THE HIGH COURT

JUDICIAL REVIEW

2019 No. 191 J.R.

IN THE MATTER OF SECTION 50, 50A AND 50B OF THE PLANNING AND DEVELOPMENT ACT 2000

BETWEEN

SOUTHWOOD PARK RESIDENTS ASSOCIATION

APPLICANT

AND

AN BORD PLEANÁLA

MINISTER FOR CULTURE HERITAGE AND THE GAELTACHT

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

CAIRN HOMES PROPERTIES LTD.

DUN LAOGHAIRE RATHDOWN COUNTY COUNCIL

NOTICE PARTIES

JUDGMENT of Mr Justice Garrett Simons delivered 10 July 2019.

SUMMARY

1. This judgment addresses the circumstances, if any, in which it is legitimate to treat a breach of the public participation requirements of the planning legislation as *de minimis*. The issue arises as follows. An Bord Pleanála has purported to grant planning permission for a large-scale residential development. The planning application had been made pursuant to the special statutory regime governing applications for "strategic housing development" as defined. It is a requirement of the relevant regulations that the applicant for planning permission, i.e. the developer, must make a copy of the planning application available for inspection on a dedicated website.

2. It appears that, through inadvertence, one of the documents submitted as part of the planning application had not been posted online. The omitted document contained information relating to the potential impact of the proposed development on various species of bat which are protected under EU law. An earlier version of this document has been posted online in error. None of the parties were seemingly aware of this error until *after* the within judicial review proceedings had been instituted. On learning of the error, the Applicant sought to amend its statement of grounds to include a further complaint that there had been non-compliance with the regulations. The other parties to the proceedings, very sensibly, consented to the proposed amendments. Indeed, the Developer went further and conceded that in circumstances where the requirements of the regulations had not been fulfilled, the decision to grant planning permission should be set aside on that narrow ground. It would not then be necessary for the court to consider the *other* grounds of judicial review.

3. Perhaps surprisingly, An Bord Pleanála has adopted a different approach. The Board concedes that there has been a breach of the requirements of the regulations, but contends that this breach was *de minimis* and does not affect the validity of the decision to grant planning permission.

4. The judicial review proceedings came on for hearing before me on Tuesday, 9 July 2019. All parties agreed that the legal consequences which the breach of the regulations has for the validity of the planning permission should be addressed as a preliminary issue, in advance of hearing any of the other grounds of judicial review. This preliminary issue was fully argued before me, and I reserved judgment overnight.

5. For the reasons set out herein, I have concluded that the breach of the requirements of the regulations is fatal to the validity of the planning permission. The regulations could not be clearer in their terms, and the failure to post the correct version of the document online represented a breach of those regulations. An Bord Pleanála's reliance on case law in relation to *de minimis* breaches is misplaced. The breach in this case cannot be characterised as trivial, technical or insubstantial. The content of the omitted document—which consisted of (i) the results of surveys of bat activity in the vicinity of the application site, and (ii) proposed mitigation measures—was significant.

6. The effect of the breach was twofold. First, it undermined public participation in the planning process in that members of the public, including the Applicant, did not have an opportunity to consider and make submissions on the survey results and mitigation measures relied upon by the Developer. Secondly, it distorted the interpretation of the planning permission itself. One of the conditions of the planning permission had required that the mitigation and monitoring measures which had been submitted as part of the planning application be carried out in full. A member of the public who examined the online version of the planning application would only have sight of an earlier version of the mitigation measures. This has the potential to undermine the right of access to the courts within the eight-week time period allowed under section 50 of the Planning and Development Act 2000 ("*the PDA 2000*").

7. In the premises, I propose to make an order setting aside the decision to grant planning permission. The order will recite that the only grounds upon which this court has adjudicated are those in relation to public participation and the requirement to make a full copy of the planning application available online. (Ground E.25 of the amended statement of grounds). This judgment has nothing to say—one way or another—about any of the other grounds of challenge.

BACKGROUND

8. These proceedings seek to challenge a decision of An Bord Pleanála dated 13 February 2019. The application for planning permission had been made pursuant to the special statutory scheme established under the Residential Tenancies and Planning and Development (Housing) Act 2016 ("*the PD(H)A 2016*"). This Act allows for the making of an application directly to An Bord Pleanála in the case of "strategic housing development" as defined.

9. The procedure governing the making of an application is set out, principally, at section 8 of the Act, and under Ministerial Regulations made pursuant to the Act, namely the Planning and Development (Strategic Housing Development) Regulations 2017 (S.I. No. 271/2017). The Ministerial Regulations take effect by inserting an additional Part into the principal planning regulations, i.e. the Planning and Development Regulations 2001.

10. Article 301(3) of the Planning and Development Regulations 2001 (as amended) provides as follows.

> "(3) The applicant shall make a copy of an application available for inspection on the Internet at a web address set up for the purpose for the period commencing on the date of making the application and expiring 8 weeks following the sending by the Board to the applicant of a copy of its decision on the application."

