by public transport."*

GDA Transport Strategy 2016

162. Returning to the present case, as the Board pleads, the Inspector cited Development Plan Policy ST3: Development of Sustainable Travel and Transportation Policies,[285] and Development Plan Policy ST15: Luas Extension.[286] Board pleads, accurately, that Policy ST15 cites the Draft GDA Transport Strategy 2016-2035 as including a proposal *"To upgrade passenger capacity on the existing Luas Green Line, as required to meet demand."*[287] The Board stressed the Strategy. In that Strategy the following appear as to the Luas:

> *"These lines provide a high frequency, high capacity service along these corridors, with trams operating at a frequency of up to every 3 minutes at peak hours."*[288]
>
> *"In terms of the service provided, Luas is generally regarded as frequent and reliable …"*
>
> *"The existing Luas Green Line could deliver a limited increase in line capacity. Currently, the line is operating close to its maximum theoretical capacity during the peak demand periods."*[289]
>
> *Luas Green line reconfiguration "will include the introduction of longer (and higher capacity) trams."*[290]
>
> *"….. significant investment is required to develop this system into a full network and provide the capacity required in the future, most notably the integration of the Red and Green Lines, and the introduction of Metro services."*[291]

[285] Development Plan Chapter 2 §2.2.6.3 p54.
[286] Development Plan Chapter 2 §2.2.8.5 p61.
[287] Emphasis by the Board. This is a citation of the Development Plan §2.2.8.6. This precise sentence does not appear in that Strategy.
[288] §3.2.2 GDA Transport Strategy 2016-2035.
[289] §3.4.1 GDA Transport Strategy 2016-2035.
[290] §6.3 GDA Transport Strategy 2016-2035.
[291] §3.4.1 GDA Transport Strategy 2016-2035.

The area the Luas serves *"including Cherrywood and other potential development areas, will require high capacity public transport. It is, therefore, proposed to upgrade the Luas Green Line to Metro standard from the city centre, …. as far as its current terminus at Bride's Glen."*[292]

"It is intended to further develop the light rail network in the GDA through the implementation of the following projects:

> *Metro South - Luas Green Line Capacity Upgrade from the south city centre to Bride's Glen, completing a full north-south high-capacity high-frequency cross-city rail corridor through the central spine of the Metropolitan Area;"*[293]

"Services on the Luas / Metro network will be operated in alignment with passenger demand, and are likely to operate on a 3 minute frequency in peak hours;"[294]

163. I should first say that I do not see the undoubted general requirement[295] that the Board have regard to the GDA Transport Strategy 2016-2035 in considering the general issue of *"proper planning and sustainable development of the area"* as overthrowing the terms of the specific §3.2 criteria for the mandatory application of SPPR3 to materially contravene the GLAP and Development Plan.

164. The foregoing passages demonstrate that in 2016 the GDA Transport Strategy considered that

- despite operating at "*up to every 3 minutes at peak hours*", "*The existing Luas Green Line … is operating close to its maximum theoretical capacity during the peak demand periods*" and
- despite envisaged "*introduction of longer (and higher capacity) trams*", it "*could deliver a limited increase in line capacity*".

Indeed, this reference to the Luas's ability to deliver only "*a limited increase in line capacity"* likely underlay the adoption in the 2016 Strategy of the intention, not since realised and no longer intended,[296] to "*upgrade the Luas Green Line to Metro standard from the city centre, to …. Bride's Glen*"[297] in order to provide the necessary "*high capacity public transport service*" to "*Cherrywood*[298] *and other potential development areas*,"[299] already served by the Luas to Bride's Glen. The Site lies between these areas and the city centre. This Metro South was one of the schemes informed by "*the need to accommodate expected growth in demand between segments along Corridor F, as well as from these segments to the city centre …"*.[300] Clearly,

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[292] §4.2 GDA Transport Strategy 2016-2035.
[293] §5.3 GDA Transport Strategy 2016-2035.
[294] §6.3 GDA Transport Strategy 2016-2035.
[295] S.31J. PDA 2000 provides that in any case in the GDA where …… An Bord Pleanála is carrying out any relevant function … the transport strategy of the DTA shall be a consideration material to the proper planning and sustainable development of the area or areas in question.
[296] I can take judicial notice that the envisaged Metro South had been abandoned by the date of the Impugned Decision.
[297] Bride's Glen, south-east of Cherrywood, is the current southern terminus of the Luas Green line.
[298] A Strategic Development Zone.
[299] This is reference to Corridor F identified in the Strategy as "Arklow – Wicklow – Greystones – Bray – Cherrywood – Dundrum – Dun Laoghaire – Dublin City Centre." It includes the Luas Green Line.
[300] §4.2.6 GDA Transport Strategy 2016-2035.

in 2016 the Strategy considered that the Luas itself could not supply to those areas the "*require(d) high capacity public transport*".

165. All this seems to me to be far from the Strategy commitment as depicted by the Board, of an almost automatic and automatically adequate increase in Luas capacity to meet whatever demand might arise either on the Green Luas line generally or from the Site in particular. It also demonstrates that as to an "*intensely practical*" question – **Ballyboden TTG**[301] – the Board's recourse to formalistic arguments deeming the Luas to be, as a matter of law, inevitably and unarguably high capacity in terms of its ability to serve a particular site (leaving aside the proximity issue) is at very least unattractive. And, while impressive in itself, it does not seem to me that the phrase *"In terms of the service provided, Luas is generally regarded as frequent and reliable …"* is consistent with an assertive and definitive preclusion of an argument that in particular circumstances or as to serving particular locations it may be neither. Neither is such a preclusion suggested by the identification of the need for the Metro South to replace the Luas south of Charlemont. Save for noting that the Metro is no longer intended south of Charlemont, I take no judicial notice of, much less criticise, doubtless complex, events since this plan was adopted in 2016. But it is not difficult to infer that the inadequacy, anticipated in 2016, of the Luas to service, as the "*require(d) high capacity public transport*", Cherrywood and other potential development areas at least implies questions as to the real capacity of trams arriving at peak hour from those locations at intermediate Luas stops to the City Centre such as those at Kilmacud and Dundrum identified as available to serve the Site. Perhaps those questions can be readily and reassuringly answered, but even leaving aside the proximity issue, the Impugned Decision does not consider them.

166. None of this is to suggest that such considerations and the answers to those questions should, as a matter of law or policy, necessarily prevail, either generally or as to particular proposed developments, over the urgent requirement for new homes. Nor does any of this trammel the Government in adjusting policy – amending guidelines – as priorities develop and change. But that is not a warrant for ignoring those considerations of real transport capacity or for ignoring what the relevant Transport Strategy – and the relevant Heights Policy – actually say. And it is the Board which has invoked the 2016 Strategy which remains current policy – even if it is known that the Metro, if and when it is built, will not run south of Charlemont. Nor does any of the foregoing constitute a planning judgment on my part as to whether the Proposed Development is desirable generally or should be permitted having regard to general planning considerations as they relate to service of the Site by public transport services – present or foreseen.

167. Undoubtedly, national policy is to satisfy demand for public transport – and to respond as that demand arises. At least generally, any other policy would be bizarre. But that need not imply and I am not convinced that, but need not determine whether, national policy generally is "*build and public transport will come*". As counsel for the Board put it, remembering that he did so in the context of a planning permission

[301] Ballyboden Tidy Towns Group v An Bord Pleanála & Shannon Homes [2022] IEHC 7.

to build high density apartments, *"transport policy does not support the notion that trains and buses run at half or three quarters capacity to have empty space available. Demand comes first".*[302]

168. But my proper concern is limited to the much more specific question of law whether the §3.2 Public Transport Criterion as to serving this Site has been satisfied such that the application of SPPR3 in derogation from local planning policy was in accordance with law. There is nothing improbable or contradictory about a system in which general national policy of the kind described just above would not apply to a specific issue of allowing material contravention of development plans to build high density apartment blocks on the footing[303] that their occupants will be particularly dependent on public transport. And, at least in general and ceteris, paribus it makes perfect sense to build such apartments where public transport is already available and has spare capacity. It also makes sense to provide in compensation, as it were, for the material contravention of development plans, that such contravention will only occur where such capacity exists.

169. Importantly, that is not to say that any such compensation was an inevitable policy choice or that policy in this regard could not be changed. For example, if in hindsight it were considered unrealistic to require existing spare transport capacity as a criterion for applying SPPR3, the §3.2 Public Transport Criterion could be amended accordingly.

170. But what matters now and in this case is what policy choices were in fact made – what §3.2 now sets as the Public Transport Criterion for applying SPPR3. Notably that criterion is expressed in Height Guidelines which recognised the need to *"accommodate anticipated population growth … by building up and consolidating the development of our existing urban areas ………. to provide substantially more population growth within existing built-up areas where there is more infrastructure already in place"*[304] and to "*actively plan for and bring about increased density and height of development*"[305] with a view to *"see that greatly increased levels of residential development in our urban centres and significant increases in the building heights and overall density of development is not only facilitated but actively sought out and brought forward… "*. Yet, as McDonald J observed in O'Neill, as to public transport frequency and capacity well serving the site, §3.2 is expressed in the present tense. It must be considered that this was a deliberate policy choice reflecting a balance thought proper by policymakers when contravention of development plans is to be permitted.

171. Further, I think counsel for Mr Molloy was correct in submitting that if the §3.2 criterion as to public transport serving the Site could be satisfied by reliance on a policy that public transport will be supplied to

302 Transcript day 3 p63.
303 Inter alia based on a policy of modal shift to public transport encouraged by, for example limited parking space provision. See Inspector's report §10.12.22 et seq. – in particular §10.12.27.
304 Height Guidelines §1.9.
305 Height Guidelines §2.4 & SPPR1.

meet any demand – "*build and public transport will come*" – that would eviscerate it as a criterion. It would be a criterion incapable of not being satisfied. It would not be a criterion. That cannot be correct.[306]

172. While the foregoing treatment of this issue ventilates various concerns which the Board may wish to consider on any remitted decision, it suffices for me to hold, as I do, that

- Knockrabo Investments failed to demonstrate that, and set out how, the §3.2 criterion as to public transport capacity is satisfied.
- The Inspector and the Board, in respects identified above and in its consideration of the question whether the §3.2 criterion as to public transport serving the Site is satisfied, failed to consider and find in accordance with law satisfaction of the §3.2 Public Transport Criterion as to capacity and so applied SPPR3 in the Impugned Decision other than in accordance with law.

173. I respectfully reject the Board's argument that this ground should be dismissed as authority to date has not required an "empty seats" analysis of transport capacity. True, authority has not prescribed the precise method of capacity analysis – no doubt, methods may acceptably vary. But authority has made plain that the issue of capacity is, as was said in **Ballyboden TTG**,[307] "*intensely practical*". A capacity analyses which assumes a frequency of the #11 bus not met by 3 of the 4 peak hour vectors, which assumes that every bus arrives empty at the bus stop during peak hours and which makes no attempt to quantify the demand for public transport likely to be generated by the Proposed Development is anything but practical. On the contrary, it is both intensely theoretical and clearly and fundamentally flawed even in its premises. So, Knockrabo Investments' failure to demonstrate that, and set out how, current public transport service to the Site is "high capacity" did flow into the Impugned Decision. I will quash the Impugned Decision accordingly.

