2023 IEHC 14

THE HIGH COURT
JUDICIAL REVIEW

2023 IEHC 14
2021/750 JR

In the matter of Sections 50, 50A and 50B of the Planning and Development Act 2000 and in the matter of the Planning and Development (Housing) and Residential Tenancies Act 2016

Between

WENDY JENNINGS AND ADRIAN O'CONNOR

Applicants

and

AN BORD PLEANÁLA,
IRELAND AND THE ATTORNEY GENERAL

Respondents

and

COLBEAM LIMITED

Notice Party

JUDGMENT OF MR JUSTICE DAVID HOLLAND DELIVERED 17 February 2023.

Contents

INTRODUCTION

1. The Applicants, local residents who participated in the planning process before the First Respondent ("the Board"), seek to have quashed the Board's decision dated 3 June 2021, on foot of a planning permission application dated 12 February 2021, to grant planning permission (the "Impugned Permission" or "Impugned Decision") to the Notice Party ("Colbeam") for, essentially, construction of 698 bedspaces of student accommodation ("the Proposed Development"). 679 of the bedspaces are to be in 99 clusters of 5 to 8 bedspaces. The Planning Application form states[1] and the Board's Inspector notes[2] that *"Each cluster includes a communal Living / Kitchen / Dining room"* – though, as will be seen, that is controversial. The remaining 19 bedspaces are to be accessible studios. The student accommodation will comprise 8 blocks of up to 7 storeys, on a 2.12-hectare site at Our Lady's Grove, Goatstown Road, Dublin 14 ("the Site"). The Proposed Development will include public open space, communal open space, communal residential amenity spaces[3] and parking.[4] The Site lies about 5km south of Dublin city centre, 1km north-east of Dundrum, 850m south-west of University College Dublin, Belfield and about 180m west of Goatstown Road.

2. The Impugned Permission was granted pursuant to the Planning and Development (Housing) and Residential Tenancies Act 2016 ("the 2016 Act") as applicable to Strategic Housing Developments ("SHD"). The relevant development plan is the Dun Laoghaire-Rathdown County Development Plan 2016 - 2022 (the "Development Plan").

3. The Board's Inspector ("the Inspector"), in her report dated 13 May 2021 ("the Inspector's Report"), describes the Site as being in a suburban area. It comprises essentially the southwestern quadrant of a larger (6.0264 ha[5]) campus of Our Lady's Grove School and Convent – ("the Campus"). The Campus has been substantially redeveloped over time and now contains a secondary school[6], a primary school[7], and a childcare facility. A recently-constructed secondary school hockey pitch lies in the northwest of the Campus and three school tennis courts lie north of the secondary school. A convent (Errew House) lies in the south-east of the Campus[8] – as does a residential development, The Grove, in which the Applicants reside. Vehicular access to the Campus is via Goatstown Road from the east, with an additional pedestrian access via Friarsland Avenue from the south. The surrounding area is residential – including a mix of newer residential developments of houses, duplexes, and apartment buildings of up to 5 storeys along Goatstown Road and older suburban detached and semi-detached single- and two-storey housing in Friarsland Avenue, Friarsland Road and Larchfield Road. The Site includes most of The Grove Afterschool – which is to be partly demolished and replaced.

1 §9.
2 Inspector's report §3.1.
3 At ground and lower ground floor level – movie room - music room - laundry - gym – reception desk and seating area - common room - study space - library - yoga studio - prayer room - group dining.
4 9 car spaces; 4 motorcycle spaces; 860 bicycle spaces.
5 The figure of 6.4 hectares is elsewhere given but at §10.3.11 of her report, the Inspector appears to have accepted Colbeam's assertion of 60,264m^2. Likewise, §13 of the Statement of Grounds states that the site subject to the institutional lands designation is 60,264 m^2.
6 Jesus and Mary College.
7 Our Lady's Grove.
8 Inspector's report §2.1.

4. The Site is relatively flat and includes grass cover and disturbed ground. There are mature trees along its southern and western boundaries and in its north-western area. The Site is bounded to the west by the rear gardens of houses on Friarsland Road and to the south by the rear gardens of houses on Larchfield Road. Colbeam's Planning Report[9] describes the Site as predominantly greenfield lands in a surrounding context generally of low-density suburban housing. It describes the apartment buildings along Goatstown Road as being of 3 storeys. The following figures generally illustrate the position. Various changes to the school buildings were made over time - but for present purposes they are as depicted in Figure 1. Of some note, and as will be seen from a comparison of Figures 1 and 2, the original hockey pitch in the north-west quadrant overlapped the site and, after the Development Plan took effect, was reoriented from north/south to east/west in what remain school lands, such that it no longer overlaps the Site.

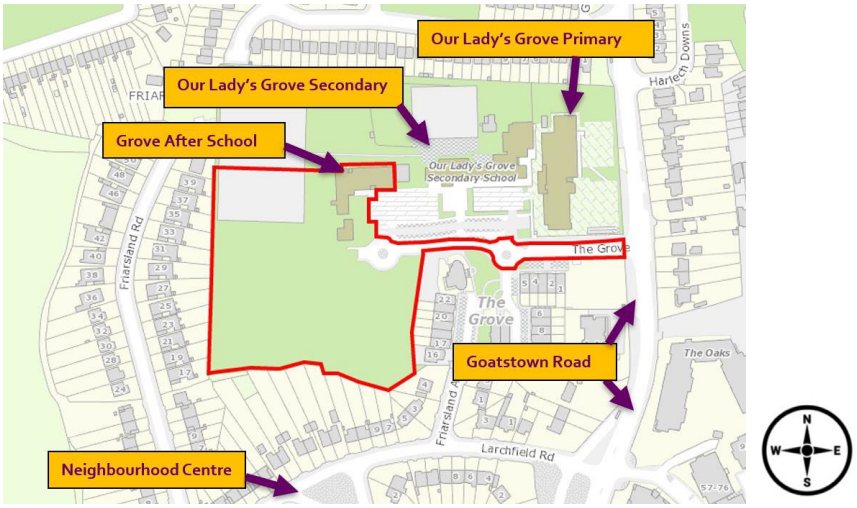


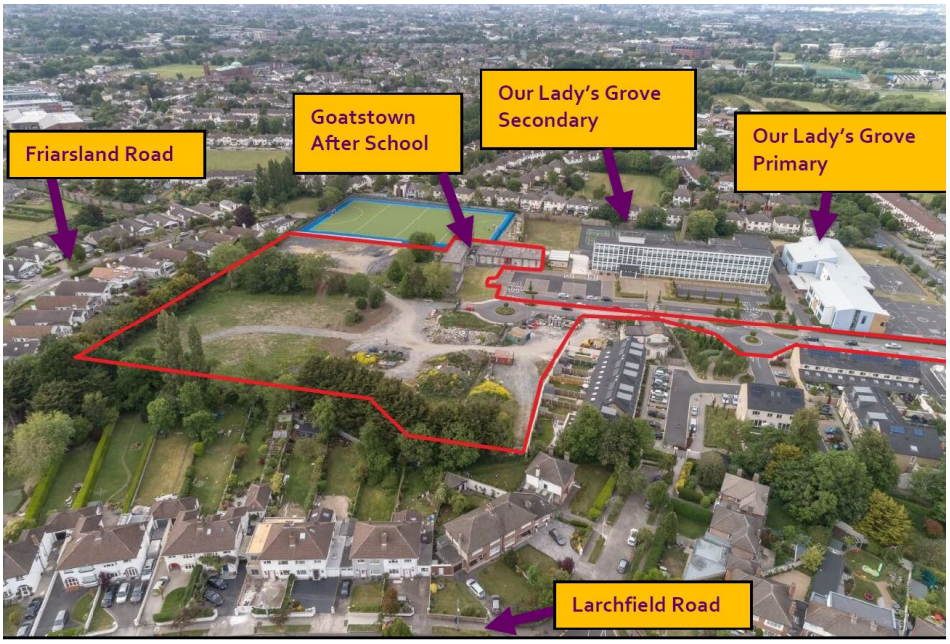
Figure 1: Site Location Map[10]

- The very light green rectangle in the north-western corner of the site represents the overlap of the former hockey pitch on the Site.