11. An applicant for planning permission is required to provide a declaration to the effect that, to the best of their knowledge and belief, the copies of the application documents displayed on any website under the applicant's control are identical to the application documents deposited with An Bord Pleanála.

12. The planning application had been submitted by Cairn Homes Properties Ltd ("*the Developer*"). The Developer established the requisite website under the domain name "chesterfieldplanning.com". It seems that, through inadvertence, one of the documents which had been submitted as part of the planning application to An Bord Pleanála was not posted to the website. Instead, *an earlier* version of the document was posted online. Given the nature of arguments made on behalf of An Bord Pleanála at the hearing before me, it is necessary to say something about the content of the omitted document.

13. The document is entitled "Cross Avenue, Blackrock, Co. Dublin, Bat Survey" and is dated 2018. (It is date stamped as having been received by An Bord Pleanála on 30 October 2018). The title does not, however, fully reflect the content of the document. Whereas the document does certainly contain survey results, the content of same is more elaborate. In particular, the document puts forward detailed mitigation and monitoring measures based on the survey results. It would be more accurate to describe the document as a "report" rather than merely a "survey". The terms "*bat survey*" and "*report*" will be used interchangeably when referring to the document.

14. The omitted document is, in fact, one of two "Bat Surveys" which had been prepared on behalf of the Developer. The explanation for there being two separate reports lies, largely, in the fact that the first report (2017) had identified the need to carry out a further survey during the summer months. The second report is, in effect, an updated report to reflect the results of the additional survey subsequently carried out in July 2018. As explained in the affidavit of Paula Galvin of 7 June 2019, only the 2018 version has been lodged with An Bord Pleanála.

15. The recommendation for the additional survey is stated as follows in the first report (2017) at page 19 thereof.

> "3. Removal of Buildings
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> Conformation (sic) was provided on the 28/2/18 with regards to the removal on buildings. The summer cottage and protected sections of the main house will remain. While no bats were recorded roosting within the buildings on-site, it is recommended that further survey work is undertaken earlier in the survey season (June or July of the summer months) to ensure that there are not roosting sites within the main house and the summer cottage. Access is also required to the attic space of both the main house and summer cottage to determine their bat roosting potential."

16. As an aside, it should be noted that one of the complaints made by the Applicant in the proceedings is that the survey ultimately carried out in July 2018 did not, in fact, involve a survey of the attic space.

17. The content of the two versions of the document is broadly similar. The principal difference between the two appears to be that the 2018 version includes (i) the results of an *additional* bat survey carried out in July 2018, and (ii) a revised set of mitigation measures, which seemingly reflect the results of the additional bat survey.

18. The potential impact of the proposed development on ecology, and, in particular, on the various species of bat had been identified by An Bord Pleanála's inspector in her report as one of the principal issues to be considered on the planning application.

19. The inspector's assessment of this issue is set out as follows at pages 70/71 of her report.

> "Ecological Issues
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> An Ecological Impact Statement is submitted, which is based on a site survey carried out on 31st August 2017. There are no sensitive receptors within a 2km radius of the development site. The South Dublin Bay SAC / SPA / pNHA is within 10km. There are no protected species within the relevant 10 km grid square and the site is not in the catchment of any significant watercourse. The habitats present at the development site are of low local biodiversity value except for the treelines and woodland, which provide habitat of high local ecological value for common breeding birds and foraging areas for bats. There are no habitats listed in Annex II of the Habitats Directive. No alien invasive plant species are present. The site survey found a single entrance burrow at the southern end of the site. A camera survey in September 2017 found the burrow to be occupied by a fox (not a protected mammal). There is no evidence of any protected species at the development site.
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> The Statement identifies the following potential ecological impacts:
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> • Removal of habitats including buildings, meadow, drainage ditch, treelines and individual trees, predominantly of negligible or low local value. The loss of these habitats is considered to be minor negative. Habitat enhancement measures are proposed comprising new tree and shrub planting of a diverse range of native and non-native species. The expanded pond feature will provide a permanent body of water.
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> • Direct mortality of animal species during demolition. This is identified as a moderate negative impact. Construction mitigation measures are proposed.
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> • Pollution of watercourses during construction. Site investigations have shown that the drainage ditch is not connected to wider water courses and so there is no connection to aquatic habitats. Run-off is to be managed

during the construction phase. No negative water impacts are identified for the operational stage of the development.

• No significant cumulative impacts are identified.