174. In this light, and in light also of the view I take as to the issue of proximity of the Luas to the Site, it is not necessary that I reconsider the view taken in **Fernleigh**, which was decided after this case was argued on the point, of the argument that the Luas is "high capacity" as a matter of definition preclusive of argument (or, for that matter, evidence) on the point, such that its high capacity must be accepted by the Court. In fairness to counsel for the Board, he did not shy away from the logic of the Board's position that, for purposes of application of the §3.2 Public Transport Criterion, and the activation of SPPR3 to override Development Plans and Local Area Plans, the Luas is, by definition and indisputably, "high capacity". The Board's position is illustrated in the following passage[308] which, I emphasise, was based on a factual hypothesis for purposes of analysis and does not represent facts known to the court or knowledge of the actual situation any Luas station in this vicinity. I asked counsel for the Board:

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[306] Transcript Day 3 174. As to the 3.2 criterion as to public transport, Counsel said: "Why on earth would they bother putting that in if the issue was to be decided on a policy basis? They build it and the buses will come. So if Mr. Foley was correct, the issue simply wouldn't arise. He wouldn't need to know anything about the public transport because the policy position would be build them and the public transport will be supplied."
[307] Ballyboden Tidy Towns Group v An Bord Pleanála & Shannon Homes [2022] IEHC 7.
[308] Transcript day 3 p75 et seq.

> *" …… is it the Board's position, as a matter of law, that the scenario I have just described in which residents of an area are left standing in rush hour for extended periods because they can't get on full Luases, or indeed as we have seen in some other cases it's been suggested get on Luases going the other way so they can get out to a station where there is a space on the Luas. Your position is that simply because the Luas is deemed to be a high capacity service, it ipso facto follows that that area and a site in that area of the catchment of that crowded Luas station is well served by public transport, is that your position?*
> *[Counsel]: No, Judge. Sorry, to be very clear: expressed in those words, that is obviously not my position but that is the logical consequence –*
> *[Judge]: No, no that's my point, it is a logical consequence of your position*
> *[Counsel]: The Court has it correct, I won't shy from that, that is absolutely the logical consequence. …..*
> *[Judge]: No matter how long the present residents of this area are waiting for a Luas in rush hour and how late for work they may be as a result, or how early in the morning they have to get up to avoid that outcome, the Board is constrained to assume not merely that that problem will be served by the provision of extra public transport, but that it will be solved sufficiently to accommodate not merely those existing residents, but the residents of a future development, a high density development within that catchment, the planning application for which they are considering; is that right?*
> *[Counsel]: That's right. That's the logical consequence, but it's obviously not the case here."*

However, the GDA Transport Strategy, as cited above regarding Luas capacity, does seem to shed at least some light on the practicalities of that issue.

175. Clearly, the Board's proposition is entirely reliant, as relates to the requirement of **O'Neill** that a site be well served, in the present tense, by "*high capacity*" public transport, on its assertion of the "definitional" status of the Luas as "high capacity" in derogation from the "intensely practical" analysis mandated in cases including **Ballyboden TTG**.[309] However, as I say and for reasons just identified, I need not here reconsider the view taken in **Fernleigh** on this issue or decide this issue. I have, however, expressed above some views on the question.

176. Further, in her consideration of the §3.2 Public Transport Criterion the Inspector explicitly had regard to an irrelevant consideration – the prospect of future improvements in public transport services serving the Site. Indeed, that prospect perfuses her §3.2 Public Transport Criterion analysis. Putting it at its lowest, she significantly and undesirably muddied the waters of that analysis. As matters stand, and to restate what is clear since O'Neill – only present service is relevant to the satisfaction of the §3.2 criterion.

[309] Ballyboden Tidy Towns Group v An Bord Pleanála & Shannon Homes [2022] IEHC 7.

177. I have given real consideration to quashing the Impugned Decision by reference to this consideration of an irrelevancy. Ultimately I have decided not to do so as, given I am quashing the decision for another reason, it would make no difference to the substantive outcome.

178. There is, it must be said an appreciable argument against quashing the Impugned Decision on this account in light of the Inspector's observations as to adequacy of the current service and on the basis that, where possible, a decision should be read as valid rather than invalid.[310] On the other hand, it is also very arguable that the obligation to read the Inspector's report as a whole and on a fair reading forbids disregard or excision of her explicit invocation of irrelevancies in her §3.2 Public Transport Criterion analysis. After all, in **Connolly** Clarke CJ said that *"One of the matters which administrative law requires of any decision-maker is that all relevant factors are taken into account and all irrelevant factors are excluded from the consideration. It is useful, therefore, for the decision to clearly identify the factors taken into account."* Recently, Haughton J in **Breanagh**[311] did not, as I understand, consider himself to be making new law as to reasons or as engaging in anything but an orthodox interpretation of **Connelly**[312] when he said: *"To paraphrase Clarke C.J. in Connelly the decision must show that all relevant factors are taken into account and all irrelevant factors are excluded from the consideration ..".* This was in a case in which he found that the reasons created *"in the mind of the reader with knowledge of the error uncertainty as to the extent to which this error may have influenced the Tribunal in its conclusions".* But as it makes no difference to the substantive outcome, I will leave resolution of the tension between those arguments to another case.

Disposition

179. I will quash the Impugned Decision for the Board's application of SPPR3 in the absence of demonstration, as required by §3.2 of the Height Guidelines, that the Site is well served by high capacity public transport.

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[310] M.R. (Bangladesh) v IPAT [2020] IEHC 41 and Sweetman v An Bord Pleanála & Bord na Mona [2021] IEHC 390. See also O'Donnell v An Bord Pleanála [2023] IEHC 381, St. Margaret's Recycling and Transfer Centre Ltd v An Bord Pleanála [2024] IEHC 94. As to the parameters and limits of this interpretive approach, see Fernleigh v ABP & Ironborn [2023] IEHC 525 §14 et seq.

[311] Breanagh v Commissioner of Valuation [2024] IECA 53 §67.

[312] Connelly v. An Bord Pleanála [2018] IESC 31.

GROUND 5 MATERIAL CONTRAVENTION – TREES

G5 – Trees – Pleadings – Grounds

180. Mr Mulloy pleads that:

- the Impugned Decision is in material contravention of the Development Plan and/or the GLAP as to tree protection and so is invalid as not made pursuant to s.37(2)(b) PDA 2000.[313]

- Knockrabo Investments' Arboricultural Report identified 16[314] of 37[315] trees on Site (43%) for removal, including 3 of 8 category A trees.

- DLRCC,
    - identified the removal, to construct Block E, of 2 category A trees – a Blue Cedar and a Copper Beech[316] – as in breach of Development Plan Policy OSR7[317] and the Site-specific objective to protect and preserve trees.[318]
    - therefore considered that the Proposed Development would seriously injure the amenities of properties in the vicinity and be contrary to the proper planning and sustainable development of the area.[319]

181. Mr Mulloy pleads that the Inspector assessed the issue as follows: [320]

- Development Plan Maps 1 and 2 show a tree symbol[321] sited centrally on the Site to the north-east of Cedar Mount, the associated objective of which is "*To protect and preserve trees and woodlands*".

- Development Plan Policy OSR7 and §8.2.8.6 identify BS 5837 (2012) as the standard for handling trees on development sites and require preservation of significant trees, "*wherever possible*" and "*as far as practicable"* and allow their removal to facilitate development where "necessary". And where that is necessary, commensurate replacement trees are required. The GLAP states objectives, OS4 '.. to protect and preserve mature trees" and OS7 requiring "*where appropriate"* "*measures to retain existing trees and incorporate them into the overall landscaping plan'.*

- Knockrabo Investments' stated approach is to retain as many trees as possible.

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[313] A plea that the Proposed Development materially contravenes a specifically Zoning Objective to "Preserve Trees and Woodlands", such that S.9(6)(b) of the 2016 Act precluded permission was not pursued.
[314] Comprising 3 category 'A' trees, 1 category 'B' tree, 8 category 'C' trees, 4 category 'U' trees and 2 hedges. Category "A" identifies the most valuable trees: category "U" the least.
[315] Comprising 8 category A trees, 9 category B trees, 13 category C trees, 7 Category U trees, and 2 hedges.
[316] Trees #0711 & #0710 respectively.
[317] Development Plan §4.2.2.6, Policy OSR7: Trees and Woodland.
[318] DLRCC CE report p46.
[319] DLRCC CE report p46.
[320] §10.9
[321] In fact the Site straddles Development Plan Maps 1 and 2 and the tree symbol is on Map 2 only, but nothing turns on that.

- The level of tree retention and the trees retained in Phase 1, combine to add significantly to the character of the area.
- A balance is required between sustainable development of this zoned serviced Site in the metropolitan area and the requirement to protect existing significant trees and the amenity value of the Site.
- The DLRCC CE Report cites removal of the Blue Cedar and Copper Beech in recommended refusal reason #6 – but not removal of the third category A tree.
- The DLRCC Parks Department report[322] raises no issues as removal of category A trees – noting Knockrabo Investments' rationale for their removal.

- The Inspector concluded: "*Having regard to the tree retention plan and the level and quality of planting proposed in the landscaping plan (planting of 181 semi-mature, heavy standard, and multi-stemmed trees, as well the hedges and ground cover), I am satisfied that the development as proposed will provide for a high-quality open space plan supported by the character of existing trees being retained.*"
- *"Therefore, the loss of 3 category A trees, in the context of the wider site, will be adequately mitigated by the proposed landscaping plan"*.
- The Proposed Development is consistent with the Development Plan and GLAP approach to tree preservation.[323]

Pleaded Legal Issues

182. Mr Mulloy pleads "four legal issues" – material contraventions as to which the Board failed to satisfy s.37(2)(b) PDA 2000. The alleged material contraventions are:

i. of the Development Plan objective to "*Preserve Trees and Woodlands*" that applies to part of the Site. There is no caveat to that objective and no basis to read it with §8.2.8.6[324] of the Development Plan.

ii. of §8.2.8.6 of the Development Plan - in that Knockrabo Investments made no attempt to demonstrate why the retention of the three category A trees is not practicable or why their removal is necessary. The Inspector did not advert to this issue nor interrogate the potential of the Site to accommodate alternative building arrangements that would preserve the category A trees as required and as was achieved, in respect of some of the Category A trees, by the previous scheme.[325]

[322] The DLRCC Parks Department report is attached to the DLRCC CE Report at p76 et seq.
[323] Inspector's report §10.15.1.
[324] §8.6.2.2 of the Development Plan is pleaded but there is no such paragraph, and the reference clearly should be to §8.2.8.6. §8.2.8.6 reads: "New developments shall be designed to incorporate, as far as practicable, the amenities offered by existing trees and hedgerow and new developments shall have regard to objectives to protect and preserve trees and woodlands as identified on the County Development Plan Maps." "Where it proves necessary to remove trees to facilitate development, the Council will require the commensurate planting or replacement trees and other plant material. This will be implemented by way of condition."
[325] i.e. the development permitted by Permission D17A/1124 which excluded Block E.

iii. of §8.2.8.6 of the Development Plan - in that Knockrabo Investments proposes planting 182[326] trees but not like-for-like – “commensurate” – replacement of the Category A trees.

iv. of OS4 and OS7 of the GLAP and commentary on OS7 of the GLAP.[327] There are no caveats to these obligations.