5. A little surprisingly, information is sparse as to prior use of the Site. The Roebuck Residents' Association's submission to the Board says that, until shortly before the Congregation of the Religious of Jesus and Mary sold the site in 2017, the schools had access to the Site and that part of the Site was used as the site of the old primary school before the new primary school was built on the east of the Campus. This seems unlikely to be incorrect and is supported by the fact that the Development Plan Map,[11] likely based on an earlier OS map, depicts buildings on, roughly, the eastern half of the Site. Of course, that is not to say that the primary school was necessarily still there or that the lands were not open when the Development Plan was made, as the Development Plan Map is likely based on an earlier OS map. But it does suggest that the Site is significantly brownfield rather than entirely greenfield. As to the western half of the Site, there is no more evidence as to what it may ever have been used for. There is no more evidence of specific

9 Thornton O'Connor Town Planning, February 2021.
10 Thornton O'Connor Town Planning, Planning Report February 2021 Figure 2.1. Recently laid hockey pitch not depicted. See Figures 2 below.
11 Figure 5 below.

recreational or amenity use or of public access or use – though that is not at all to say that its merely being open space has no amenity value.



Figures 2A & 2B: Aerial Views of Site & Context[12]

- The trees can be seen in these aerial views – including the line of trees in the north-western quadrant of the Site running from the western boundary, east into the Site and those just beyond the afterschool. It seems that Figure 2B is a winter photograph such that deciduous trees are less visible than when in leaf in Figure 2A.
- The remains of the overlap of the old hockey pitch in the northwest of the Site can also be seen

12 2A - Thornton O'Connor Town Planning, Environmental Report February 2021 Figure 2.2.
2B - 3D Design Bureau Verified Views and CGI Aerial View Baseline.

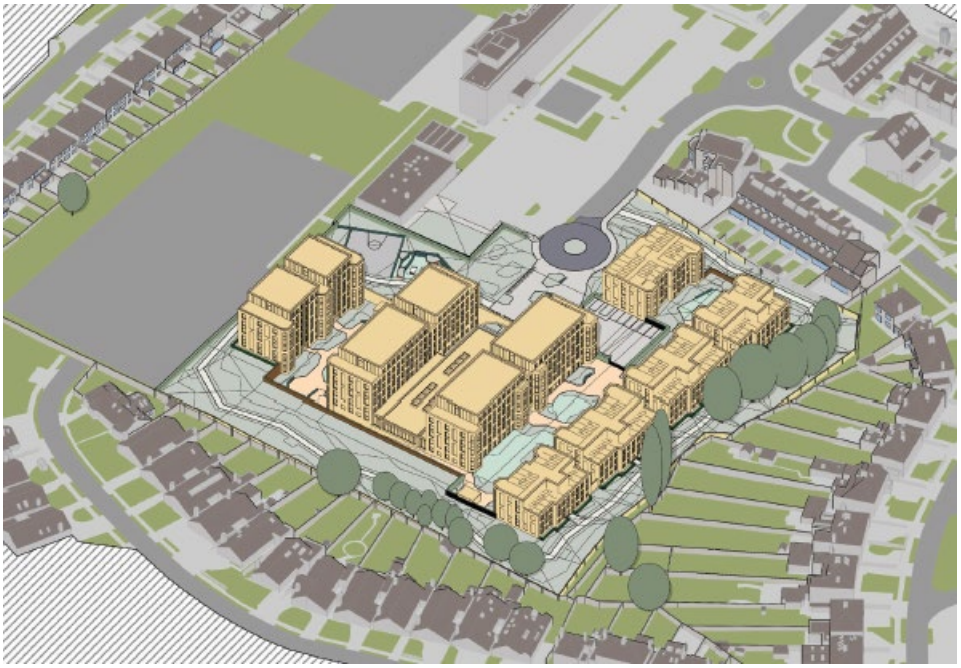


Figure 3A: General Impression #1 of Proposed Development viewed from the south-west[13]

Figure 3B: General Impression #2 of Proposed Development viewed from the east[14]

13 From Colbeam's Daylight and Sunlight Assessment Report.
14 3D Design Bureau Verified Views and CGI.

Figure 4: General Impression #3 of Proposed Development – in Plan[15]

- Note – though not readily apparent from this figure, the 2 areas between the 3 "rows" of buildings are open courtyards internal to the buildings.

The Applicants, The Grove & Roebuck House

6. The Applicants reside in houses in "The Grove" - which is in the south-eastern quadrant of the original Campus and can be located in Figures 1 and 2A. It is a residential development of 102[16] units – a mix of apartments, duplexes, and houses - built in late 2016/early 2017, after the Development Plan was made but pursuant, in substance, to planning permissions granted earlier.[17] The Applicants' gardens back onto to the eastern boundary of the Site.

7. Robuck House[18] is just visible in Figure 2A. It is not on the Site. It lies east of the Site in the north-western corner of the area occupied by The Grove. Once thus located, it can be easily discerned in Figure 1 and in Figure 3A.

15 Ground Floor Plan from Planning Application.
16 Inspector's report §10.3.12.
17 D06A/0858, D11A/0595, D15A/0199, D11A/0595/E, D16A/212 (the last two were granted in 2017).
18 Also known as "Robuck Grove House".

The Proceedings – Course to Trial

8. These proceedings have taken a complex course. Orders have been made and judgments[19] given, inter alia, as follows:

- 19 October 2021 – Leave to seek judicial review was granted ex parte. By a stay on works pursuant to the Impugned Permission, Colbeam was, in effect, restrained from interfering with trees on the Site.
- 14 January 2022 – The stay on works was vacated to the extent of allowing works to proceed to the point immediately prior to handover of the Site to the main construction contractor. This in effect permitted tree removal.
- 19 January 2022 – Colbeam's applications that prosecution of these proceedings be made conditional on the Applicants' provision of undertakings in damages and that the Applicants be directed to disclose their means to satisfy any liability which could arise on such an undertaking were refused.
- 7 February 2022 - The effect of the judgment and order of 14 January 2022 vacating the stay on works was stayed pending further application to the Court of Appeal.
- 27 April 2022 - The Court of Appeal refused to extend the stay pending appeal. Thereby Colbeam was freed to commence works in accordance with the judgment of 14 January 2022 once compliance with all pre-commencement conditions of the Impugned Permission had been agreed with the planning authority.
- 3 May 2022 – Costs protection orders were made in respect of some grounds on which leave to seek judicial review had been granted, and the question whether costs protection orders should be made as to other grounds was deferred to the trial of the action.

As a result of this sequence of events, by the time the case came to trial, the trees for removal pursuant to the Impugned Permission had been removed.

Colbeam's Motion as to Applicants' Supporters

9. From an early point in these proceedings Colbeam has been agitating to be told by the Applicants the names of any non-parties to the proceedings who have assisted the Applicants in the prosecution of these proceedings, with a view to Colbeam's seeking to expose those non-parties to the costs of these proceedings. By Notice of Motion dated 3 December 2021, Colbeam sought reliefs along those lines. While that Motion was before me at trial and was not abandoned, neither was it pressed. Essentially, I considered, to no dissent, that its decision could await the outcome of the trial. I invite the parties to consider whether, and if so, how best, to proceed with that motion in light of this judgment.

19 Orders of the High Court unless otherwise indicated.

10 GROUNDS & SUB-GROUNDS

10. The Applicants' Statement of Grounds seeks to quash the Impugned Permission on the following grounds.[20]

1) It materially contravenes the open space requirements of Development Plan §8.2.8.2(i)[21] such that the Board acted *ultra vires* in breach of s.9(6)(c) of the 2016 Act in granting permission without considering the matter under S.37(2)(b) of the 2000 Act.

2) It materially contravenes the Institutional designation of the lands in the Development Plan as to:
   - (a) the minimum 25% open space requirement for the overall holding,
   - (b) the requirement to maintain the open character of the lands,
   - (c) densities and/or
   - (d) future institutional use/additional facilities.

- The Board erred in breach of S.9(6)(c) of the 2016 Act in concluding that the proposed development did not materially contravene requirements (a) (b) and (d) above.