Details of a bat survey carried out at the site on the 11th and 12 August 2017 and 12th July 2018 are submitted. Bat activity was recorded mainly at the treelines at the site perimeter with some activity in the treeline adjacent to Chesterfield House. At least 4 species of bats were recorded feeding and commuting within the survey area. This is indicative of the importance of this area for bats. While 3 of the species recorded are common Irish bat species (common pipistrelle, soprano pipistrelle and Leisler's bat), the fourth species relies on woodland and parkland (brown long-eared bat). This is a rich bat fauna for one survey area. There are a number of large mature trees that are considered suitable for roosting bats and the garden is highly suitable for foraging and roosting bats. It is also likely that bats may occasionally use the buildings on site. However, no roosts were recorded during the site surveys. Potential impacts on bats relate to disturbance due to potential light and noise pollution, loss of roosting sites and foraging areas and interruption of commuting routes. Proposed mitigation measures include tree planting, supervision of tree removal, survey of areas of roosting potential prior to commencement of construction, a bat box scheme and review of proposed lighting plan by a bat ecologist.

The Ecological Impact Assessment concludes that no significant residual effects to biodiversity are likely to arise as a result of the proposed development. This conclusion is accepted, subject to the implementation of the proposed construction mitigation measures, landscaping proposals and bat mitigation measures."

20. As appears, the content of the 2018 bat survey/report was heavily relied upon by An Bord Pleanála's inspector in her assessment of the ecological impact of the proposed development. The inspector expressly states that the bat mitigation measures are to be implemented, and included a condition to that effect as part of her recommended decision. A condition in almost identical terms to that recommended is to be found as Condition No. 8 of the planning permission as follows.

"8. The mitigation and monitoring measures outlined in the Ecological Impact Statement and Bat Survey submitted with this application shall be carried out in full, except where otherwise required by conditions of this permission.

Reason: To protect the environment."

OTHER GROUNDS OF JUDICIAL REVIEW

21. This judgment is confined to the grounds of challenge arising out of the failure to comply with Article 301(3) of the Planning and Development Regulations 2001 (as amended). It is, however, necessary to say something about some of the other grounds of challenge in order to assess the significance of that non-compliance.

22. A number of the grounds pleaded arise out of the obligation under Article 12 of the EU Habitats Directive (Directive 92/43/EEC) to establish a system of "strict protection" for certain animal species, including, relevantly, certain species of bat. The "deliberate disturbance" of protected species, and the "deterioration or destruction" of their breeding sites or resting places is prohibited. This is subject to the possibility of granting derogations in certain circumstances under Article 16.

23. These provisions of the EU Habitats Directive have been transposed into domestic law by the Birds and Natural Habitats Regulations 2011 (S.I. No. 477/2011). Regulation 54 allows for the grant of a "derogation licence" in certain circumstances.

24. The proper interaction between these requirements of the Birds and Natural Habitats Regulations 2011 and the development consent process provided for under the PD(H)A 2016 is one of the principal issues in the judicial review proceedings. In particular, the Applicant contends that An Bord Pleanála ought to have included a condition as part of the planning permission requiring the Developer to seek a derogation licence. (This might represent an important safeguard in circumstances where the Bird and Natural Habitats Regulations 2011 do not impose any mandatory obligation for advance screening to determine whether a derogation licence is required). An Bord Pleanála refutes this, saying that such a condition is unnecessary given that the requirement to comply with the Birds and Natural Habitats Regulations 2011 arises irrespective of any decision of the Board, i.e. the grant of planning permission does not obviate the need to seek a derogation licence where required.

25. Crucially, the mitigation measures recommended in the 2017 version of the bat survey had made express reference to the requirement to obtain a derogation licence in the event that the main house was recorded as a bat roost. This mitigation measure is omitted under the 2018 version of the bat survey. A person who relied upon the documentation posted on the website—which of course only displays the 2017 version—would thus have been given the mistaken impression that a link was being forged between the planning permission and the requirements of the Birds and Natural Habitats Regulations. I discuss the legal consequences of this at paragraph 48 below.

SUBMISSIONS OF THE PARTIES

26. On behalf of the Applicant, Mr James Devlin, SC, conducted a very careful analysis of both versions of the bat survey, and drew attention to what he characterised as a number of significant differences between the two. Counsel laid particular emphasis on the changes to the proposed mitigation measures in respect of the removal of the non-original features of Chesterfield House. Counsel was also critical of the fact that the additional survey carried out in July 2018 had—contrary to what had been recommended in the first report—not included the attic space of both buildings, i.e. Chesterfield House and the summer cottage.

27. Counsel submitted that the case law is unequivocal, and that a breach of a statutory requirement could only be discounted if it were *de minimis*. Counsel relied on a number of passages from the judgment of the Supreme Court in *Monaghan County Council v. Alf-a-Bet Promotions Ltd.* [1980] I.L.R.M. 64. Reliance was also placed on the judgment of the High Court (Peart J.) in *Marshall v. Arklow Town Council (No. 2)* [2004] IEHC 313; [2004] 4 I.R. 92.