G5 – Trees – Pleadings – Opposition

183. Beyond traverses, the Board pleads:

- Mr Mulloy is estopped from raising the issue, not having raised it before the Board.
- His complaints are subjective on the merits.
- The Board’s entitlement to rely on the evidence before it as justifying the absence of a finding of material contravention. In particular it pleads relevant content of
  - the Development Plan as not precluding tree removal – citing the relevant map, Policy OSR7, §8.2.8.6 – and GLAP Policies OS4 and OS7 and GLAP §6.4.
  - Knockrabo Investments’ Aboricultural Assessment, and its Design Rationale – Landscape Architecture Report, with neither of which Mr Mulloy takes issue.

- A contrast between the DLRCC CE report and its accompanying Parks Report as to the removal of trees.
- The Inspector’s report and its regard to the relevant content of the Development Plan and GLAP.
- Condition 23 of the Impugned Decision.[328]

G5 – Trees – Planning Policy & Analysis thereof.

184. The applicable planning policy has been in part set out above. At the cost of some repetition, it bears revisiting and some analysis.

185. I accept Mr Mulloy’s submissions that the protection afforded by the tree symbol on Development Plan Map 2 is not limited to trees on the precise footprint of the symbol itself. But, read as a whole, I do not read the Inspector’s Report as isolating that protection to the area north-east of Cedar Mount. Generally, one cannot be too prescriptive about the “spread” of this symbol over the area in which it is found. It will be context-specific and vary across different sites. In my view properly, the Inspector appears to have regarded the protection as extending to the Site generally.

[326] There is a minor discrepancy as between 181 and 182 trees, which I will ignore.
[327] See above.
[328] It requires, essentially, the retention of, and frequent site visits by and report to DLRCC by a qualified consultant arborist during all construction and compliance with the requirements of the Arboricultural Report. The reason given is “To ensure and give practical effect to the retention, protection and sustainability of trees during and after construction…”.

186. Mr Mulloy says that this map, the tree symbol and its legend comprise a "standalone" and "uncaveated" objective "*To protect and preserve trees and woodlands*" - with which significant tree loss cannot be reconciled. He asserts that there is no warrant for reading this content with caveated text in the Development Plan on the subject of tree preservation. I have no hesitation in respectfully disagreeing. The map and its legend in my view, in this respect, clearly cross-refer to and must be read with,

- Development Plan Policy OSR7[329] – to implement the County Tree Strategy 2011-2015. It states that "*significant groups of trees worthy of retention have been identified in the Development Plan Maps*".
- Development Plan §8.2.8.6. It in part, reads: *'… new developments shall have regard to objectives to protect and preserve trees and woodlands as identified on the County Development Plan Maps*.'
- Development Plan §1.1.4.3 as to Development Plan maps. It provides that such maps "*provide a graphic representation of the proposals contained in the Written Statement and/or Appendices and indicate … control standards together with various other objectives of the Council. … Should any potential conflicts arise between the Written Statement and the County Maps the Written Statement shall prevail*."

187. Mr Mulloy's plea also contravenes the basic principle that, like any other document, a Development Plan must be read as a whole and specific content must be read in the context of which that whole is part. The many authorities for these propositions, include **Byrnes,**[330] **Eoin Kelly,**[331] **Navan Co-Ownership,**[332] a **Ballyboden TTG case**[333] and **Grafton.**[334] In **Forest Fencing**[335] Charleton J. held that the Development Plan should be "*considered in the round*" and that "*no section should be considered in isolation from the entire document*".

188. So, contrary to Mr Mulloy's plea, it is very clear that the Development Plan maps on which the Objective to "*To protect and preserve trees and woodlands*" is denoted, Policy OSR7, §8.2.8.6 and the County Trees Strategy are to be read together.[336] I see no reason to revise the view in that regard taken in **Jennings**.[337]

189. In addition to cross-referring to the map, Policy OSR7 also states, "*Trees, groups of trees or woodlands which form a significant feature in the landscape or are important in setting the character or ecology of an area should be preserved wherever possible*." It cites the Tree Strategy it adopts as promoting the care and protection of existing trees and the planting of new trees in the right places to ensure

[329] Development Plan §4.2.2.6, Policy OSR7: Trees and Woodland.
[330] Byrnes v Dublin City Council [2017] IEHC 19.
[331] Eoin Kelly v An Bord Pleanála & Aldi [2019] IEHC 84.
[332] Navan Co-Ownership v An Bord Pleanála [2016] IEHC 181.
[333] Ballyboden Tidy Towns Group v An Bord Pleanála & Shannon Homes [2022] IEHC 7.
[334] Grafton Group PLC v An Bord Pleanála [2023] IEHC 725.
[335] Wicklow County Council v Forest Fencing [2007] IEHC 242, [2008] 1 I.L.R.M. 357.
[336] However as the County Trees Strategy is not exhibited, I will confine my consideration of it to the account of it given in Policy OSR7.
[337] Jennings & O'Connor v An Bord Pleanála & Colbeam [2023] IEHC 14 §523 et seq. See below.

continued regeneration of tree cover and to replace trees that are aging and/or unhealthy or are lost to development pressures.

190. Development Plan §8.2.8.6 also states:

- *"New developments shall be designed to incorporate, as far as practicable, the amenities offered by existing trees …"*
- *"Aboricultural assessments …….. will inform the proposed layout in relation to the retention of the maximum number of significant and good quality trees …"*
- *"Where it proves necessary to remove trees to facilitate development, the Council will require the commensurate planting of*[338] *replacement trees and other plant material."*

191. The GLAP, notably, reproduces, as "Map 2" [339] an extract of the Development Plan Map showing the tree symbol just north-east of Cedar Mount, and the associated objective "*To protect and preserve trees and woodlands*". The GLAP states:[340]

- OS4[341] '*It is an objective of the Plan to protect and preserve mature trees / groupings of trees that add to the character and visual amenities of the area'*.
- OS4 – commentary: '*…… There are a number of trees and tree groups within the Plan area, which are specifically identified and protected in the … Development Plan ….. These trees, in addition to other attractive tree groupings, are identified on Map 2.'*
- OS7 '*It is an objective of the Plan that proposals for new development should include measures to retain existing trees and incorporate them into the overall landscaping plan'*.
- OS7 – commentary: "*The mature trees located on the open space at Trimbleston demonstrate the value of retaining trees in new developments as they undoubtedly add to the attractiveness of the residential environment. New developments should include proposals to retain existing mature trees where appropriate and provide for planting of new trees. In large residential developments where it is required to provide public open space, existing trees should be incorporated into the overall landscape scheme and used to enhance public open space*.'

192. As to the "Knockrabo Sites", the GLAP, includes:

- §6.4 – "*The lands at Knockrabo include many mature trees and planting. This should be integrated into any redevelopment proposals to help assimilate the development and enhance the character of any new development*."
- Table 6.3 – Development Guidance – includes:
  - Retain and integrate existing mature trees and planting.
  - Provide a detailed tree survey, landscape plan and planting plan.

[338] §8.2.8.6 says "or" but it is a typo and the sense is clear. See Jennings & O'Connor v An Bord Pleanála & Colbeam [2023] IEHC 14 §524.
[339] Map 2 was not in the copy GLAP exhibited but the parties agreed I should download it – Transcript Day 2 p30. It is entitled "Goatstown Local Area Plan Extract from Development Plan 2010-16 Map 2" and is drawing PL-11-111 dated March 2011.
It shows the same tree protection symbol as is seen north east of Cedar Mount House on Development Plan Map 2.
[340] GLAP p13.
[341] OS stands for "Open Space".

It bears repeating that, save for a small part in its north east corner, the Site is not part of the "Knockrabo Sites" to which this GLAP content applies. However I don't think this specific Knockrabo Sites tree policy much differs from the general GLAP and Development Plan tree policies. In any event, the exhibited Tree Constraints Plan and Tree Protection Plan show no category A or B trees for removal in that north east corner – it is difficult to be precise but there may be one category C tree in that area for removal.

193. In my view it is clear that, as to tree preservation in the GLAP area, including the Knockrabo Sites,, the GLAP and the Development Plan are, as one would expect, complementary. Both incorporate the "tree symbol" tree protection mapping objective which, in my view, the Inspector correctly related to the Site generally. On a broad **XJS** interpretation[342] as if by an intelligent layperson, highly literal legalistic parsing and comparison of words and phrases such as "*as far as practicable", "where appropriate"*, *"wherever possible*", "*maximum retention*" and "*necessary to remove"* is unproductive. It seems to me to suffice to say that, read holistically, the applicable policy – both Development Plan and the GLAP – strongly favours tree retention on the Site but is far from absolute as to the retention of all trees. I reject Mr Mulloy's submission that the GLAP provides a qualitatively different level of protection from the Development Plan such that the present case is distinguishable from **Jennings**,[343] in which the GLAP was irrelevant. Indeed, in terms of GLAP objective OS7, the Proposed Development does retain and incorporate existing trees and incorporate them into the overall landscaping plan to enhance public open space. It is not required that all existing trees be so retained and incorporated.

G5 – Trees – Jennings

194. The same tree preservation objectives of the Development Plan were considered in **Jennings**[344] as to a site to which the same tree symbol and objective applied. It was observed that it appeared to follow from the map and Policy OSR7 that the trees on that site were deemed "*significant*" and "*worthy of retention*". Though at some risk of material contravention, there was clearly room for nuance as to materiality and as to whether individual trees within the protected groups are worthy of retention.[345] The decision in Jennings interpreted the Development Plan on **XJS** principles and as a whole.[346] Much of the following reasoning is applicable here.