- The Board erred and failed to take into account relevant considerations in purporting to justify material contravention (c) as to densities under S.37(2)(b)(iii) of the 2000 Act.

- The decision is irrational and/or fails to give adequate reasons for and/or took into account irrelevant considerations in forming its conclusions that
  - the proposed public open space was of high or exceptionally high quality.
  - the proposed development would support the provision of an open character to the lands.
  - the proposed development would support the provision of an open character to the lands and provide recreational amenity within the site and, so would be in accordance with Development Plan §2.1.3.5 which allows higher densities on such basis.
  - the Site is unlikely to be required for future school expansion in the short- to medium-term.

3) The Board acted *ultra vires* in breach of S.96 of the 2000 Act and S.15 of the 2016 Act, in
- granting permission without provision for Part V social housing and/or
- not rejecting and/or considering rejecting the planning application for non-compliance with Article 297(2)(h) PDR 2001[22] and S. 4(1)(a)(iv) of the 2016 Act as to Part V requirements.

The Board erred in considering that such breach could be justified by invoking S.9(6) of the 2016 Act S.37(2)(b) of the 2000 Act.

20 I have simplified wording without altering meaning.
21 8.2.8.2 Public/Communal Open Space – Quantity - (i) Residential / Housing Developments.
22 Planning & Development Regulations 2001.

4) The Board erred in purporting to justify material contravention of the Development Plan as to building height under S.37(2)(b)(iii) by reference to SPPR3 of the Height Guidelines[23] which do not apply to the lands, which are greenfield lands in a suburban area.

5) If SPPR3 applies, it has not been complied with as the Impugned Permission contravenes the sunlight/daylight requirements/criteria of §3.2 of the Height Guidelines and the Apartment Design Guidelines[24] with which the Board must comply under S.9(3) of the 2016 Act.
The proposed development does not comply with the BER Daylight and Sunlight Guidelines[25] and/or BS 8206-2[26] as to daylighting and/or contains material errors of fact.

6) If SPPR3 applies, the Impugned Permission contravenes it, as the Board failed to assess whether there was adequate public transport capacity prior to granting permission in material contravention of the Development Plan.

7) It contravenes S.9 of the 2016 Act and S.37(2)(b)(i) PDA 2000 in that the Board did not identify any or adequate basis for concluding that the Proposed Development was of national and strategic importance.

8) It materially contravenes the Development Plan as to protection of trees. This is a grant contrary to a Zoning Objective in breach of S.9(6)(b) of the 2016 Act or a grant not made pursuant to S.37(2)(b) PDA 2000.

9) Colbeam breached S.8(1)(a)(iv)(II) of the 2016 Act - which requires applicants for SHD permission to publish a statement indicating, by reference to S.37(2)(b) of the 2000 Act, why permission should be granted despite material contravention of the Development Plan ["Material Contravention Statement"].

10) The Board breached Article 299B(1)(b)(i) PDR 2001 in concluding that the possibility of significant effects on the environment, and hence the need for EIA screening or EIA could be excluded at preliminary assessment.

11. Other pleaded grounds are abandoned[27] or stand adjourned.[28]

23 Urban Development and Building Heights: Guidelines for Planning Authorities (2018).
24 Sustainable Urban Housing: Design Guidelines for New Apartments (2020).
25 Site Layout Planning for Daylight and Sunlight: A Guide to Good Practice (BR 209).
26 British Standard BS 8206-2 Code of Practice for Daylighting, 2008 (as revoked and replaced by BS EN 17037:2018).
27 Ground 11- That Colbeam failed in its SHD application form to accurately identify ownership of Roebuck House contrary to Article 297(1) PDR 2001. Ground 12 – That the Impugned Decision contravenes Article 12 of the Habitats Directive, Article 299(C)(1) PDR 2001 and/or Article 27 of the Habitats Regulations 2011 as it failed to apply the correct legal test in respect of bats entitled to strict protection and/or the EIA preliminary examination was based on inadequate information contrary to Article 4(4) of the EIA Directive.
28 i.e. issues of EU law arising other than on foot of EU laws transposed to Irish law and challenges to the validity of Articles 51 and 54 of the Habitats Regulations 2011 and Article 299B(1)(b)(i) PDR 2001.

THE IMPUGNED PERMISSION – and its intended Amendment

12. Board Order ABP-309430-21 dated 3 June 2021, granting the Impugned Permission ("the Board Order") records that the Board:

- Had regard to
  - the Development Plan and that the site was therein zoned residential.
  - that the site was on "urban" lands – accessible to the bus network.
  - the planning history of the site and the pattern of existing development in the area.
  - the National Student Accommodation Strategy[29], Rebuilding Ireland - the Action Plan for Housing and Homelessness[30] (the "Action Plan"), the National Planning Framework[31] ("NPF"), the Relevant Regional Spatial and Economic Strategy[32] ("RSES"), the Design Manual for Urban Roads and Streets[33] ("DMURS"), the Urban Residential Guidelines.[34]
  - the submissions and observations received, the Chief Executive's Report of the Planning Authority (the "Chief Executive's Report") and the report of the Board's Planning Inspector (the "Inspector's Report").

- In deciding not to accept the Chief Executive's recommendation for refusal in of permission, agreed with its Inspector's assessment and recommendation that permission be granted.

- Did an AA[35] Screening and accepted its Inspector's recommendation that AA was not required. Did an EIA[36] Preliminary Examination[37] and accepted its Inspector's recommendation that EIA Screening and EIA were not required.

13. The Board Order records that permission would not materially contravene a zoning objective but would materially contravene the Development Plan as to building height, density, open space and Part V PDA 2000[38] and Affordable Housing. However, Board Member Michelle Fagan has sworn on affidavit that the reference here to open space was a clerical error which is, she says, clear on reading the Order as a whole. She says the Board did not in fact consider that the Impugned Permission would materially contravene the Development Plan as to open space. She says the Board will invoke S.146A PDA 2000 to correct that error in due course. The Applicants accept the Board's position that it did not find a material contravention as to open space and its entitlement to correct the error in the Order in that regard. However, they impugn the Impugned Permission on the footing that there is in fact a material contravention as to open space.

29 Issued by the Department of Education in July 2017.
30 Rebuilding Ireland Action Plan for Housing and Homelessness 2016.
31 Project Ireland 2040, issued by the Department of Housing, Planning and Local Government in February 2018; See Part II Chapter IIA PDA 2000.
32 The Regional Spatial and Economic Strategy for the Eastern and Midland Region 2019-2031; See Part II Chapter III PDA 2000.
33 Issued by the Department of Transport, Tourism and Sport and the Department of the Environment, Community and Local Government in March 2019, as amended.
34 The Urban Development and Building Heights Guidelines for Planning Authorities, issued by the Department of Housing, Planning and Local Government in December 2018.
35 Appropriate Assessment within the meaning of the Habitats Directive.
36 Environmental Impact Assessment within the meaning of the EIA Directive.
37 Pursuant to Article 103 of the Planning and Development Regulations 2001 as amended.
38 Planning & Development Act 2000.

14. The Board Order records that permission would be justified despite such material contraventions having regard to:

- S.37(2)(b)(i)[39] PDA 2000 in that,
  - the Proposed Development falls within the definition of strategic housing in the 2016 Act.
  - it is Government policy, as set out in the Action Plan, to provide more housing.

- S.37(2)(b)(iii)[40] PDA 2000 in that, as to material contravention of Development Plan Policy UD6: Building Height Strategy,
  - NPF Objectives 13 and 35 support increased residential densities and building heights at appropriate locations.
  - SPPR3[41] of the Heights Guidelines 2018[42] ("SPPR3") supports increased building heights and densities.

- S.37(2)(b)(iii) PDA 2000 in that, as to material contravention of Development Plan §2.1.3.5 Policy RES5: Institutional Lands and §2.1.3.5 as to density,
  - NPF Objective 35 supports increased residential densities at appropriate locations.
  - RPOs[43] 5.4 and 5.5 of the RSES encourage higher densities and the consolidation of Dublin and suburbs.