28. On behalf of An Bord Pleanála, Mr Rory Mulcahy, SC, submitted that not every breach of the planning regulations has the legal consequence that a decision to grant planning permission is invalid. The breach in this case was said to meet the *de minimis* test identified in *Monaghan County Council v. Alf-a-Bet Promotions Ltd.* [1980] I.L.R.M. 64, i.e. the breach could be characterised as "trivial", "technical" or "peripheral".

29. Counsel very properly drew the court's attention to the judgment of the High Court (Kelly J.) in *McAnenley v. An Bord Pleanála* [2002] 2 I.R. 763. That case concerned a failure to comply with the statutory obligation on the part of the planning authority to furnish certain documents to An Bord Pleanála. Kelly J. (as he then was) stated as follows (at page 766 of the report).

> "It is difficult to treat non-compliance with an express statutory requirement on a *de minimis* basis. The notification of a decision of a planning authority will in all cases contain the essence of the decision itself. Notwithstanding that, parliament has ordained that both should be provided to the respondent. I cannot disregard this statutory requirement."

30. Counsel submitted that whereas the issue of the impact of the proposed development on the species of bat had since become the focus of the judicial review proceedings, the importance of the issue in the context of the overall planning application had to be considered. The Applicant had been in a position to make submissions on the application for planning permission. It was suggested that the Applicant did not need the results of the 2018 survey to make all of the arguments which it wished to do in relation to mitigation measures. Counsel sought to suggest that the difference between the material in the two versions of the bat survey was minimal, and hypothesised that had the second bat survey been submitted by way of a response to a request for further information in the context of a conventional planning application, it could not be said that An Bord Pleanála would have had to circulate that information to the other parties.

31. Counsel on behalf of the Developer, Mr Eamon Galligan, SC, confirmed that his client accepts that the consequence of non-compliance with Article 301(3) is that the decision to grant planning permission is invalid. The Developer adopts the pragmatic approach that an order setting aside the planning permission on this narrow ground should be made. No order for remittal has been sought.

32. Ireland and the Attorney General ("*the State respondents*") had been joined to the proceedings as *legitimus contradictor* to a claim by the Applicant that Article 12 of the EU Habitats Directive (1992/43/EEC) has not been properly transposed into domestic law. Counsel on behalf of the State respondents, Mr Brian Kennedy, SC, indicated that his clients had no objection to the issue under Article 301(3) being dealt with as a preliminary issue. Counsel submitted that this was generally in accordance with the principle of judicial self-restraint whereby judicial review proceedings should, if possible, be resolved by reference to national law issues before the court embarks upon any consideration of an alleged failure in the transposition of an EU Directive. No submissions were made on the *substance* of the dispute in respect of Article 301(3) in circumstances where this was a matter between the Applicant and the Board.

DISCUSSION

33. The terms of Article 301(3) of the Planning and Development Regulations 2001 (as amended) are unequivocal. There is no question but that the failure to post the 2018 bat survey online constitutes a breach of the Planning and Development Regulations 2001 (as amended). The dispute between the Applicants and An Bord Pleanála centres on the separate question of whether the admitted non-compliance with the requirements of Article 301(3) can be discounted as *de minimis*.

34. The jurisdiction of the courts to excuse or waive a breach of a procedural requirement which has been prescribed by legislation is severely limited. The position has been stated as follows by the Supreme Court in *State (Alf-a-Bet Ltd) v. Monaghan County Council* [1980] I.L.R.M. 64.

> "I do, however, feel it pertinent to express the opinion that when the 1963 Act prescribed certain procedures as necessary to be observed for the purpose of getting a development permission, which may affect radically the rights or amenities of others and may substantially benefit or enrich the grantee of the permission, compliance with the prescribed procedures should be treated as a condition precedent to the issue of the permission. In such circumstances, what the Legislature has, either immediately in the Act or mediately in the regulations, nominated as being obligatory may not be depreciated to the level of a mere direction except on the application of the *de minimis* rule. In other words, what the Legislature has prescribed, or allowed to be prescribed, in such circumstances as necessary should be treated by the courts as nothing short of necessary, and any deviation from the requirements must, before it can be overlooked, be shown, by the person seeking to have it excused, to be so trivial, or so technical, or so peripheral, or otherwise so insubstantial that, on the principle that it is the spirit rather than the letter of the law that matters, the prescribed obligation has been substantially, and therefore adequately, complied with."

35. As appears, before a breach can be waived, it must be technical, trivial, peripheral or otherwise insubstantial. On the facts of *State (Alf-a-Bet Ltd),* the breach of the then planning regulations involved a failure to properly describe the "nature and extent" of the proposed development in the public notices published at the time of the making of the application for planning permission.

36. These principles were applied in the specific context of what might be described as a "missing documents" case by the High Court in *McAnenley v. An Bord Pleanála* [2002] 2 I.R. 763. The breach in that case involved the failure on the part of the planning authority to furnish certain documents to An Bord Pleanála. As appears from the following passages, Kelly J. (as he then was) emphasised that it is difficult to treat non-compliance with an express statutory requirement on a *de minimis* basis.