> *"…. the Applicants' approach to the interpretation of the Development Plan as to tree retention tends to legalistic parsing as opposed to application of XJS principles and tends to untenably isolate the objective "to protect and preserve" from the remainder of the narrative text of the Development Plan. ……… These lands, in a suburban and generally residential area, are zoned for residential development, albeit subject to limitations imposed by …. the Tree Protection Objective. Planning decisions, even within the confines of a Development Plan, are of their nature multi-factorial,*

[342] Re XJS Investments Limited [1986] IR 750.
[343] See below.
[344] Jennings & O'Connor v An Bord Pleanála & Colbeam [2023] IEHC 14 §523 et seq.
[345] §527.
[346] §577 et seq.

requiring an exercise of broad judgment in the resolution of competing objectives and tensions. There is an inherent tension between designating lands for development, in accordance with a perfectly proper planning principle of efficient use of land and applying a Tree Preservation Objective to those lands. One need not agree with all in the Tree File report to recognise its articulation of those inherent tensions. Notably, the obligation imposed by the Development Plan is to "have regard" to that objective – a phrase well-understood in planning to involve no obligation of compliance. ….. While I agree with the Applicants that efficient site usage is not the only criterion, neither is tree protection - as is recognised in the phrase "necessary to remove trees to facilitate development". The criterion of necessity cannot be ignored but neither can one take an absolute view of "necessity" of tree removal or an excessively literal and absolutist view of the words "preserve and protect". And as the relevant content of the Development Plan contemplates not merely the necessity of tree removal but the consequent imposition of "the commensurate planting or replacement trees and other plant material" it seems to me that this possibility must be considered in considering the question of material contravention of the objective to preserve and protect trees.

……… the Development Plan objective allegedly materially contravened is far from the black and white or cut and dried objective portrayed by the Applicants. And it is an objective to which Developers and the Board must, by the terms of the Development Plan "have regard" in a multifactorial exercise balancing both the varying functions and values of different trees …. and other planning objectives such as the residential development of the site. This required a significant exercise of multifactorial planning judgement.

*It therefore seems to me to fall into the category of material contravention identified by Laffoy J in **O'Reilly**[347] as reviewable, not "full bloodedly"[348] but rather for irrationality. And whatever view one takes of the present state of the law of irrationality[349], remembering that its requirement is "extremely high and .. almost never met in practice"[350], I cannot find the Impugned Decision irrational on this issue. As I have said, the inspector carefully and comprehensively addressed the issue of tree removal. … the Applicants have not made out their case for material contravention as to tree removal."*

195. I should add that the very helpful review by Humphreys J in **4 Districts**[351] of the law of material contravention, which included consideration of Jennings, does not seem to me to suggest any re-evaluation here of Jennings as to the tree protection objectives of the same Development Plan as was at issue in Jennings.

[347] O'Reilly v O'Sullivan unreported, High Court, Laffoy J., 25 July 1996 & unreported, Supreme Court 26 February 1997, [1997] Lexis Citation 6336.
[348] Heather Hill Management Company clg v An Bord Pleanála [2019] IEHC 450 (Simons J) §41; Redmond v An Bord Pleanála [2020] IEHC 151 §26.
[349] See above.
[350] Stanley v An Bord Pleanála [2022] IEHC 177 at §§ 49 & 77; St. Audeon's NS v An Bord Pleanála [2021] IEHC 453 (Simons J).
[351] Four Districts Woodland Habitat Group v An Bord Pleanála [2023] IEHC 335.

196. **Jennings**[352] also considered §8.2.8.6 of the Development Plan as to "*commensurate planting of replacement trees and other plant material"* as, at very least, a strong and holistic aspiration of broad equivalence within practical limitations, at least some of which will be imposed by the Proposed Development. Clearly, one cannot precisely replace trees like-for-like and in the same places. Indeed, even if it were technically possible it would defeat the purpose of their removal. And, though their ecological functions are undoubtedly very important, it is clear that trees serve valuable functions other than the ecological and both positive and negative non-ecological considerations may arise. Legitimate aesthetic judgments as to the incorporation of the commensurate planting or replacement trees in a suitable landscaping scheme may militate against like-for-like replacement. The purpose of the replacement trees may be different to that of those lost in that the replacements may be part of a new public open space or garden and/or differently located. And there may be practical and horticultural difficulties in replacing older or larger trees with trees of the same age or size. Indeed, the "*planting*" may or may not consist entirely of trees. It may include "*other plant material"* – though it seems unlikely that trees would not be a very considerable part of the provision. The requirement identified in Jennings is that *"in broad and general terms, what has been lost will be replaced with something equally valuable on a broad consideration of value, while accepting that considerations of practicality and preference of some functions of trees over others may in the circumstances be required and that precise like-for-like replacement would defeat the purpose of removal. The equivalence required is a general equivalence, not a precise one.*" It was concluded in Jennings that:

> *"None of this is to suggest that the requirements of the built structure will necessarily predominate over tree protection or that the structure and its design may not have to adapt in greater or lesser degree to the requirements of existing trees or commensurate planting or replacement trees. It is to suggest that these issues require careful and balanced consideration and articulation by the intending developer and the exercise of careful planning judgement by the decision-maker with a view to ensuring that, balancing all with all, what is provided by way of commensurate planting or replacement trees is, broadly at least, as valuable as what has been lost.*
>
> *In light of the decision of Laffoy J in O'Reilly, that exercise of careful planning judgement, even if a question of material contravention, seems to me to be very much the kind of decision to be afforded curial deference and reviewable for irrationality rather than substantive correctness. In that light, I cannot say that, as to replacing lost trees the decision is irrational."*

G5 – Trees – Knockrabo Investments' Expert Reports & Comment Thereon

197. As has been seen, Development Plan §8.2.8.6 stipulates that an arboricultural assessment inform the proposed layout in relation to the retention of the maximum number of significant and good quality trees. Knockrabo Investments submitted such an expert report ("the Arboricultural Report"). It also submitted an expert "Design Rationale – Landscape Architecture Report" and addressed the issue of trees in

[352] Jennings & O'Connor v An Bord Pleanála & Colbeam [2023] IEHC 14 §581 et seq.

its Architectural Design Statement and its EIA Screening Statement. Mr Mulloy, though making a general objection to tree removal, has not impugned the expertise or content of these reports.

Architectural Design Statement

198. The justification for Block E despite the tree removal it would require – or, to put it another way, the demonstration of the necessity of the loss of those trees – received considerable attention in the Architectural Design Statement.[353] Inter alia, it records DLRCC concerns[354] and states:

- that the subject scheme proposes development in the same areas as permitted by Permission D17A/1124, – "*therefore the tree retention and removal strategy for the subject scheme is the same*".[355]

- That the overall site masterplan/strategy for Phases 1 and 2 is *"to create a significant public open space that retains the specimen trees along the northern edge of the site, and another significant public open space to the front of Cedar Mount House, which preserves the setting of the protected structure, the mature trees associated with the entrance to the house, and the sylvan quality of the boundary with Mt Anville Road. The subject scheme proposes three development zones with apartment blocks.*" One of these is "*Block E, beside the site entrance, which frames the square with the existing oak tree and demarcates the entrance to the site"*[356]

- The maps[357] show:
  - the open space between the ByPass reservation corridor and Blocks F and G in which trees will be retained.
  - the open space roughly between Cedar Mount House and Block E to its south/southeast in which trees will be retained.
  - The square with the existing mature oak tree east of Block E. This is identified on a map as the "*Square with mature oak tree*".[358] Though elsewhere it is said to be west of Block E, this seems to be in error.[359]

199. The Architectural Design Statement also states:

> *"The overall Knockrabo site contains many trees that are high quality, and the landscape strategy for the site has always been to retain as many high quality trees as possible within public open spaces that have a clear purpose - defining the setting of Cedar Mount House, maintaining a sylvan quality*

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[353] Architectural Design Statement p13 states as to Permission D17A/1124 "It is the Applicants view that Block E, which was removed by DLR on approval of the scheme, forms an important part of the development of the overall Knockrabo lands, and it is our intention to seek permission for a similar building as part of the subject SHD planning application." See also p39, 40 & 41.
[354] Architectural Design Statement p40.
[355] Architectural Design Statement p29.
[356] Architectural Design Statement p16 & 22.
[357] Architectural Design Statement e.g. pp 16 & 29.
[358] Architectural Design Statement p16.
[359] Architectural Design Statement p41. The Board agreed that this square lies east, not west, of Block E – Transcript day 3 p148.

to Mt. Anville Road, and providing a significant buffer space between the DEBP[360] *and the proposed development. In order for the lands to be developed at a sustainable density, some tree removal has been necessary, which is possible without negatively impacting the overall quality of the development and is indeed necessary to facilitate appropriate placemaking."*[361]

"Block E is located at the entrance to the site, and it is has an important placemaking role in demarcating the entrance to the scheme, completing the streetscape along Knockrabo Way, and defining the square with the mature oak tree at the site entrance." [362]

"It remains the view of the design team that Block E has an important placemaking role within the scheme:
- Demarcating the entrance to the avenue created by Knockrabo Way,
- Defining the public open space at the entrance to the site, to the west[363] *of Knockrabo Way, which contains a mature oak tree,*
- Providing passive supervision of the public open space to the front of Cedar Mount house, which would otherwise be a large open space, with only small scale buildings on its perimeter to provide passive supervision.
The CGI and LVIA views … clearly demonstrate that the proposed design for Block E is in keeping with the scale of the existing apartment blocks, completes the avenue effect as one enters the site, and provides passive supervision of the public open space to the south of Cedar Mount house.
…. it remains the design teams' opinion that a compact apartment building, as proposed, makes the best use of this part of the site, performing an important placemaking role, while also minimising the impact on both trees and the protected structures. Additional CGIs have been prepared as part of this planning application to demonstrate Block Es' relationship to its context." [364]

Design Rationale – Landscape Architecture Report

200. The Design Rationale – Landscape Architecture Report states, as relevant, that,

- it incorporates and is to be read with the Arboricultural Report.
- the landscaping of Phase 1 won the Irish Landscape Institute Awards 2020 Residential category.
- the landscape strategy was developed with regard for "*the substantial and realistic retention of trees". "Open spaces are designed around existing trees which are used to create a strong identity on site*."[365]
- "*There will also be significant tree planting, not least in the open spaces south and east of Cedar Mount House*."[366]

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[360] The Bypass.
[361] Architectural Design Statement p40.
[362] Architectural Design Statement p39.
[363] I think this perhaps should read "east" – see above.
[364] Architectural Design Statement p41.
[365] §3 (p8).
[366] §3.2 – p10 & Figure 8.