- S.37(2)(b)(iv)[44] PDA 2000 as to material contravention of Development Plan Appendix 2 - Part V and Affordable Housing - §7.6, in that since the making of the Development Plan, the Board did not apply Part V for off-campus student accommodation developments at (listed sites[45]).

IRRATIONALITY – GENERAL LAW

15. Counsel for the Board started his oral submissions by making what he said were overarching general observations as to standards of review, curial deference, discretion in decision-makers and "*What is a matter for the court and what is a matter for the decision-maker*", with some focus on the issues of irrationality and of material contravention which arise repeatedly in this case. Accordingly it

39 (i) the proposed development is of strategic or national importance.
40 (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.
41 Specific Planning Policy Requirement 3. Specific Planning Policy Requirements are defined as follows in S.34(2)(d) PDA 2000. "…'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."
42 Urban Development and Building Heights Guidelines for Planning Authorities, issued by the Department of Housing, Planning and Local Government in December 2018.
43 Regional Policy Objective.
44 (iv) permission for the proposed development should be granted having regard to the pattern of development, and permissions granted, in the area since the making of the development plan.
45 Vector Motors site (formerly known as Victor Motors), Goatstown Road (An Bord Pleanála Reference Number ABP- 308353-20); at the Avid Technology International site, Carmanhall Road, Sandford Industrial Estate, (An Bord Pleanála Reference Number ABP 303467-19) and at the Blakes and Esmonde Motors Site, Lower Kilmacud Road, Stillorgan (An Bord Pleanála Reference Number ABP-300520-18).

is necessary to address those issues generally and later attempt a similar exercise as to material contravention.

16. The starting point is that judicial review is not an appeal on the merits of the impugned decision and *"… the Board's decisions enjoy a presumption of validity until the contrary is shown"*.[46] Much of the law in this regard is recently set out in **MRRA**[47], on which Colbeam relied, and need not be repeated here.

Keegan (1986) – O'Keeffe (1993) – Meadows (January 2010) - Weston (July 2010)

17. While the content of the law of judicial review for irrationality[48] has been for many years, and arguably remains, controversial, **Keegan**[49] and **O'Keeffe**[50] have generally provided the yardstick of irrationality of an impugned public law decision. Finlay CJ in O'Keeffe cited Henchy J. in Keegan to the effect that

> *"… three different methods of expressing the circumstances under which a court can intervene are not in any way inconsistent one with the other, but rather complement each other and constitute not only a correct but a comprehensive description of the circumstances under which a court may, according to our law, intervene in such a decision on the basis of unreasonableness or irrationality."*

18. Those three expressions were:

> *"1. It is fundamentally at variance with reason and common sense.*
> *2. It is indefensible for being in the teeth of plain reason and common sense.*
> *3. Because the court is satisfied that the decision-maker has breached his obligation whereby he 'must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision'."*

19. Thus informed, Finlay CJ held in O'Keeffe that:

- The court can intervene for irrationality only in limited and rare circumstances.
- The court cannot intervene merely on the grounds that (a) on the facts as found it would have raised different inferences and conclusions, or (b) the case against the decision was much stronger than the case for it.
- These considerations are of particular importance as to decisions of planning authorities as the legislature has unequivocally and firmly placed questions of planning, questions of the balance between development and the environment and the proper convenience and amenities of an

46 Ratheniska Timahoe and Spink (RTS) Substation Action Group and Another v. An Bord Pleanála [2015] IEHC 18.
47 See generally in this regard Monkstown Road Residents Association v An Bord Pleanála [2022] IEHC 318 §57 et seq.
48 a.k.a. unreasonableness.
49 The State (Keegan) v Stardust Compensation Tribunal [1986] I.R. 642.
50 O'Keeffe v An Bord Pleanála [1993] 1 I.R. 39.

area, within the jurisdiction of the planning authorities and the Board. They are expected to have special skill, competence and experience in planning questions. The court is not vested with that jurisdiction. Nor is it expected to, nor can it, exercise discretion with regard to planning matters.

- An applicant for judicial review, to show irrationality in the sense outlined above, must show positively that the decision-making authority had before it "*no relevant material*" which would support its decision. That would require "*something overwhelming*".[51]

20. This last point has become known as the "no evidence" or "no relevant material" test – the latter phrase being more accurate - as that used by Finlay - and it may have a somewhat broader connotation protective of impugned decisions. Decisions since have regarded O'Keeffe as consistent with Keegan and the "no relevant material" test as a particular aspect of the Keegan rule, applicable to judicial review of decisions by expert decision-makers.

21. Essentially, in the present case, the Board argues, as it generally does, that, as to the law of irrationality, there has been no change of consequence since **O'Keeffe**.

22. In 2010 the Supreme Court in **Meadows**[52] introduced the concept of proportionality to the analysis. Debate ensued as to whether, and if so in what manner or degree, that concept altered the **Keegan/O'Keeffe** rule. The debate was immediate: the majority[53] in Meadows asserted it did not; the minority[54] dissented precisely because it did. I consider Meadows with some trepidation as a recent Supreme Court[55] has found its ratio difficult to discern.

23. In **Meadows,** the High Court certified the following question of law for determination by the Supreme Court.

> *"In determining the reasonableness of an administrative decision which affects or concerns constitutional rights or fundamental rights is it correct to apply the standard as set out in O'Keeffe ….?"*

24. The majority in **Meadows** considered the **Keegan/O'Keeffe** rule "*sufficiently general and flexible when construed broadly*"[56]. Murray CJ returned to a phrase of Henchy J in Keegan which had not been cited in O'Keeffe: if the decision did not "*flow from the premises*" it may be considered

51 Finlay CJ citing Henchy J in Keegan citing in turn citing Lord Greene M.R. in Associated Provincial Picture Houses Limited v Wednesbury Corporation [1948] 1 K.B. 223.
52 Meadows v The Minister for Justice, Equality and Law Reform, Ireland and The Attorney General [2010] 2 IR 701.
53 Murray CJ, Denham and Fennelly JJ.
54 Kearns P and Hardiman J.
55 Burke v Minister for Education and Skills [2022] IESC 1; [2022] 1 I.L.R.M. 73. infra.
56 A view taken in the consideration of decisions which affected constitutional or fundamental rights but Fennelly J stating that there was a single standard of review sufficiently flexible to provide an appropriate level of judicial review of all types of decision – not a different standard for cases involving an interference with fundamental, constitutional or other personal rights.

"*fundamentally at variance with reason and common sense*". As to determining whether a decision flows from its premises and is at variance with reason and common sense, Murray CJ saw no reason not have recourse to the principle of proportionality as "*a means of examining whether the decision meets the test of reasonableness … in cases where it could be considered to be relevant."*[57]. The principle *"requires that the effects on, or prejudice to, an individual's rights by an administrative decision be proportional to the legitimate objective or purpose of that decision".* He also said that "*where the principle of proportionality is relevant*" the onus of proof of disproportion was on the applicant for judicial review. So, Murray CJ considered that proportionality would not be relevant in all cases.

25. Importantly, proportionality was not to be a back door to review on the merits: Murray CJ reiterated that "In reviewing the rationality or otherwise of the decision it remains axiomatic that it is not for the court to step into the shoes of the decision maker and decide the issue on the merits but to examine whether the decision falls foul of the principles of law according to which the decision ought to have been taken." And "judicial review permits the courts to place limits on the exercise of executive or legislative power not to exercise it themselves".[58]

26. Denham J considered Keegan to be the fundamental source[59] of the relevant "*broad principles*" and "*the basic issue to determine is whether the decision is fundamentally at variance with reason and common sense*". She stated that while Keegan and O'Keeffe did not expressly refer to the concept, proportionality "*is inherent in any analysis of the reasonableness of a decision*"[60]. Denham J referred to the "*underlying similarity*" between the proportionality test and the reasonableness test[61]. "*The nature of the proportionality test is that ……..* [the impugned decision] *must be rationally connected to the objective; not arbitrary, unfair, or irrational. The inherent similarity may be seen in the requirement in O'Keeffe … that the decision not be irrational, or at variance with reason or common sense*."[62] She said that "*the nature of the decision and decision maker being reviewed is relevant to the application of the test*". So, while *"the general test is not as narrow" ,* O'Keeffe sets a "*narrower aspect of the test*", to be applied "*strictly*" to review of decisions of a technical or skilled or professional decision-maker in the area of that special competence – "*such as planning*" – in which the Court should be "*slow to intervene*".[63] Denham J also appeared to confine proportionality analysis to cases where fundamental rights are in issue.*[64]* The Board in the present case says that Denham J's clear statement that the O'Keeffe "no material" test applies to exercises of planning judgement still applies and has not been downgraded by subsequent authority.