> "I am of the view that the legislature is setting up the statutory scheme of appeals to the respondent had in mind that certain documents would be placed before it when it is called upon to exercise its de novo jurisdiction involving an appeal to it from a decision of a planning authority.
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> The obligation to submit these documents is placed on the planning authority. The section uses the word 'shall'. The intent of the legislature is that there should be placed before the respondent the documentary material as specified which was on the planning authority file and was before it when it made its decision together with the documents which are set forth at subs. (c) which relate to the decision itself.
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> The documents in question in this application are as follows:-
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> > (I) It is common case that the decision of the notice party was not forwarded to the respondent. The respondent did not therefore have the decision of the notice party before it when it made its decision on the appeal. It did have a copy of the notification to grant permission. It is said that this document contained all of the material which was contained in the decision itself. In this case the decision was constituted by an order of the county manager. It is argued that this failure to comply with the provisions of s. 6(c) of the Act should be treated and excused on a *de minimis* basis.

> It is difficult to treat non-compliance with an express statutory requirement on a *de minimis* basis. The notification of a decision of a planning authority will in all cases contain the essence of the decision itself. Notwithstanding that, parliament has ordained that both should be provided to the respondent. I cannot disregard this statutory requirement.
>
> That is not to say that, notwithstanding non-compliance with the provisions of s. 6(c), in an appropriate case certiorari might be withheld as a matter of discretion, if that were the only lacuna involved and no injustice would result. But that is not the case here for reasons which I will turn to presently. There was here a failure to comply with the obligations imposed under s. 6(c) of the Act of 1992, but it was not the only failure."

37. The breach in *McAnenley* was fatal even in circumstances where the content of the one of the missing documents, i.e. the planning authority's decision, was available in an almost identical form. This has an obvious resonance with the present case.

38. Counsel for An Bord Pleanála has suggested that it is legitimate for the court to consider the differences between the two versions of the bat survey in order to determine whether those differences are material. In this regard, counsel draws an analogy with the case law in respect of the exchange of submissions on a planning application or appeal. The courts have long since accepted that the exchange of submissions between parties must come to an end at some stage, and this has the inevitable consequence that one of the parties will have had the "last word", i.e. in the sense that they will have submitted a document to which the other side will not have had an opportunity to respond in writing. This point is made as follows in the judgment of the High Court (Murphy J.) in *State (Haverty) v. An Bord Pleanála* [1987] I.R. 485 at 493/94.

> "I have no doubt that on an appeal to the planning board the rights of an objector — as distinct from a developer exercising property rights — the requirements of natural justice fall within the former rather than the latter range of the spectrum. This flows from the nature of the interest which is being protected, the number of possible objectors, the nature of the function exercised by the planning board and the limited criteria by which appeals are required to be judged and the practical fact that in any proceedings whether oral or otherwise there must be finality. Some party must have the last word. The substantive reality of the present case is that the prosecutrix and the Sefton residents' association put forward a detailed professional argument before the planning authority in the first instance and the planning board in relation to the appeal. I can appreciate their concern that they might have wished to expand upon their argument or to raise counter-arguments to those made in reply by the developers but I have no doubt that the real substance of their case was before An Bord Pleanála and duly considered by it. If there was in fact a material conflict of evidence that could not have been resolved by additional submissions or observations. Disputes of that nature could only be adequately dealt with in an oral hearing.
>
> To avoid misunderstandings perhaps I should make it clear that I do not accept and I have not accepted any general proposition that An Bord Pleanála could discharge its obligation to an interested party by delivering part only of the appellant's submission to any person entitled to receive the same. I could imagine cases in which further communications from the developer extended the original submission so radically as to constitute a different or additional case and in that event natural justice might well require An Bord Pleanála to postpone its decision until it had afforded interested parties an opportunity of commenting upon the revised submission. However, as I say, in the present case it seems to me that whilst the prosecutrix and her planning adviser do feel strongly that they would wish to have had an opportunity of amplifying the arguments which they had made I believe that the requirements of natural justice have been met so that there are no grounds for granting the order sought. I would allow the cause shown with no order as to costs."

39. The point has more recently been made by the High Court (Hedigan J.) in *West Wood Club Ltd. v. An Bord Pleanála* [2010] IEHC 16.

> "I am satisfied that the submissions in question raised no new issues requiring the respondent to circulate them for comment. There is no obligation on the respondent to repeatedly circulate submissions treating of the same matter. I am satisfied therefore that leave should not be granted."