201. As to "*Retention of Existing Trees*"[367] the Design Rationale – Landscape Architecture Report cites the Arboricultural Report to the effect that:

- Efforts have been made to retain as many existing trees as possible.
- BS 5837:2012 calls for a realistic assessment of the viability of retaining trees in the context of proposed construction and was used to rigorously assess the stock of existing trees and to make realistic recommendations which represent a fair assessment of the quality and long-term viability of the trees on Site.
- Particular attention has been paid to trees located on boundaries, with minimal removal of trees at Mount Anville Road.
- Two figures[368] provide an illustrative comparison of the existing trees and those to be retained.
- Minimal impact on all trees to be retained will be ensured during works.
- The retention of trees is allied to the proposal of 181 new trees to replace/compensate for the trees removed and to improve age profile, species mix and diversity and the proportion of native species – all in line with good arboricultural, horticultural and ecological practice. Proposed sizes range from semi-mature to extra heavy standards and multi-stemmed trees. Suitable and typical species are illustrated.[369]

Arboricultural Report

202. Remembering that the Impugned Permission is, in effect, by way of amendment/part replacement of Permission D17A/1124, using a "*similar footprint of development*",[370] it is notable that the Arboricultural Report properly records that the bulk of the trees for removal under permission D17A/1124 had, at the date of the Arboricultural Report, already been removed in preparation of the commencement of that development. That is to say, 84 trees were removed in reliance on permission D17A/1124,[371] substantive development pursuant to which did not proceed and which is to be replaced, as it were, by the Proposed Development. 10 trees remain of those for removal under permission D17A/1124.[372] Four other trees were removed/lost for reasons unclear but which did not prove controversial in these proceedings.

203. The applicable Planning Policy as to trees applied to the Site in its condition prior to the removal of those 84 trees and, in my view, continues to apply to it and to the Proposed Development. In substance, the Proposed Development reaps the benefit of and is, as it were, accountable for those removals. The Arboricultural Report fairly records these removals[373] – though beyond raw numbers of removals and identification of the trees removed by number, it does not describe their quality or importance. Notably, it does not refer to the content of whatever Arboricultural Report or like analysis informed those 84 removals

[367] §3.4.
[368] Figures 11 & 12.
[369] §4.1.
[370] Arboricultural Report p1 & §5.1.1.
[371] These removals were discussed at trial – Transcript Day 3 p150 et seq.
[372] Arboricultural Report §4.5. It lists 12 for removal, including trees #0710 and #0177. But those trees were for removal to facilitate building Block E and Block E was omitted by condition of permission D17A/1124. See in this regard Architectural Design Statement p12.
[373] P1, §4.5. & §5.1.1.

or incorporate that analysis into its analysis. It appears to regard those 84 trees as no longer in the reckoning as part of the price to be paid for the Proposed Development.

204. Beyond recording those 84 removals, the Arboricultural Report effectively ignores them for purposes of analysis and confines its analysis to the 37 remaining trees. Its "*assessment is based on what was visible at the time of the inspection and … only relates to factors apparent at the time of the inspection*".[374] The 84 removals, as far as analysis goes, seem to be eaten apples which have been soon forgotten. Why that is so is not explained or justified – either by the Arboricultural Report or by the Inspector. So, while the tree removal now proposed is stated as 16 of 37, or 43%, if one took into account the 84 removals of which the Proposed Development will have had the advantage, the removals would be in the order of 100[375] of 125[376] or 80%.

205. While appropriately increased density might explain it, it is not in fact explained why removal of the 16 trees in addition to the 84 already removed is necessary to facilitate the appropriate development of the Site in line with current planning policy – note, not necessarily to facilitate the Proposed Development specifically. That is notable given the Arboricultural Report asserts that:

- the Proposed Development will be on a "*similar footprint of development*", to that permitted by Permission D17A/1124.
- "*The current proposed site layout has been generated in consultation with the projects design team which have worked closely to retain a substantial number of the better quality existing trees on site and this will be strengthened with new tree, shrub and hedge planting using a mix of tree species including native species within the completed landscaped development.*"[377]
- "*All efforts have been made to retain as much of the tree and shrub vegetation around the site area that is important to its treescape and sylvan character*."[378]
- "*The loss of the above list of trees will have minimal impact on the overall treescape and sylvan character of this area as the bulk of the trees requiring removal to facilitate the proposed development are of a small size, many of which had been planted in more recent years …*"

I observe that "*The loss of the above list of trees"* is of the list of 16 – it does not include the 84 removals.

206. The assertion of "*all efforts*" is a mere assertion and in the passive tense. However, the position can be discerned as to specifically the three category A trees for removal. The Arboricultural Report is accompanied by two drawings[379] described as respectively a "Tree Constraints Plan" "*to aid the design team in the layout of the development*" and a "*Tree Protection Plan*" which depicts the trees to be retained and those to be removed. Both drawings identify each tree by its Category Retention Rating under BS 5837:2012.

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[374] §2.0.
[375] 84 + 16.
[376] 84 + 4 + 37.
[377] §5.1.2.
[378] Sic. §5.2.3.
[379] KB-P2-001 and KB-P2-00.

One of the category A trees for removal is in the centre of what is inevitably the main development area behind Cedar Mount House. The other two are at the site of Block E – to which the chief executive of DLRCC objected (though not its Parks department)[380] and the justification for which received considerable attention in the Architectural Design Statement[381] as noted above, and from the Inspector.

207. Also, it seems to me that Permission D17A/1124 established the principle that removal of 94[382] of 125[383] trees – 75% – from the Site to allow its development was acceptable in planning terms and was not a material contravention of the Development Plan.[384] In gross numbers, the Proposed Development will require removal of an additional 6. But of these, 4 – Trees 1, 2, 3 and 4 – are trees for removal considered as part of a hedge under permission D17A/1124 but now redesignated as trees in their own right. On that view, the increment is 2 trees.

208. Turning to the proposed tree removals, the assertion of the Arboricultural Report[385] that the 16 trees now to be removed were all to be removed under permission D17A/1124 is jarring, given the fact that only 10 such trees remained. However, of the apparent discrepancy, the following is apparent:[386]

- 3 Category U[387] trees – 0739, 0740 and 0741 – were not for removal under Permission D17A/1124 but are for removal now. However, their removal is proposed as part of active arboricultural management due to their poor condition – not directly due to the Proposed Development layout.

- 2 trees – 0710 and 0711 – were not for removal under Permission D17A/1124 but are for removal now to permit construction of Block E. However, the Arboricultural Report mistakenly recorded that permission D17A/1124 permitted their removal, when in fact their removal had been obviated as Block E was omitted by condition of permission D17A/1124.

- 3 trees – 0802, 0707 and 0804 were not for removal under Permission D17A/1124 but are for removal now directly due to the Proposed Development Layout other than as to construction of Block E.

- As just stated above, 4 trees – 1, 2, 3 and 4 – were included in Hedge #2 for removal under permission D17A/1124 but are now re-categorised as individual trees for removal.[388]

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380 See below.
381 P13 states as to Permission D17A/1124 "It is the Applicants view that Block E, which was removed by DLR on approval of the scheme, forms an important part of the development of the overall Knockrabo lands, and it is our intention to seek permission for a similar building as part of the subject SHD planning application." p16 says of Block E, that it is "beside the site entrance, which frames the square with the existing oak tree and demarcates the entrance to the site". See also p39.
382 84 removed + 10 not yet removed.
383 84 + 4 + 37.
384 There is no suggestion that DLRCC activated the material contravention procedures of S.34(6) PDA 2000. Not is such activation apparent on the face of Permission D17A/1124.
385 §5.2.1 – "All of the above trees were highlighted for removal in the current live planning permission, D17A/1124."
386 Comparing the tables at §4.5 and 5.2.1 of the Arboricultural report.
387 i.e. little or no potential. Tree Categorisation is in accordance with BS 5837:2012. Though it was not exhibited it was agreed by all at trial that I might have regard to its Table 1 – Cascade Chart For Tree Quality Assessment.
388 This reclassification affects the total tree number and percentage removal calculations but not appreciably.

- 5 trees – 0489, 0657, 0660, 0722, 0723, and 0768 – for removal under permission D17A/1124 are no longer for removal.

209. I have failed to precisely resolve the tree removal numbers as between the two permissions but am satisfied that I have got as near as makes no difference. The net position of consequence is that:

- 3 Category A[389] trees not for removal under Permission D17A/1124 are now for removal. These are young trees planted as part of more recent landscaping[390] with long life potential. They are:
  - 0710 – the mature copper beech – and 0711 – the semi mature blue cedar – to be removed to build Block E.
  - 0802 – a semi-mature Ash – roughly in the middle of the northern part of the Site, on the site of Block G.
- All other additional removals are of trees categorised C or U. The Arboricultural Report explicitly identifies trees categorised C as "of low quality/value" – to be considered for retention where viable but not seen as a considerable constraint on development[391] and not to be retained where they would impose a significant constraint on development.[392] BS 5837:2012 describes category C trees as unremarkable trees of very limited arboricultural merit and no material conservation or other cultural value. Category U trees are of even lower quality and are uncontroversially for removal.

210. Though considering only the 37 trees now remaining, the Arboricultural Report[393] asserts that:
- "*The majority of the large prominent mature trees that are important to the treescape of these grounds or the greater area are being retained …*".
- "*For the most part, the trees are being retained within open spaces around the proposed development and will be easily incorporated into these open spaces ..*"

In that regard, I note that 5 of 8 Category A trees and 8 of 9 Category B trees will be retained. The Report describes Category B trees as of moderate quality/value with a minimum of 20 years' life expectancy and with the potential to contribute to the tree cover of the grounds for the medium term. BS 5837:2012 describes category B trees, as to arboricultural value, as trees that might be included in category A, but are downgraded because of impaired condition such that they are unlikely to be suitable for retention for beyond 40 years, or trees lacking the special quality necessary to merit the Category A designation but as material conservation or other cultural value. As to categories A and B taken together, 13 of 17 trees will be retained.

211. Notwithstanding that, in my view, the correct assessment of tree removal should in absolute terms incorporate the 84 removals already effected and is in percentage terms far higher than 43%, if one assumes (as I think I must) the acceptability from a planning perspective of the removals permitted by Permission

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389 Trees of high quality/value.
390 I infer, in the refurbishment of Cedar Mount House as a residence before its subsequent acquisition for development.
391 p5.
392 p30.
393 §5.2.4.

D17A/1124, it follows that the additional tree removal of significance consists in the 3 additional Category A trees to be removed. The intention to remove these trees and the reasons for their removal are clearly apparent on the planning application documents.

212. It may be said that, as to the strict necessity of removal of 2 of those 3 Category A trees – those on the site of Block E - Permission D17A/1124 establishes that they need not be removed. I do not know if tree 0802 – the semi-mature Ash roughly on the site of Block G was one of the 10 removals outstanding under Permission D17A/1124. However, as Jennings makes clear, necessity is to be considered not in absolute terms but as part of a multi-factorial planning judgment, taking into account other planning considerations – including those favouring the inclusion of Block E (trees 0710 and 0711) and the efficient development of the main development area in the northern part of the Site (tree 0802).