27. Fennelly J was also in the majority in Meadows[65]:

57 §58.
58 Citing T.D. v Minister for Education [2001] 4 I.R. 259.
59 §142.
60 §134.
61 §138.
62 §141.
63 §143 & 146.
64 §143 & 146.
65 §442 et seq.

- He considered that the Keegan test had never been inflexible. He said[66] that his view did not involve a modification of the existing test as properly understood. Rather it explains principles already implicit.

- He observed that the courts are by tradition and instinct very slow to interfere with decisions regarding technical or administrative matters. He thought it not surprising to see the courts act with particular caution before interfering in the case of routinely administrative decisions or decisions made by persons with particular technical expertise. Planning authorities have the technical expertise and knowledge necessary for the granting or refusal of planning permissions.
- He observed that in none of **Wednesbury**[67]*,* **Keegan** or **O'Keeffe**[68]*,* was the court confronted with a significant incursion into fundamental human rights.

- He said that it is natural, however, for any decision-maker to be the more hesitant, deliberate, and cautious as the decision he or she is considering will the more gravely trench on the rights or interests of those likely to be affected. Interestingly, Fennelly J appeared to cite[69] a planning case as an example of decisions which trench on rights or interests. **White**[70] was a decision whether a modification to a planning application which changed the extent of overlooking of a neighbour's property should have been notified to the public. The court quashed the decision for the planning officer's failure to appreciate that the neighbour might wish to object. Fennelly J observed: *"The decision-maker will balance the need to make the particular decision against the effects of the decision, if made, on rights".*

- Immediately thereafter Fennelly J cited **O'Brien v Moriarty #2**[71] to the effect that "The courts will, of course, always have regard to the context of a decision, the statutory purpose of the body concerned and its duties and, where appropriate, the need to have regard to the rights or interests of individuals or categories of individuals, whose interests it is the object of legislation to protect".

- Perhaps reflecting the majority view that introducing proportionality would not much alter the O'Keeffe standard, Fennelly J considered that *"where fundamental human rights are at stake, the courts may and will subject administrative decisions to particularly careful and thorough review, but within the parameters of O'Keeffe ….. reasonableness review."*[72] Regard must be had to the subject matter and that the consequences of a decision may demand a particularly careful and thorough review of the materials before the decision-maker with a view to determining whether the decision was *O'Keeffe* irrational. Fennelly J considered[73] that

66 §450.
67 Associated Provincial Ltd. v Wednesbury Corporation [1948] 1 K.B. 223 – the paradigm English decision on irrationality.
68 O'Keeffe objected to a long-wave radio mast to be built 300m from his home. The objection was, it seems, primarily that electro-magnetic radiation from the mast would interfere with various types of machinery, appliances, equipment and fixtures. While anticipated diminution in property values is mentioned it is not apparent that that fear was expressed in terms of fundamental or constitutional rights. Nor were health effects or the like alleged.
69 §443.
70 White v Dublin City Council [2004] IESC 35, [2004] 1 I.R. 545.
71 O'Brien v Moriarty (No. 2) [2006] IESC 6, [2006] 2 I.R. 415 at p. 469.
72 §444.
73 §445.

"At one level all this is no more than semantics; what is irrational or unreasonable depends on the subject matter and the context. … The courts have always examined decisions in context against their surrounding circumstances." And "There is an infinitely broad spectrum of decisions and of contexts and an infinite gradation of rights. There are constitutional rights, statutory and other legal rights, rights guaranteed by the Convention[74]".[75]

- I observe that:
  - Fennelly J cites interests as well as rights and as encompassing rights and interests of local residents fearful of the effects of a proposed development.
  - In **Kelly**[76] it was noted that Kearns J in **Harding**[77] had considered local residents' interests legitimate.

- Fennelly J did not consider it necessary to change the Keegan/O'Keeffe test[78].
  - The Keegan/O'Keeffe test is "sufficiently flexible to provide an appropriate level of judicial review of all types of decision ..."
  - "It lays down a correct rule for the relationship between the courts and administrative bodies."
  - "Properly understood, it is capable of according an appropriate level of protection of fundamental rights" and "Where decisions encroach upon fundamental rights guaranteed by the Constitution, it is the duty of the decision maker to take account of and to give due consideration to those rights. There is nothing new about this."
  - A decision may "affect fundamental rights to such a disproportionate degree, having regard to the public objectives it seeks to achieve, as to cross a threshold, and to be justifiably labelled as so unreasonable that no reasonable decision-maker could justifiably have made it ….. it may "plainly and unambiguously fly in the face of fundamental reason and common sense".

- However it does seem that, as between Keegan and O'Keeffe, Fennelly J preferred the former:

"I prefer to explain the proposition laid down in …Keegan … and O'Keeffe … retaining the essence of the formulation of Henchy J. in the former case. I would say that a court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied, on the basis of evidence produced by the applicant, that the decision is unreasonable in the sense that it plainly and unambiguously flies in the face of fundamental reason and common sense. I use the word, "substantive" to distinguish it from procedural grounds and not to imply that the courts have jurisdiction to trespass on the administrative preserve of the decision maker. This test, properly applied, permits the person challenging the decision to complain of the extent to which the decision encroaches on rights or interests of those affected. In those cases, the courts will consider whether the applicant shows that the encroachment is not justified. Justification will be commensurate with the extent of the

74 European Court of Human Rights.
75 §446
76 Kelly v An Bord Pleanála & Atlas GP Limited [2022] IEHC 238 (High Court (Judicial Review), Holland J, 28 April 2022).
77 Harding v Cork County Council, An Bord Pleanála & Xces Projects Ltd, [2008] 4 IR 318.
78 §445 et seq.

encroachment. The burden of proof remains on the applicant to satisfy the court that the decision is unreasonable in the sense of the language of Henchy J. The applicant must discharge that burden by producing relevant and cogent evidence."[79]

28. Fennelly J rejected[80] a posited criterion of "anxious scrutiny", precisely because it "would follow that different standards of review would apply depending on whether the case was concerned with the protection of different types of right. That is the English "sliding scale" of review. In my view, it is neither appropriate nor necessary to have a different standard of review for cases involving an interference with fundamental, constitutional or other personal rights." While this might be considered to differentiate between rights and interests and to not automatically encompass the position of objectors in planning matters, the example of his view which Fennelly J chose to give is instructive as from the planning context:

"For example, it would be wrong and confusing to have two different standards of judicial review for planning decisions depending on whether the review was being sought by the applicant for permission (the owner of the land with constitutionally protected rights) or a third party objector (with a merely legal right to object, as in White[81] *…). The holder of a licence may have a mere legal right, but still be entitled to expect not only fairness in any decision affecting his right to hold it but, in addition, that it will not be taken from him for trifling reasons. It seems to me that the principle of proportionality, more fully developed in the judgments which have been delivered by Murray C.J. and Denham J., can provide a sufficient and more consistent standard of review, without resort to vaguer notions of anxious scrutiny. The underlying facts and circumstances of cases can and do vary infinitely. The single standard of review laid down in.. (Keegan) v…. and O'Keeffe … is sufficiently responsive to the needs of any particular case."*

29. While, as I have recorded above, Fennelly J did refer both to deference to decisions by expert tribunals and to considerations arising from decisions affecting fundamental rights, in the end it seems clear that he at least rejected the proposition of different tests based on categoric distinctions turning on the type of decision impugned or the types of rights and interests affected. Some may consider that his fear of confusion may have been borne out by subsequent attempts to adhere to such distinctions – perhaps informed by an understandable fear that flexibility and proportionality might, over time degenerate towards merits-based review.