40. I do not think that a proper analogy can be drawn between this line of case law and the circumstances of the present case. The language of Article 301(3) of the Planning and Development Regulations 2001 (as amended) is emphatic. Neither the Developer nor An Bord Pleanála enjoy any *discretion* as to compliance with same. This is in marked contrast with the position in relation to the exchange of documents on a planning application or appeal where, by necessity, the decision-maker must have a power to end the exchange. If this were not the case, then a planning application or appeal might never reach conclusion. To this extent, a decision-maker can be said to have a form of discretion, albeit one that is circumscribed by the overarching requirement to comply with fair procedures. The case law indicates, for example, that the other parties must be afforded an opportunity to respond if the latest documents submitted contain new material.

41. Where judicial review proceedings are brought alleging a failure to comply with fair procedures, then it might be appropriate for the court to consider the content of the documents, and, in particular, to assess whether there is new material in respect of which a right to reply must be afforded. Typically, this will be done against a background whereby the decision-maker itself has considered the material and reached a view on whether or not same contains new material. The High Court, on judicial review, will normally show some deference to that view. See, for example, the judgment of the High Court (Kelly J.) in *Kinsella v. Dundalk Town Council* [2004] IEHC 373 ("The task of assessing whether 'significant additional data' is contained in a response involves the exercise of planning expertise").

42. The legal position is entirely different where, as in the present case, the decision-maker has no discretion. In such circumstances, it is inappropriate for either the decision-maker, or for the court, to embark upon a detailed examination of the content of the material with a view to determining whether or not it is significant or otherwise. This is because the Oireachtas has ordained, albeit mediately through Ministerial Regulations, that all documentation in respect of a planning application must be posted on a dedicated website. In truth, therefore, the position is closer to that analysed by the High Court (Kelly J.) in *McAnenley* (see paragraph 36 above). It will be recalled that the breach in *McAnenley* was fatal even in circumstances where the content of the one of the missing documents, i.e. the planning authority's decision, was available in an almost identical form.

43. It should also be noted that—as a consequence of the chronology in this case—An Bord Pleanála has not, in fact, ever formally considered whether the difference between the two reports is significant. This is because the failure to upload the correct version of the document to the website did not become known until after the Board had already made its decision. Accordingly, there is no assessment on the part of An Bord Pleanála of the significance or otherwise of the difference between the two documents in respect of which curial deference might be applied.

44. For similar reasons, the analogy which counsel for An Bord Pleanála sought to draw with information received in response to a request for further information does not hold good. The legal test is that prescribed under Article 35 of the Planning and Development Regulations 2001, i.e. "significant additional data". This is a much higher threshold than *de minimis*. This test was considered in detail in *Kinsella* (above).

DECISION

45. The principal argument advanced on behalf of An Bord Pleanála is to the effect that if one carries out a comparison between the 2017 bat survey (which had been posted to the website) and the 2018 bat survey (which had been omitted), there is no significant difference between the two.

46. I am satisfied on the basis of the careful analysis conducted by counsel on behalf of the Applicant that the differences between the two bat surveys cannot be discounted as insubstantial. The identification of appropriate mitigation measures was an important issue in the planning application, and the Board's inspector had relied in this regard almost exclusively on the mitigation measures put forward by the Developer. (See pages 70 and 71 of her report). Indeed, such was the eagerness of the inspector to adopt the mitigation measures wholesale that she appears to have overlooked entirely the fact that certain of the mitigation measures were presented in the alternative, and, in one instance, it was expressly stated that "a better mitigation solution" than that identified might be required. None of this is engaged with by the inspector.

47. Effective public participation requires that members of the public be afforded an opportunity to make submissions on those mitigation measures. The fact that only the 2017 version of the bat survey appeared on the website undermined this exercise. This is especially so as the mitigation measures recommended in the 2017 version were, in some instances, more robust than those under the 2018 version.

48. This point can be illustrated by reference to the following example. The 2017 version has very detailed recommendations under the heading "*3. Removal of Buildings*". These are set out at pages 19 and 20 of the report. Crucially, one of the mitigation measures recommended concerns an obligation to obtain a derogation licence under the Birds and Natural Habitats Regulations 2011. As flagged at paragraph 21 above, this touches upon one of the principal grounds of challenge advanced in the judicial review proceedings.

49. The relevant part of the 2017 bat survey reads as follows.

> "In general, the recommendations are to remove the roof of the buildings recorded as bat roosts and leave open for 3-4 nights prior to demolishment (sic) of the building. This will change the internal temperature of the building and encourage residing bats to move off. Only undertake this work in under (*sic*) permission with a NPWS Derogation Licence if a building is recorded as a bat roost. Such works should only be undertaken in the autumn or springs months to avoid the maternity and hibernation periods."

50. These mitigation measures have not been included in the second version of the bat study (2018).

51. In order to appreciate the importance of this, it is necessary to rehearse briefly one of the grounds of challenge advanced on behalf of the Applicant. The Applicant contends that the requirement for the "strict protection" of species which is applicable to certain of the bat species under the EU Habitats Directive has not been complied with. The Applicant criticises An Bord Pleanála for the manner in which it dealt with this issue, and, in the alternative, has sought to challenge the manner in which the State has transposed this aspect of the Habitats Directive. One of the issues arising is whether An Bord Pleanála is obliged to impose a planning condition requiring a developer to apply for and obtain a derogation licence under the Birds and Natural Habitat Regulations 2011.