EIA Screening Statement

213. The EIA Screening Statement does, in at least some degree, incorporate the 84 tree removals into the present application. It states that the tree retention and removal strategy, in the Arboricultural Report *"is the same as that proposed as part of the Extant Permission (D17A/1124). As part of the Extant Permission, most of the trees have been removed north of Cedar Mount House and a cluster are to be removed adjacent to Block E to facilitate construction.[394] The subject application also seeks removal of some trees, however maximum effort has been made to retain existing trees …".*[395]

<u>G5 – Trees – DLRCC Reports</u>

214. As has been noted, the DLRCC CE report recommended refusal of permission as removal of the 2 category A trees to construct Block E would breach Development Plan Policy OSR7 and the Site-specific objective to protect and preserve trees.[396] The report considered that, given the Site-specific objective to protect and preserve trees, the removal of trees should have featured in Knockrabo Investments' Material Contravention Statement.[397] The DLRCC CE report does not place that issue in the context of the 94[398] tree-removals permitted by DLRCC in its Permission D17A/1124 but the report is consistent with that permission in its opposition to the removal of the two trees on the site of Block E.

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[394] This last phrase is incorrect as Permission (D17A/1124) by condition 2, omitted Block E.
[395] I have regard also to an exhibited "Landscape & Visual Impact Assessment", but it was not addressed at trial and its contents don't seem to me to add to the material I have addressed above.
[396] DLRCC CE report p46.
[397] DLRCC CE report p38.
[398] The 84 removed plus the 10 not yet removed but identified by Permission D17A/1124 for removal.

215. The DLRCC CE report recommended in the alternative a condition requiring omission of Block E[399] for two reasons:

- detrimental impact on the setting, character and amenity of Cedar Mount House and gate lodge, and
- the removal of 2 Category A trees[400] – as to which "*serious concern*" is raised of failure to accord with the Development Plan and LAP. DLRCC considered that the Proposed Development did not suitably balance tree retention and sustainable land use.[401]

That report also recorded the elected members as complaining of excessive tree removal.

216. In notable contrast, while the DLRCC Conservation Report[402] recommended omission of Block E, it did so to protect the character and setting of the Protected Structures on site – not to save trees. And the DLRCC Parks report[403] did not recommend refusal or omission of Block E to save trees. Rather, it

- noted "*a special collection of large-scale trees*" and "*a high quality collection of trees on and immediately adjacent to the site*",
- described the Arboricultural Report as comprehensive and thorough and
- described the landscape proposals as an appropriate response to a site with many existing, exceptional trees and "*as a continuation of the work completed in Phase 1 which is a successful green space amenity*."

It concluded: "*This is a well-considered landscape proposal which should sit lightly on the site and compliment the work done in a previous phase of the overall scheme. The long term viability of the trees to be retained will benefit the quality of life of existing and future residents.*" It recommended granting permission.[404]

<u>G5 – Trees – Inspector's Report & Condition 23 of the Impugned Decision</u>

217. The Inspector does not record any observer submissions as to tree loss. She records the respective views of the DLRCC CE report and its Parks Report and its elected members – as to which see above.[405] She specifically considers,[406] from a conservation/protected structures perspective and a tree retention perspective, both the objections to Block E and Knockrabo Investments' justification of Block E as I have set it out above. She acknowledges that there is a delicate balance involved but considers that Block E,

- would support the existing and new urban form along the eastern side of Knockrabo Way.
- would be sufficiently separate (visually and physically) from and peripheral to Cedar Mount.
- can co-exist with the gate lodge.[407]
- will be aligned to the more contemporary unit of development associated with Phase 1 and these Phase 2 lands.[408]

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[399] DLRCC CE report p47.
[400] DLRCC CE report p32.
[401] DLRCC CE report p39.
[402] Enclosed with the DLRCC CE report – p80 et seq.
[403] Enclosed with the DLRCC CE report – p76 et seq.
[404] Subject to conditions which it listed but are not here relevant.
[405] Inspector's Report §8.1.2.
[406] Inspector's Report §10.7.26 et seq. & 10.8
[407] As to which see also Inspector's Report §10.8.17 et seq.
[408] See also Inspector's Report §10.8.11 et seq.

218. The Inspector noted,

- that the Planning Application states that its tree retention and removal strategy is the same as that in Permission D17A/1124.[409]
- that the stated approach has been to retain as many trees as possible.
- that most of the trees north of Cedar Mount had been removed under Permission D17A/1124. 84 had been removed and the proposal was now to remove 16 of the remaining 37 trees.[410]
- the omission of Block E[411] from Permission D17A/1124 had resulted in two category A trees being retained.[412] In the present application, the DLRCC CE Report recommended refusal in relation to the loss of those trees where Block E is proposed.[413]
- that the DLRCC Parks Report did not recommend retention of any of the trees proposed for removal. It noted the rationale given for the removal of the three category A trees proposed to be removed and raised no issue as to their removal.[414]
- the level of tree retention alongside the trees retained on the developed site to the east. She considered that, combined, they add significantly to the character of the area.[415]
- the level and quality of planting proposed in the landscaping plan (planting of 181 semi-mature, heavy standard, and multi-stemmed trees, as well the hedges and ground cover).[416]

219. Including by way of response to the DLRCC CE recommendation of refusal of permission by reason of tree loss, the Inspector considered[417] that:

- a balance was required between achieving the sustainable development of this zoned serviced site within the metropolitan area and the requirement to protect existing significant trees and the amenity value of the Site – including its protected structures and their settings

- the required balance has been achieved "*with the front garden area and retention of trees (as per the Arboricultural Report) and planned tree planting in this area*".

- *"In terms of how the development responds to the overall natural environment, I have assessed the impact on the existing trees and the landscaping strategy put forward by the applicant. I am satisfied the applicant has adequately incorporated key trees within the scheme and has proposed a landscaping plan which builds upon and extends the existing high quality open space delivered by the Knockrabo development to the east …"*

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409 Inspector's Report §10.9.9.
410 Inspector's Report §10.9.3.
411 The Inspector referred to it as the "apartment block at the entrance to the scheme". It is clearly Block E.
412 Inspector's Report §10.9.9.
413 It is clear that though they are different in substance, the blocks at this location were both designated "Block E" in the earlier and the present planning applications and that the trees retained by the omission of Block E from Permission D17A/1124 are those to be removed to construct Block E under the Impugned Decision.
414 Inspector's Report §10.9.13.
415 Inspector's Report §10.9.13.
416 Inspector's Report §10.9.14.
417 Inspector's Report §10.15.1, §10.7.32. §10.9.13 & 14.

- the Proposed Development will provide for a high-quality open space plan supported by the character of existing trees being retained.

- the loss of three category A trees, in the context of the wider site, will be adequately mitigated by the proposed landscaping.

- "*I have reviewed the arboricultural report and landscape strategy for the site, as well as the relevant development plan and LAP policies and objectives. I am satisfied that the proposed development has been designed to incorporate, as far as practicable, existing trees and has had adequate regard to objectives to protect and preserve trees and woodlands as identified on the County Development Plan maps. I am satisfied that the development as proposed will provide for a high quality open space plan supported by the character of existing trees being retained, balanced against the requirement to achieve the sustainable development of this zoned serviced site within the metropolitan area*."

220. These views are at least consistent with, and in my view are amplified by, her comments in other contexts which seem to me to be of general application and so applicable also to the issue of tree retention. In considering the impact of Block E on Mount Cedar House she said:

- "*… in examining applications for multi-unit development, a balance is required in all assessments in relation to making the most efficient use of zoned and serviced land in the delivery of housing, where land is a finite resource, against the impacts of a proposal on existing residential amenities as well as the visual impact of the proposal …*"[418]

- *"… a balance needs to be achieved in such instances between developing lands to an appropriate scale in compliance with national policy guidance whilst at the same time protecting the character and setting of protected structures and their settings. I am satisfied that this balance has been achieved with the front garden area and retention of trees (as per the arboricultural report) and planned tree planting in this area. I am satisfied that the house itself retains sufficient grounds and visual separation via existing and planned landscaping to the south of the building and when viewed from Mount Anville Road."*[419]

In considering the impact of Block E on the gate lodge, she considered that *"a balanced approach to the consideration of development is required in instances such as this, where the land is zoned and sensitivities exist in relation to site characteristics such as protected structures and trees to be retained …"*[420]

221. One is free to agree or disagree as to merit with the Inspector's opinions on the issue of tree removal. But it is clear that she considered the issue,

[418] Inspector's Report §10.11.3.
[419] Inspector's Report §10.8.16.
[420] Inspector's Report §10.8.18.

- in terms of the requirements of planning policy objectives to protect and preserve trees and woodlands and to incorporate existing trees, as far as practicable, in any development of the Site.
- as to fact, in detail, and specifically as to the removal of the category A trees.
- in the context of the 84 trees removed under Permission D17A/1124 - she accepted that the present tree retention and removal strategy is the same as that in Permission D17A/1124. In my view, to any extent one might justifiably criticise the Arboricultural Report for "starting" its analysis at the 37 trees remaining on site – perhaps harshly given its account of the 84 trees already removed – any such flaw was not carried into the Inspector's assessment.
- in the context of the balance to be struck, as part of a holistic consideration, with other planning considerations,
    - encapsulated in the concept of "*the sustainable development of this zoned serviced site within the metropolitan area*".
    - including a high-quality open space plan – with retained mature trees.
- in the context of the relationship of the Site to the adjacent Phase 1 development.
- in the context, reading her report as a whole, of Knockrabo Investments' justification of the planning virtues of Block E – which I have listed above.

222. Though nothing here turns on it, it bears noting that Condition 23 of the Impugned Decision requires, essentially, the retention of and frequent site visits by, and report to DLRCC by a qualified arborist as consultant during all construction and compliance with the requirements of the Arboricultural Report. The reason given is *"To ensure and give practical effect to the retention, protection and sustainability of trees during and after construction…".*

G5 – Trees – Decision

223. Mr Mulloy attempts to distinguish Jennings on the basis that here there is a prior permission which omitted Block E to save two category A trees to be lost on the Impugned Decision. He argues that this demonstrates that retention of the trees is "possible" and "practicable" in terms of the relevant Development Plan objectives. However, the reason stated in the earlier permission for the omission of Block E was not to avoid the loss of the trees but was to "*protect the setting and amenity of the Protected Structures on site*". That said, Mr Mulloy's argument represents a legitimate planning argument on the merits as reflecting an earlier planning judgment by DLRCC to omit Block E and the current view of the chief executive of DLRCC. However, the argument is a planning one – not a legal one. The Board is not bound by the earlier planning judgment of DLRCC as to those two trees. Via Jennings, I have rejected above much of Mr Mulloy's submissions on the interpretation of the applicable planning policy as to trees and addressed the standard of review of decisions by the Board in that regard. Suffice it to say here that the tree preservation policy is nuanced and decisions as to its material contravention are part of a multifactorial planning judgment reviewable as to merit only for irrationality. The Inspector is correct in saying as to tree preservation and removal that there is "*a balance required*" and such balances are classically matters of planning judgment for the Board. The same can, it seems to me, be said for the question of commensurate planting. Counsel for the Board brought me through some of the replanting schedule. As a layperson in that

regard, I can draw nothing from that exercise save that I agree with him when he says that *"it is neither for me or the Court to take the view that that is right or wrong when it comes to the standard of commensurate planting."*[421]

224. Counsel for the Board is correct in saying that the planning application documents put the issue of Block E and the loss of the two category A trees on its site squarely and in detail before the Board - in the context of DLRCC's previous omission of Block E from Permission D17A/1124 and by way of laying out the arguments in favour of Block E. As he said, it was "*up in lights*". It is equally clear that the Inspector and the Board considered that issue in detail. On the basis of the evidence that was before the Inspector and the Board and within the "*appreciable flexibility, discretion and/or planning judgement"* allowed by the relevant planning policy as interpreted in Jennings, the Board is entitled to its view that there was no material contravention of the Development Plan and the GLAP in relation to tree removal. The challenge on this ground is rejected.