30. Hardiman J, in the minority[82] in Meadows, as to the majority view, said:

"I fail to see how it can be denied that this is a massive change from the previous dispensation where the applicant was required to show that there was "no" evidence on the basis of which the decision impugned might have been taken.

79 §449.
80 §448.
81 White v Dublin County Council [2004] IESC 35, [2004] 1 I.R. 545.
82 With Kearns P.

It is necessary to add that, as I understand it, my colleagues do not view the decision as having anything like so drastic an effect and I very much hope that in its application in case after case hereafter, this view may be vindicated."

31. **Weston**[83] was a challenge to a refusal of planning permission. Charleton J did not cite Keegan, O'Keeffe or Meadows but, considering the burden of proof in judicial review, deployed the formula of *"such unreasonableness as flies in the face of fundamental reason and common sense"* used by Fennelly J in Meadows in expressing his preference for the view of Henchy J in Keegan. Charleton J observed that *"Once there is any reasonable basis upon which the planning authority or An Bord Pleanála can make a decision in favour of, or against, a planning application or appeal, or can attach a condition thereto, the court has no jurisdiction to interfere.". "The Court has no legal authority to substitute any view which it might have for the views expressed by the inspector, unless they are shown to be manifestly unreasonable so that they fly in the face of fundamental reason and commonsense. That case has not been made out".*

NM – (2016) – AAA (2017)

32. While numerous decisions since Meadows have confirmed and applied O'Keeffe – in particular its "*no relevant material*" rule - the dust from Meadows has never settled. In part, it has been kept in the air by EU law effective remedy requirements of "*thorough review*". In **NM**[84] Hogan J in the Court of Appeal suggested that "*such a narrow standard of review*" as that set in O'Keeffe - the "no relevant material" test - would not satisfy such requirements of "*thorough review*". In **AAA**[85] Charleton J considered that in NM Hogan J had held that, post-Meadows, judicial review was sufficiently flexible to accommodate the "*thorough review*" requirements of **Diouf**[86], even if the O'Keeffe "*no relevant material*" standard would not. In NM, Hogan J took the view that the Supreme Court in ***The State (Lynch) v. Cooney***[87], in holding that a decision *"must be one which is bona fide held and factually sustainable and not unreasonable",* in effect obliged decision-makers "*to demonstrate that the factual basis of the decision was, in its material respects, soundly-based and that the reasons for the conclusion were accordingly justifiable"* such that judicial review was sufficiently flexible and expansive to provide an adequate and effective remedy. Hogan J observed that "*Lynch was not referred to in O'Keeffe, despite the former's seminal status as an absolutely critical decision*" and the two seemed "*at odds*".

83 Weston Ltd. v An Bord Pleanála [2010] IEHC 255, [2010] 7 JIC 0102 (Unreported, High Court, Charleton J., 1st July, 2010).
84 N.M. (DRC) v The Minister for Justice, Equality and Law Reform [2016] IECA 217.
85 AAA & anor v Minister for Justice & ors [2017] IESC 80.
86 Case C-69/10, Diouf v Ministre du Travail, de l'Emploi et de l'Immigration eld that the effective remedy requirements of Article 39 of the Procedures Directive (2005/85/EC) did not require Member States to prescribe a particular form of remedy provided that the legality of the final decision adopted in an accelerated procedure - and, in particular, the reasons which led the competent authority to reject the application for asylum as unfounded - may be the subject of a thorough review by the national court, within the framework of an action against the decision rejecting the application.
87 [1982] I.R. 337, 361.

33. Nonetheless, Hogan J acknowledged that O'Keeffe had in reality dominated the judicial review landscape for the ensuing two decades or so and imposed a very limited view of the scope of judicial review – what he called the *"narrow and artificial confines of O'Keeffe".* Hogan J cited Meadows as a seminal reaction - *"since it was perfectly clear that for quite some time there was increasing judicial unease with the manner in which O'Keeffe had come to be applied in practice."* Hogan J considered that the importance of Meadows was, first that Court was prepared to apply a general proportionality test in respect of all decisions affecting fundamental rights. But "*Second, it is equally clear that the O'Keeffe test has been re-interpreted and clarified to take fuller account of ….. Keegan …* [in which] *Henchy J. had stressed that the courts could intervene to quash on reasonableness grounds where the conclusion simply did not follow from the original premise."* Hogan J observed that there is:

> *"…….. a clear difference in principle between saying on the one hand that a decision is unreasonable because there is "no evidence" for the conclusion reached, while on the other quashing a decision because it does not flow from the original premises of the decision maker*[88] *…… It will be a rare case indeed where there is absolutely no evidence to support a particular proposition. By contrast, there may well be many instances where there is some evidence to justify a particular decision, but where the ultimate conclusion simply does not flow from the original premise (Keegan) or nonetheless falls to be quashed for lack of proportionality (Meadows)."*

34. The last sentence of this passage seems to me to identify three distinct bases on which irrationality may be found:

- Failure of the "*no relevant material*" test (O'Keeffe).
- Failure of the decision to flow from its premises (Keegan).
- Lack of proportionality (Meadows).
- And I do not see the passage as excluding the Keegan test: is the impugned decision *"fundamentally at variance with reason and common sense"*.

35. **Browne**[89] echoes Hogan J in **NM** as to judicial unease with the manner in which O'Keeffe had come to be applied in practice, in observing that *"One of the most serious criticisms of the doctrine of unreasonableness is that it is being over-applied."* Notably he cites the issue of material contravention as an example[90]. I will return to that issue in due course.

36. Charleton J in **AAA** said that proportionality operates "*within the confines of the irrationality test*". In a sentence illuminating the operation of proportionality, Charleton J considered *"that there was no fact demonstrated in any decision affecting the applicants as being so unreasonable as to require it to be quashed or so lacking in proportion to the evidence presented as to fail to be*

88 Citing McKechnie J in Holland v Governor of Portlaoise Prison [2004] IEHC 208, [2004] 2 I.R. 573 and in Nurendale Ltd (t/a Panda Waste Services) v Dublin City Council & Ors [2013] 3 IR 417.
89 Simons, Planning Law, 3rd Ed'n, Browne 2021 §13-260.
90 §13-264 et seq.

reasonable in itself." Whether the concept of a decision "*lacking in proportion to the evidence"* differs from Murray J's formulation of proportionality as between the "*effects on an individual's rights"* and the *"legitimate objective or purpose of"* the impugned decision may be doubted as Charleton J was clearly endorsing Meadows. But the concept of *"proportion to the evidence"* might be thought to sit ill with the "*no evidence*" standard set in O'Keeffe. He recited the general test as described by Denham J and her view that the O'Keeffe principles were a narrower aspect of the rationality test and apply where the decision was taken by a technical or skilled or professional decision maker in the area of that special technical or skilled knowledge. Consistent with that view he refers to cases "*where the principle of proportionality is relevant*" – implying that in some types of irrationality it isn't. But he also said that Denham J in Meadows had found an underlying harmony between the tests of proportionality and rationality, and he cited NM before concluding that *"While the full extent of the interaction of proportionality in decision making with the duty to act reasonably, ... should await scrutiny in an appropriate case, every case remains fact specific."* This seems significant both in its acknowledgment that the law on irrationality requires further elucidation and its view that much is likely to turn on the facts of the specific case. It echoes the observations of Fennelly J in Meadows, in favouring proportionality analysis, that facts and circumstances of cases can vary infinitely and that the single standard of review laid down in Keegan and O'Keeffe is flexible and sufficiently responsive to the needs of any particular case.