52. A person relying on the documentation posted on the website would be left with the mistaken impression that the mitigation measures—which have since been given effect to by Condition No. 8 of the planning permission—include a requirement to obtain a derogation licence in certain circumstances. In fact, this is not what is envisaged under the 2018 version of the bat survey.

53. The omission of the 2018 version from the website thus had the potential to mislead members of the public. This risk is not fanciful. A person relying on the website might have been satisfied that this express requirement to apply for a derogation licence represents an important safeguard. A person who had a concern as to the interaction between the planning legislation and the Birds and Natural Habitats Regulations 2011 would have been left with the mistaken impression that a condition forging a link between the two legislative regimes had, in effect, been imposed as part of the planning permission. Such a person might—on the basis of this mistake—decide not to object to the proposed development.

54. Counsel for An Bord Pleanála has sought to explain away the difference in the wording between the two reports by saying that—in circumstances where the 2018 survey has confirmed that there are no night time roosts in the two buildings—the mitigation measures originally proposed, which had included the requirement to apply for a derogation licence, became unnecessary. With respect, this argument requires the court to trespass on the substantive planning merits of the case. It requires the court to consider whether the revision to the mitigation measures was justified. More importantly, it invites the court to discount the importance of public participation. In circumstances where the 2018 bat survey was not posted to the website, members of the public, including the Applicant, were denied an opportunity to make submissions in relation to same. They were thus denied an opportunity to make submissions, for example, on the robustness of the 2018 survey given that it did not involve an examination of the attic spaces as had been recommended in the 2017 version. They were also denied an opportunity to make submissions on whether the planning permission should have included a condition obliging the Developer to seek a derogation licence if required.

55. I am satisfied, therefore, that the differences between the two versions of the bat survey are significant, and can certainly not be dismissed as trivial, technical, or insubstantial.

56. The right to effective public participation has been undermined as a result of the failure to post the report on the website. Moreover, there is a continuing consequence of this omission in circumstances where the mitigation measures have, in effect, been incorporated into the planning permission by dint of Condition No. 8. A person reading this condition, who then sought to examine the documentation on the website, would be left with the mistaken impression that the 2017 version of the mitigation measures applied. This has the potential to undermine the right of access to the courts within the eight-week time period allowed under section 50 of the PDA 2000. The fact that Article 301(3) requires the website to be available for eight weeks after the planning decision indicates that it is relevant for the purpose of access to the courts.

57. A breach which has not only had a negative impact on the public participation process prior to decision, but would, if not corrected, have effects after the grant of planning permission could not properly be said to be *de minimis*.

EU CASE LAW
58. There was some brief discussion at the hearing before me as to whether the determination of the legal consequences of Article 301(3) of the Planning and Development Regulations 2001 should be guided by EU law. In particular, it was suggested that the emphasis which EU environmental law and the Aarhus Convention place on public consultation might be relevant.

59. Counsel on behalf of An Bord Pleanála took the very pragmatic view that whereas it remains the Board's position that the planning application did *not* trigger the public participation requirements of the EIA Directive (something which is itself in dispute between the parties), the standard of protection afforded to public participation under national law is not less than that under European law.

60. Counsel sought to rely on the judgment in Case C 72/12 *Altrip*. This, it was suggested, indicated that an application for judicial review based on procedural defect might be dismissed on the basis that the procedural defect did not affect the substantive outcome of the proceedings. Reliance was placed on the following passages from the judgment.

> "48. Moreover, given that one of the objectives of that directive is, in particular, to put in place procedural guarantees to ensure the public is better informed of, and more able to participate in, environmental impact assessments relating to public and private projects likely to have a significant effect on the environment, it is particularly important to ascertain whether the procedural rules governing that area have been complied with. Therefore, as a matter of principle, in accordance with the aim of giving the public concerned wide access to justice, that public must be able to invoke any procedural defect in support of an action challenging the legality of decisions covered by that directive.
>
> 49. Nevertheless, it is unarguable that not every procedural defect will necessarily have consequences that can possibly affect the purport of such a decision and it cannot, therefore, be considered to impair the rights of the party pleading it. In that case, it does not appear that the objective of Directive 85/337 of giving the public concerned wide access to justice would be compromised if, under the law of a Member State, an applicant relying on a defect of that kind had to be regarded as not having had his rights impaired and, consequently, as not having standing to challenge that decision.
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> 50. In that regard, it should be borne in mind that Article 10a of that directive leaves the Member States significant discretion to determine what constitutes impairment of a right (see, to that effect, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen*, paragraph 55).
>
> 51. In those circumstances, it could be permissible for national law not to recognise impairment of a right within the meaning of subparagraph (b) of Article 10a of that directive if it is established that it is conceivable, in view of the circumstances of the case, that the contested decision would not have been different without the procedural defect invoked."