Trees – a final comment

225. Though rejecting the challenge to the Impugned Permission on this account, I cannot leave this subject without expressing some concern, at least in general terms, that, as to a Site the subject of a tree protection objective and on standing back from the detail of the matter and looking at it in overview, the net position is that 80% of the trees, measured as against those contemplated when the Development Plan was made in 2016, will have been removed to allow development. However,

- the great part of that removal was brought about in reliance on Permission D17A/1124.
- Permission D17A/1124 is not challenged in these proceedings.
- the removal of 84 trees in reliance on Permission D17A/1124 is not challenged in these proceedings.
- the removal pursuant to the Impugned Decision of further valuable trees, of the 37 trees of all sorts remaining, is relatively confined.

226. Nor am I alive to the consideration of the tree-removal issue in the decision-making process of DLRCC which lead to Permission D17A/1124, save that it found no material contravention. I know merely the number of those removals without reference to the quality and value of the trees removed. Also, these proceedings are not concerned with questions whether it was legitimate to activate reliance on Permission D17A/1124 to remove the 84 trees such as to amount to the commencement of development on foot of that permission and then, in considerable degree, to abandon Permission D17A/1124, presenting the removals in the present process as, at least in considerable degree, a fait accompli.

[421] Transcript Day 2 p142.

227. But it bears observing, at least generally, that Permission D17A/1124 was not a permission for tree removal simpliciter. It was a permission for tree removal only as incidental to the substantive housing development permitted by Permission D17A/1124. Even if pleaded, questions in those regards would have required complex argument as to difficult issues relating, no doubt inter alia, to,

- the legal effect of commencement of site clearance on foot of a planning permission.
- the view that a permission is entire and that the development it permits must be completed once development is commenced on foot of it.
- the law as to permissions inconsistent with each other and as to amending permissions and
- the overall view that developers must have legitimate opportunity to change strategy over time and, indeed, that there may be a public interest in their doing so. For example, here a move from a lower density development permitted in 2018 by Permission D17A/1124 to a higher density development pursuant to the Impugned Decision, though far from uncontroversial,[422] could be said to conform to policy both in response to the housing crisis and as to the development of a compact sustainable city.

228. Nor, indeed, was the case pleaded or argued in terms of 80% removal of trees. All that said, the net result of removal of 80% of the trees on this Site the subject of a tree protection objective, to allow its development, is striking – as is the fact that it has come about without, it seems, a finding of material contravention of that objective. However, as a matter of law that seems to me to be the position at which we have arrived.

GROUND 6 MATERIAL CONTRAVENTION – EASTERN BYPASS RESERVATION

229. Mr Mulloy pleads that the Impugned Decision is in material contravention of the Development Plan as to the Bypass Reservation and is in error of law as not made pursuant to s.37(2)(b) PDA 2000. The Impugned Decision did not identify a material contravention on this issue. The Board

- disputes that there was a contravention on this issue,
- argues alternatively that any contravention was not material.

The Board expressly took the view that, if there was a material contravention, relief should not be refused on discretionary grounds as it would be incorrect of the court to assume the outcome of a remitted decision, if remitted having been quashed for this reason, as favouring the grant of permission.[423] Accordingly, I need not consider discretionary refusal of relief: if there was a material contravention in this regard, the decision must be quashed.

230. The chronological sequence assists in understanding this ground. As noted earlier, the Bypass Reservation runs along the northern boundary of the Site. The Bypass has been mooted since at least

[422] Objectors complained of excessive density.
[423] See Transcript Day 3 p4 et seq. The Board cited Talbot v ABP, [2009] 1 ILRM 356, [2009] 1 IR 375.

2007.[424] In 2011, the NRA[425] published the "Dublin Eastern Bypass Corridor Protection Study, Booterstown to Sandyford" (the "2011 Bypass Corridor Study"[426]) *"to assist Local Authorities in their deliberations on planning applications by establishing guidelines for developments near or adjacent to the proposed route corridors …. with a view to permitting certain development of the adjacent lands without undermining the future deliverability of the motorway scheme."[427]* The study states that "*Figure 1 shows the route corridor developed for the proposed motorway scheme. It is proposed that development should generally not be permitted within this corridor where it would jeopardise the deliverability of the Eastern Bypass motorway."*[428]

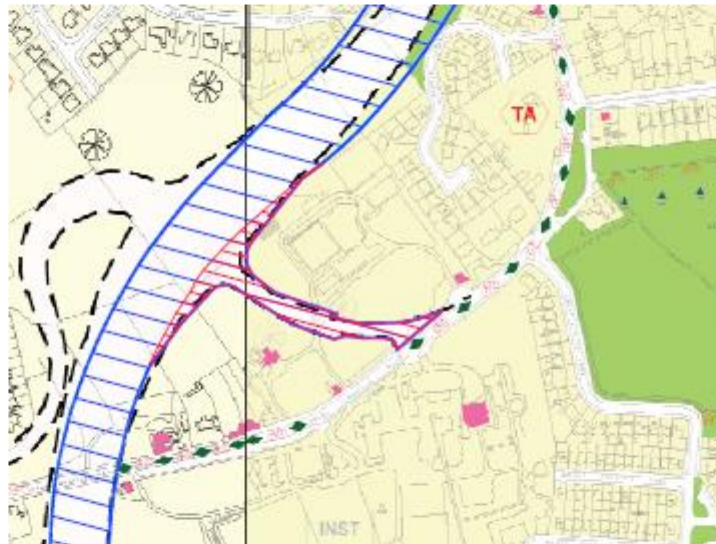

Figure 4 – Extract from Figure 1 of the 2011 Bypass Corridor Study.[429]

- I have realigned the extract from the original to approximate a North/South configuration.
- The blue and white striped area represents the main Bypass Reservation.
- The red and white striped area represents the Spur from the main Bypass Reservation across the Knockrabo/Mount Cedar lands (including part of the Site) to Mount Anville Road.
- Cedar Mount House can be seen depicted in pink "below" the Spur.
- Block F of the Proposed Development would straddle the Spur and disable construction access to the main Bypass Reservation via the precise route of the Spur.
- The legend to Figure 1 of the 2011 Bypass Corridor Study – identifies the Spur as "*Additional Land Not required following Scheme Opening*".

[424] The Dublin Eastern Bypass Feasibility Study, September 2007 found a strong economic case for retaining the Bypass as a medium to long term objective of the National Roads Authority and concluded that a route Reservation should continue to be protected.
[425] National Roads Authority. See Appendix below.
[426] It is found at Appendix 2 to the Knockrabo Investments MCS.
[427] §1 Introduction.
[428] §3 Route Corridor to be protected.
[429] The vertical black line is an artefact of no present significance.

231. Inter alia, and as to "Access Provision", the 2011 Bypass Corridor Study, in the particular context of planning applications, states:

> *"New development should be laid out is such a way so as not to preclude access for construction traffic to the Eastern Bypass construction site. Where the Local Authority considers that a particular development might compromise access to the Route Corridor, the following measures are suggested as requirements for planning applications:*
> *(1) Drawing indicating possible construction traffic routes from national / regional / local roads through to Eastern Bypass Route corridor;"*[430]

232. The clear implication of the foregoing taken with the identification of the Spur as "*Additional Land Not required following Scheme Opening*" is that it is required only for construction access to the Bypass Reservation.[431] It is also clear that the identification of such access is subject to indications of possible alternative construction traffic routes by planning applicants to avoid compromising access to the Route Corridor and such that development should generally not be permitted within this corridor where it would jeopardise the deliverability of the Eastern Bypass motorway.[432] I accept the Board's submission that the corollary is there is no reason refuse permission, at least on account of the ByPass, where the Proposed Development would not jeopardise deliverability of the Bypass. Thus, the 2011 Bypass Corridor Study is clear that there is flexibility as to precise access routes, and in particular the route of the Spur, as long as access is not compromised and delivery of the Bypass is not jeopardised. The issue is essentially a practical one of temporary construction access to build the Bypass.

233. The GLAP Map #2 of 2012 shows the same route as does Figure 1 of the 2011 Bypass Corridor Study – but without distinguishing the intended temporary status of the Spur from the intended permanent status of the main Bypass Reservation. It might have helped if it had made that distinction. The lack of enthusiasm in the GLAP is clear, as it notes that the Bypass Reservation has been in place for many years, yet it is "categorically" clear that the Bypass will not be constructed during the lifetime of the Strategy and meanwhile its "*sterilisation impact …. has significantly restricted the development and hampered the evolution of Goatstown as a distinctive urban village*." Nonetheless, GLAP objective MT2 is to protect the Bypass Reservation.

234. The Development Plan in 2016 echoes the lack of enthusiasm for the Bypass Reservation.[433] Its maps identify the Bypass Reservation and the Spur, as had GLAP Map #2. The Development Plan identifies Long Term Road Objectives[434] as including the Bypass *"(as identified in the Dublin Eastern Bypass Corridor*

[430] P4.
[431] It is theoretically possible that access is required for some other temporary purpose ending once the by Bypass opens. But even if so it seems to me to make no difference.
[432] Emphases added.
[433] 1.3.4.6 Goatstown: "The continuing requirement for a reservation for the Eastern Bypass has effectively sterilised a portion of the Plan lands and has had an overall negative impact on the wider area".
[434] Table 2.2.6.

Protection Study, TII[435] 2011)". Policy ST25, is to improve the road network and the accompanying text includes the following: *"The .. Long-Term Road Objectives ..(are) displayed graphically on the related 14 no. Development Plan Maps and also on Map No. T3 …... ….. the roads shown on the Maps are purely diagrammatic with regard to location and dimensions. Variations and/or adjustments may be necessary as projects progress."* I accept the Board's submission that this content of the Development Plan both requires a consideration of the 2011 Study to fully understand the Bypass Reservation and allows flexibility as to "*Variations and/or adjustments" "with regard to location and dimensions".* I reject, as artificial and as inconsistent with the way in which an intelligent layperson would consider the matter, Mr Mulloy's submission that the words *"(as identified in the Dublin Eastern Bypass Corridor Protection Study, TII 2011)* limit consideration of the 2011 Study to its map of the route as opposed to any wider consideration of the content of the 2011 Study. Maps, like text, must be read in context.