Redrock - 2019

37. In **Redrock**[91] Faherty J in substance affirmed the O'Keeffe "*no relevant material*" test in terms cited in **MRRA**[92], as follows:

> *"The circumstances under which the court in judicial review can interfere with a decision on the basis of irrationality are limited and rare. The court cannot interfere for irrationality merely on the grounds that (a) it is satisfied that on the facts as found it would have raised different inferences and conclusions or (b) it is satisfied that the case against the decision made by the authority was much stronger than the case for it.[93] Once there is any reasonable basis upon which the planning authority or the Board can make a decision in favour of or against a planning application or appeal, or can attach a condition thereto, the Court has no jurisdiction to interfere. To establish that a decision-maker has acted irrationally so that the court can quash its decision, an applicant in judicial review must establish that the decision-maker had before it no relevant material to support its decision."*

91 Redrock Developments Limited v An Bord Pleanála [2019] IEHC 792, Faherty J, citing North Meath Wind Farm Limited v An Bord Pleanála [2018] IEHC 107 And Dunnes Stores v An Bord Pleanála [2016] IEHC 226, Ratheniska v An Bord Pleanála [2015] IEHC 18 And O'Keeffe v An Bord Pleanála [1993] 1 I.R. 39 and cases in turn cited in those cases, including: State (Abenglen Properties) v Dublin Corporation [1984] I.R. 381, Dunne v Minister for Fisheries and Forestry [1984] 1 I. R. 230, Henry Denny & Sons (Ireland) Ltd. v the Minister for Social Welfare [1998] 1 I. R. 34 Lancefort Ltd v An Bord Pleanála [1998] IEHC 199 Weston Ltd. v An Bord Pleanála [2010] IEHC 255 Ashford Castle Ltd. v SIPTU [2007] 4 I.R. 70 the State (Keegan) v Stardust Compensation Tribunal [1986] I.R. 642.
92 Monkstown Road Residents Association v An Bord Pleanála [2022] IEHC 318 §58.
93 See also People Over Wind v An Bord Pleanála, Haughton J. §98.

FIE - 2020

38. As it was a Supreme Court case, I should mention that one of the **FIE** cases[94] recently considered irrationality as an aspect of the issue of curial deference to specialist tribunals such as the Board. FIE alleged excessive curial deference by the High Court. Dunne J recited the O'Keeffe "*no relevant material*" test. She mentioned Meadows as to proportionality but did not find it necessary to address it in detail – perhaps as she noted also that FIE appeared to accept the view of Denham J. in Meadows that O'Keeffe principles still apply *"… where the review is of a decision of a technical or skilled or professional decision maker in the area of that special technical or skilled knowledge*". The Board also noted FIE's reliance on Fennelly J in Meadows as to proportionality where fundamental rights are in issue – the Board arguing that the fundamental rights only of the landowner were engaged. However Dunne J held that the impugned decision had little to do with the Board's "*special skill, competence and experience in planning matters*" and everything to do with the application of "*fair procedures*" to the issue it was being asked to decide. So, curial deference was irrelevant and further discussion of the scope and extent of the doctrine and of the role of the concept of proportionality in decision making, should await a case in which those questions clearly arose. In short, the scope of and test for irrationality in judicial review were not elucidated further.

Other & Recent Cases

39. **NM** and much of the caselaw considered by Hogan J occurred in the context of fundamental constitutional rights and/or standards of review required by EU law. But it seems the O'Keeffe "*no relevant material*" test is still applied in planning and environmental matters.

40. The Board cites **CHASE**[95] as an example of the continued vitality of O'Keeffe. Barniville J held that:

> *"The Board's view that the development would be compatible with the pattern of existing developments in the area, including the continued development of marine related research and heritage and tourism assets in Cork Harbour, was, in my view, quintessentially a matter for the planning judgement of the Board and could only be interfered with by the court on the O'Keeffe principles."*

41. Ferriter J in **Madden**[96] recently and correctly notes that in **Carroll**[97] Fullam J, extensively reviewed the authorities and concluded that *"The O'Keeffe irrationality test remains central in the Irish law of judicial review so far as planning decisions involving environmental assessments are concerned."* The authorities reviewed in Carroll included Meadows (Denham J was cited. Fennelly J

94 Friends of the Irish Environment Ltd v An Bord Pleanála [2020] IESC 14 (Supreme Court, Dunne J, 23 April 2020).
95 C.H.A.S.E. v An Bord Pleanála & Indaver [2021] IEHC 203 §383.
96 Madden v An Bord Pleanála [2022] IEHC 257 (High Court (Judicial Review), Ferriter J, 4 May 2022).
97 Carroll v An Bord Pleanála [2016] IEHC 90.

was not, and NM was yet to come). Fullam J observed *"that planning and fundamental rights are at different ends of a spectrum in terms of gravity of outcomes for persons affected by decisions, and, consequently, the deference accorded to the decision-maker is greater in planning cases."*

42. As to this contrast posited in **Carroll**, it seems to me interesting that Murray CJ observed in Meadows that "The purpose of judicial review is to provide a remedy to persons who claim their rights have been prejudiced by an administrative decision…".[98] Given what is often at stake in planning matters and their capacity to profoundly, and properly, affect the exercise of constitutionally-protected property and other rights and legitimate interests, I am not at all sure I would agree that planning and fundamental rights are necessarily at different ends of a spectrum. True, neither life nor liberty is at stake and often the interests and rights at stake for local residents in a planning controversy may not be at the more fundamental end of the spectrum. But even if not in terms of the assertion of personal rights, planning cases often engage issues of environmental protection. In the context of EU competence in planning and land use matters (Article 192 TFEU[99]), a high level of environmental protection and improvement is required by Article 3(3) TEU[100] and Article 191 TFEU and, more pointedly, is required as a matter specifically of fundamental rights by Article 37 CFREU.[101] While these principles directly inform policy and legislation rather than provide a standard directly applicable to individual measures, they are cited repeatedly such as the EIA Directive and the Habitats Directive[102]. See also **ETI**[103] in this regard.

43. EU Law does recognise that the standard of judicial review – or, put otherwise, the scope of a decision-maker's discretion – may vary. AG Kokott said in **Lies Craeynest**[104] - a environmental law case[105] - *"where interferences with fundamental rights are at issue, the extent of the EU legislature's discretion[106] may prove to be limited, in light of the principle of proportionality, depending on a number of factors, including, in particular, the area concerned, the nature of the right at issue guaranteed by the Charter, the nature and seriousness of the interference and the object pursued by the interference."* She considered that *"national courts must carefully discern whether a certain matter falls within the scope of the broad discretion and requires only limited judicial review or whether other matters requiring stricter judicial review are at issue, in particular the limits of discretion or procedural complaints."* In that regard she considered both the right to life and the high level of environmental protection demanded by the EU treaties[107] as suggestive of a higher standard of review and noted that the standard of review was strict as to issues relating to AA under Art 6(3)

98 Citing East Donegal Co-Operative Livestock Mart Ltd. v Attorney General [1970] I.R. 317.
99 Treaty On the Functioning of The European Union.
100 Treaty On European Union.
101 Charter of Fundamental Rights of The European Union.
102 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora as amended.
103 Environmental Trust Ireland v An Bord Pleanála et al incl. Cloncaragh Investments Ltd [2022] IEHC 540.
104 Case C-723/17 Lies Craeynest and Others v Brussels Hoofdstedelijk Gewest and Others – opinion delivered on 28 February 2019 citing Judgment of 8 April 2014, Digital Rights Ireland and Others (C-293/12 and C-594/12, EU:C:2014:238, paragraph 47). In Digital Rights, in view of the important role played by the protection of personal data in the light of the fundamental right to respect for private life and the extent and seriousness of the interference with that right caused by an unjustified comprehensive retention of call data, Directive 2006/24 was subject to strict review and the Court ultimately declared it invalid.
105 Directive 2008/50/EC — ambient air quality.
106 She had in mind here judicial review of EU Legislation.
107 Article 3(3) TEU, Article 37 of the Charter and Article 191(2) TFEU.

Habitats Directive.[108] The CJEU echoed this view[109]. She considered the standard in that case to be at least one of manifest error but considered, in light of the importance of the rules on ambient air quality for human life and health, that the national court should hear and decide between competing scientific evidence.[110] More generally, the CJEU answered the question as to scope of judicial review in terms very similar to the answer suggested by AG Kokott: the CJEU said it was for national courts to verify that air sampling points had been established in accordance with the Air Quality Directive 2008/50/EC. That environmental and fundamental rights may be regarded as in the same category of importance is evident in **Lies Craeynest**.