61. These comments arose in the context of the discussion of a Member State's discretion to impose *locus standi* requirements in respect of environmental litigation. Specifically, the CJEU was concerned with the right of a Member State to restrict standing to those individuals who can demonstrate an "impairment of right". Ireland has never sought to rely on this provision and instead affords locus standi on the basis of "sufficient interest".

62. The comments of the CJEU in respect of *locus standi* cannot be read across to the general standard of review under Article 11. The general principle is that set out at [48] the judgment. This principle has been emphasised in the more recent judgment in *Protect Natur.*

63. In any event, for the reasons set out under the previous heading, I am satisfied that it cannot be said with certainty that the outcome of the development consent process, i.e. the application for planning permission, would have been the same even if the breach of Article 301(3) had not occurred. Had the revised mitigation measures been available online, this would have allowed members of the public to make submissions on the suitability or otherwise of those measures and this would have allowed An Bord Pleanála to make a better informed decision. The Board might, for example, have taken a different view on whether to include a condition requiring the Developer to apply for a derogation licence if necessary. The Board might also have made a different decision for the purposes of EIA screening. It is also possible that the Board might have made a decision to refuse planning permission entirely.

PROPOSED ORDER
64. I propose to make an order setting aside the decision to grant planning permission. The order will recite that the only grounds upon which this court has adjudicated is that in relation to public participation and the requirement to make a full copy of the planning application available online. Relief is being granted in respect of the ground pleaded at E.25 of the amended statement of grounds. This judgment has nothing to say—one way or another—about any of the other grounds of challenge.

POSTSCRIPT: COSTS
65. Subsequent to delivery of an earlier *unapproved* version of this judgment, the issue of costs has since been determined. The Applicant applied for its costs as against An Bord Pleanála. Counsel for An Bord Pleanála then sought an order directing that the Developer be liable for one half of the costs of the Applicant. Counsel for the Developer indicated that his clients would not oppose such an order.

66. The determination of the liability of costs is, ultimately, a matter for the court. For the reasons set out in detail in my judgment in *Heather Hill Management Co clg v. An Bord Pleanála (No. 1)* [2019] IEHC 186, I am satisfied that proceedings which challenge a decision to grant planning permission pursuant to Section 9 of the PD(H)A 2016 are subject to the special costs rules under Section 50B of the PDA 2000.

67. Subsection 50B(2A) provides as follows.

> "(2A) The costs of proceedings, or a portion of such costs, as are appropriate, may be awarded to the applicant to the extent that the applicant succeeds in obtaining relief and any of those costs shall be borne by the respondent or notice party, or both of them, to the extent that the actions or omissions of the respondent or notice party, or both of them, contributed to the applicant obtaining relief."

68. The Applicant has succeeded in obtaining an order setting aside the planning permission (albeit on narrow grounds), and is, therefore, entitled to its costs.

69. Insofar as any apportionment of the liability for costs as between An Bord Pleanála and the Developer is concerned, it is necessary to refer to subsection 50B(3)(b) as follows.

> "(3) The Court may award costs against a party in proceedings to which this section applies if the Court considers it appropriate to do so—
>
> *(b)* because of the manner in which the party has conducted the proceedings,"

70. As explained by the High Court (Hedigan J.) in *Hunter v. Environmental Protection Agency* [2013] IEHC 591, this section does not require that there be "any moral turpitude" on the part of a party in order for it to be fixed with costs.

> "Whilst an order for costs made thereunder is in the nature of a penalty, the manner in which a party conducted the proceedings does not require any moral turpitude on the part of the party criticised in order for it to be fixed with costs."

71. On the facts of *Hunter*, a costs order was made against the notice party developer in circumstances where it had continued to oppose the application for relief notwithstanding that the decision-maker had conceded the case.

72. I am satisfied that An Bord Pleanála should bear sole responsibility for the costs of the Applicant. The position which the Board adopted whereby it opposed the application for judicial review even in respect of the narrow grounds arising under Article 301(3) of the Planning and Development Regulations 2001, notwithstanding that the Developer had conceded the point, resulted in the additional costs of a one-day hearing before the High Court being incurred. The conduct of An Bord Pleanála in this regard was unreasonable in circumstances where (i) the only party with a direct interest in the planning permission had conceded that the permission should be set aside, and (ii) the planning permission had been granted in circumstances where there was an admitted breach of the public participation requirements under Article 301(3) of the Planning and Development Regulations 2001.

73. The order for costs is to include the costs of the written legal submissions, and all reserved costs.

74. (Counsel for the State respondents expressly reserved his clients' position on whether Section 50B does apply. In circumstances where no party sought costs against the State respondents, it was unnecessary for them to make submissions on the issue and they are not bound by this aspect of the judgment).