235. Further, Knockrabo Phase 1, as permitted and built, already disables construction access to the main Bypass Reservation by the precise route of the Spur – as illustrated in Figure 5 below.

Figure 5 – Extract from Material Contravention Statement Figure 5.1 – Bypass Reservation

- The Spur, as identified in the 2011 Bypass Corridor Study, is illustrated by the light grey dotted lines. However, as they are difficult to see, I have marked up the drawing in red to identify two areas through which the Spur is depicted as passing.
- Knockrabo Phase 1 already disables construction access to the main Bypass Reservation by the route of the Spur through the red triangle. At least three buildings, including one large block, are now built on the route of the Spur. The Spur as depicted is already cut off from its destination – Mount Anville Road.
- Block F of the Proposed Development is outlined in red also. It straddles the route of the Spur.

[435] The NRA was subsumed into Transport Infrastructure Ireland. See Appendix below.

236. The orange area in Figure 5, running from Mount Anville road north to the main Bypass Reservation, is identified in Figure 1 above as "Knockrabo Way". It is already permitted by Permission D17A/1124 and is unaffected by the Impugned Permission save at its northern end. The MCS says the following of "Knockrabo Way", which is, as to fact, undisputed:

> *"The development will be served by the permitted access road 'Knockrabo Way' …The application does not impact on the future access to the Reservation for the Dublin Eastern Bypass."*[436]
>
> *"As part of the previous planning application, Planning Application File Ref. D17A/1224,*[437] *on the Knockrabo lands, the issue of a suitable corridor to provide potential construction access to the DEBP has been discussed and agreed by the applicant and DLRCC. This planning application*[438] *maintains this corridor and turning area in its entirety. These lands are subject to a future Licence Agreement with DLRCC.*
>
> *The established corridor between Mt Anville Road and the reservation for the DEBP is 15.5m wide, with a turning area at the northern end of the 15.5m corridor, as shown in orange on the diagram below."*[439]

237. The Inspector[440] accepts the MCS in that regard – noting that the 15.5m corridor includes a 7m carriageway and a 3.5m zone which can become an extra traffic lane for future construction access. She notes that the Planning Application had identified a potential material contravention because the road reservation line permitted in D17A/1124 and indicated on the current application differs from that shown on the Development Plan map. She considered, in my view correctly, that the Spur was "*an indicative line*" and, in my view inevitably, that the Proposed Development will not impede the development of the Bypass and is not a material contravention issue.[441]

238. Accordingly, Condition 3 of Permission D17A/1124 reads: "*Prior to commencement of the proposed overall development, the Wayleave Agreement for the Dublin Eastern Bypass access route area shall be approved and agreed in writing with the Planning Authority."* Similarly, Condition 5 of the Impugned Permission reads:

> *"Prior to the commencement of development, the licence agreement between the developer and the planning authority to facilitate the provision of a Construction Access Road to the Dublin Eastern Bypass Route shall be submitted to the planning authority. The exact road reservation line shall be*

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[436] MCS p5.
[437] 1224 is a typo. It should read 1124.
[438] i.e. that which resulted in the Impugned Decision.
[439] MCS p47.
[440] Inspector's Report §10.14.16 et seq.
[441] Inspector's Report §10.14.19.

agreed, and the road reservation line co-ordinates shall be marked on site in consultation with the planning authority."

239. DLRCC expressed no concern as to the issue of construction access from Mount Anville Road to the Bypass Reservation. On the contrary, DLRCC explicitly states that "*The application does not impact on the future access to the Reservation for the Dublin Eastern Bypass.*"[442] It merely suggests a condition similar to Condition 5 as imposed. TII's concerns as to the Proposed Development did not include concerns as to the Spur or construction access.[443]

240. In summary, it is very clear that:

- Use of the Spur as depicted in planning policy, for construction access from Mount Anville Road to the Bypass Reservation, is already impossible due the construction of Phase 1.

- The applicable planning policy allows flexibility as to the precise route of the Spur to provide such construction access.

- The DLRCC, TII and the Board are satisfied that the alternative route via Knockrabo Way will provide such construction access and so the Proposed Development will not compromise such access or jeopardise the deliverability of the Bypass.

- Construction cannot lawfully commence on any part of the Proposed Development, or of that part of Phase 2 still governed by Permission D17A/1124, unless and until Condition 5 is satisfied – until a licence has been agreed for the precise route for the access road and it has been marked on site. While Condition 5 might have been better worded in this regard, when it is considered with Condition 3 of Permission D17A/1124, of which permission the Impugned Permission is an amendment, that is clearly its intention and effect.

241. I hold that

- the Development Plan, not least when read with the 2011 Bypass Corridor Study (as I hold it must be), allowed flexibility as to the precise route of the Spur.

- as the Impugned Permission, when read with Permission D17A/1124 of which it is an amendment, provides for an alternative route for the Spur which will not compromise construction access to the Bypass Reservation or jeopardise the deliverability of the Bypass, the Impugned Permission is not in contravention

[442] DLRCC CE report Appendix A – Dun Laoghaire Rathdown County Council Interdepartmental Reports, Transportation Planning Report, p65.
[443] See DLRCC CE report p11.

of the Development Plan as the access to be provided in accordance therewith falls within the flexibility of the Plan.

242. Alternatively, if I am wrong and there is a contravention, I hold, for essentially the same practical reasons, that it is not material. Whether a contravention is material is a question of law for the court.[444] The test of materiality set in **Roughan**[445] is cited in **Ballyboden TTG**:[446]

> *"…. in the light of the substance of the proposed development; whether or not any change of use would be significant; the location of the proposed development; the planning history of the site or area; and the objectives of the development plan. What is material depends upon the grounds upon which the proposed development is being, or might reasonably be expected to be, opposed by local interests. If there are no real or substantial grounds in the context of planning law for opposing the development, then it is unlikely to be a material contravention."*

243. In my view, the present case illustrates that when this test observes that "*What is material depends upon the grounds upon which the proposed development is being, or might reasonably be expected to be, opposed by local interests",* it envisages that the grounds of objection and the interests mentioned will coincide. It does not have in mind that the contravention will be considered material by local interests in virtue of its being a useful proxy for the ulterior motive of having the permission quashed to advance other interests. I also consider that the interests underlying a consideration of materiality may not necessarily be local or particular to the objectors – as here, they could be wider if indeed the Proposed Development impeded necessary construction access to the Bypass Reservation. When it comes to considering the materiality of a contravention, it seems to me that the materiality must relate to the subject-matter and purpose of the plan provision which has been contravened. It is difficult to see that a contravention which in no way imperils the purpose and effect of the plan provision contravened must be material. That seems to me to be the situation in the present case. And it is difficult to see what prejudice there would be to the relevant interest of an objector – or at least none has been articulated – arising from the difference between the Spur as depicted in the planning policy maps and the access to the Bypass Reservation agreed with the planning authority by the developer over whose land it will run. In any event, it has not been suggested that in this case such difference was the subject of objections by anyone in the planning process. That includes Mr Mulloy, whose submission[447] to the Board did not mention the Bypass and whose proceedings here do not assert that the issue bears on his personal interests. Indeed, as a separate matter of his standing to raise this issue, the Board relies on the fact that he did not raise it before the Board. However, I refer to Mr Mulloy's personal interests not as, of themselves, determinative of materiality but merely as the lack of them is illustrative of the more general point that where construction access to the Bypass Reservation is agreed and the Impugned Permission is conditional on formalisation of that agreement, the issue of the Spur

[444] e.g. Redmond v An Bord Pleanála [2020] IEHC 151, Ballyboden Tidy Towns Group v An Bord Pleanála & Shannon Homes [2022] IEHC 7. Jennings & O'Connor v An Bord Pleanála & Colbeam [2023] IEHC 14.
[445] Roughan v Clare County Council unreported, High Court, Barron J., 18 December 1996.
[446] Ballyboden Tidy Towns Group v An Bord Pleanála & Shannon Homes [2022] IEHC 7 §140.
[447] Dated 2 December 2021.

is not a ground on which "*the proposed development is being, or might reasonably be expected to be, opposed by local interests*".

244. In sum, there was no contravention as the change of Spur route was within the flexibility as to such route allowed by applicable planning policy. If I am wrong and there was such a contravention, it was immaterial as it does not compromise construction access to the Bypass Reservation or jeopardise the delivery of the Bypass. For these reasons, I dismiss the challenge on Ground 6.

CONCLUSIONS

245. It follows from this judgment that I will quash the Impugned Decision on Ground 2, as to public transport, only. I dismiss all other grounds of challenge. I provisionally consider that the matter should be remitted to the Board for its reconsideration and that the Applicant should have his costs as following the event of certiorari.

246. I will list the matter for mention only on 21 March 2024 with a view to making final orders if they can be agreed. If not, I will on that occasion adjourn the matter for further argument.

David Holland
12 March 2024

Appendix A list of some statutory bodies with responsibility for transport.

Dublin Transport Authority (DTA)	The DTA was established by the Dublin Transport Authority Act 2008 It replaced the Dublin Transportation Office[448] ("DTO"). The DTA is now identified in s.2 PDA 2000 as renamed as the National Transport Authority.[449] However possible confusion is caused by the fact that the revised PDA 2000 continues to refer to the DTA in its contents list, marginal notes and the like. Its functions are described below in the entry as to the National Transport Authority.
National Roads Authority (NRA)	See Transport Infrastructure Ireland
National Transport Authority (NTA)	The NTA is identified in s.2 PDA 2000 as the renamed Dublin Transport Authority.[450] Inter alia, its functions[451] include strategic planning of transport, promotion of the development of an integrated, accessible public transport network, securing the provision of public passenger transport services, and of public transport infrastructure, and effective management of transport demand. The NTA is required[452] to prepare a Transport Strategy for the GDA[453] and to provide a long-term strategic planning framework for the integrated development of transport infrastructure and services in the GDA.
Transport Infrastructure Ireland (TII)	TII is a merger, by the Roads Act 2015, of the National Roads Authority and the Railway Procurement Agency. It is responsible for the development and operation of the national roads network and light rail infrastructure.

[448] Which had been established by the Dublin Transportation Office (Establishment) Order 1995 (S.I. No. 289 of 1995).
[449] With effect from 1 December 2009 pursuant to section 30 of the Public Transport Regulation Act 2009.
[450] With effect from 1 December 2009 pursuant to section 30 of the Public Transport Regulation Act 2009.
[451] As provided by the Dublin Transport Authority Act 2008 ss. 11 & 12.
[452] By s.12 of the Dublin Transport Authority Act 2008.
[453] By s.3 of the Dublin Transport Authority Act 2008 the Greater Dublin Area includes the counties of Dublin, Meath, Kildare and Wicklow.