44. Also, that contrasting of planning and fundamental rights in Carroll seems to me to approach the application of different tests to different categories of decision - which did not find favour, with Fennelly J at least, in Meadows. As has been seen, Fennelly J disavowed the application of different tests of irrationality depending on whether the applicant in judicial review was a developer whose constitutional property rights were at stake or an objector whose merely legal rights were at stake – giving a specifically planning case[111] as his example. While the Board's expertise justifies curial deference, I respectfully do not see that, as a matter of principle, the nature of the rights and interests at stake, as between those proposing and opposing a development, justifies greater deference depending on whether what is challenged is a grant of permission or its refusal. It would seem incongruous that the fundamental property rights of a landowner seeking to develop would justify a lower level of curial deference to a particular refusal of permission, but the supposedly lesser rights and interests of objectors would justify a higher level of curial deference had the same decision gone the other way.

45. In **Friends of the Irish Environment v Ireland**[112] MacGrath J said that the O'Keeffe test of irrationality "*remains largely unaltered*", save perhaps where fundamental rights are at issue. And the O'Keeffe "*no relevant material*" test of irrationality was recently reiterated in High Court cases such as **People Over Wind**,*[113]* **Navan Co-Ownership**,[114] **Alen-Buckley**,[115] **North Meath Wind Farm,**[116] **M28**,[117] **Kenny**,[118] and **Kemper**.[119] In Alen-Buckley, Navan Co-Ownership was approved in its assertion that the Board's assessment "*whether a particular development is in accordance with proper planning and sustainable development* **…….** *would only be subject to very limited review on the grounds of unreasonableness or irrationality following O'Keeffe … and Meadows …".* In Kenny, the O'Keeffe "*no relevant material*" test was considered[120] especially and strictly applicable to decisions by specialist bodies possessing special technical skill, such as the Board in planning matters.

108 Opinion §53.
109 Case C-723/17 Lies Craeynest and Others v Brussels Hoofdstedelijk Gewest and Others CJEU (First Chamber) 26 June 2019 §33.
110 §56, 63 & 64.
111 White.
112 [2019] IEHC 747.
113 People Over Wind v An Bord Pleanála [2015] IEHC 271.
114 Navan Co-Ownership v An Bord Pleanála & Ors [2016] IEHC 181.
115 Alen-Buckley v An Bord Pleanála & Ors. [2017] IEHC 541.
116 North Meath Wind Farm v An Bord Pleanála [2018] IEHC 107.
117 M28 Steering Group v An Bord Pleanála [2019] IEHC 929 Citing People Over Wind v. An Bord Pleanála [2015] IEHC 271.
118 Kenny v An Bord Pleanála & Roscommon County Council [2020] IEHC 290 (High Court (Judicial Review), MacGrath J, 12 March 2020).
119 Joyce Kemper v An Bord Pleanála [2020] IEHC 601. – citing M28
120 Citing Meadows, Navan Co-Ownership and Alen-Buckley.

46. But, remembering Fennelly J's insistence in Meadows on only one, but a flexible, test for irrationality, responsive to all circumstances, including but not limited to issues of fundamental rights, it may be unclear to what extent O'Keeffe remains applicable as a different, "*no relevant material*", test for review of planning and other expert technical decisions in circumstances not raising issues of fundamental constitutional rights or EU-law mandated standards of review or the high standard of environmental protection mandated by the TFEU and CFREU. And given the degree of perfusion of EU law in planning and environmental law and domestic planning and environmental law, it may be doubted whether different standards of review are desirable or practical as between domestic and EU law as to standard of review – the risk of confusion identified in Meadows by Fennelly J would seem to loom.

47. Nonetheless, Phelan J in **Stanley**[121] recently referred to **St. Audeon's**[122] in which Simons J observed that the threshold for certiorari of a decision as unreasonable and disproportionate (i.e. irrational) is "*extremely high and is almost never met in practice*" and cited **O'Keeffe** for the proposition that *"The court cannot interfere with the decision of an administrative decision-making authority merely on the grounds that (a) it is satisfied that on the facts as found it would have raised different inferences and conclusions, or (b) it is satisfied that the case against the decision made by the authority was much stronger than the case for it."*. Simons J described these limitations as having been confirmed by the Supreme Court in Meadows and as of particular importance as to planning decisions. Phelan J saw the question as *"whether there was a sufficient evidential basis for the decision reached or whether it is amenable to challenge as unreasonable for lack of an adequate evidential basis (bearing in mind the high threshold which applies in any challenge of an expert body on rationality grounds)."* While Phelan J doesn't explicitly cite the "*no relevant materials*" test, it seems likely that was the gravamen of her citation of O'Keeffe – and Ferriter J in Madden describes Stanley as articulating the "*conventional O'Keeffe test*".

48. **Madden** helpfully collects some recent decisions - Ferriter J inter alia briefly noting NM and Stanley and also **Holohan**.[123] In the end, and while he considered that a manifest error test would have produced the same result, Ferriter J not merely applied "*the conventional O'Keeffe test*" but was satisfied to refuse relief as a result. In doing so, he cited **North Meath Wind Farm** in which Twomey J re-iterated the "*classic*"[124] "*very high threshold*"[125] test whether there was *"any material before the Board which was capable of supporting that decision".* Ferriter J did not explicitly refer to that as the test he applied but, overall, that is how I read his decision. That said, he found "*compellin*g" the reasoning of Humphreys J in **Reid**[126] that O'Keeffe was inapplicable in judicial review of issues of Appropriate Assessment[127] - though AA may be a special case.[128]

121 Stanley v An Bord Pleanála [2022] IEHC 177 §§ 49 & 77.
122 Board of Management of St. Audeon's National School v An Bord Pleanála [2021] IEHC 453 (Simons J).
123 Infra.
124 Ferriter J in Madden.
125 Twomey J in North Meath Wind Farm.
126 Reid v. An Bord Pleanála [2021] IEHC 362.
127 For purposes of the Habitats Directive
128 "Some material before the decision maker" just isn't enough when the mission statement of the exercise is not "form a planning judgment" but "exclude all reasonable scientific doubt"."

49. Of the recent cases, I confess to finding **Holohan**[129] significant. Humphreys J, considering a challenge to an EIA, cites **NM** as authority that the Court can:

> *"…. quash for unreasonableness (which seems to mean in this context O'Keeffe and Keegan unreasonableness, i.e. a lack of any evidence capable of supporting the decision or flying in the face of reason and common sense) or lack of proportionality or where the decision strikes at the substance of constitutional or EU law rights. It can ensure that the conclusions follow from the premises and also quash for material error of fact. One might perhaps ask what therefore can the court not do?*
>
> *The answer appearing from caselaw to this question is that the court cannot decide that the exercise by a decision-maker of a discretion, or a finding as to fact, is simply wrong (or even clearly wrong) on the merits, if there is material to support it and if the conclusion is reached by a logical process, without factual error and supported by reasons, and does not disproportionately interfere with rights.*
>
> *The underlying reason why a court should not be permitted to find that an administrative or executive decision is wrong, or even clearly wrong, is the separation of powers. To do so the court would, as Lord Brightman said, "be itself guilty of usurping power" [130]."*

It is not apparent that Humphreys J intended to exclude decisions of experts such as the Board from irrationality analysis informed by proportionality.

50. I should say that my understanding of Humphreys J's phrase, "O'Keeffe and Keegan unreasonableness, i.e. a lack of any evidence capable of supporting the decision or flying in the face of reason and common sense", is that the "or" separating the two phrases is intended to express two distinct yardsticks as opposed to conveying that the two phrases are synonymous. That seems to me consistent with the preference of Fennelly J in Meadows for the formulation of Henchy J in Keegan over O'Keeffe. Nonetheless, both represent high thresholds.

51. Humphreys J in Holohan goes on to deprecate reliance in judicial review on Meadows to launch, in substance, a merits-based appeal process. He considers that *"the jaws of judicial review have already been opened wide enough. It is not necessary or appropriate to seek to widen them further, either under the guise of national or European law. Given the wide scope of judicial review in Ireland, the proposition that it provides an effective remedy is acte clair."*

129 Holohan v An Bord Pleanála [2017] IEHC 268.
130 Chief Constable of North Wales Police v Evans [1982] 1 W.L.R. 1155 p. 1173.

52. Something of a counterblast to O'Keeffe is evident in **Clifford**[131] - perhaps as to reasons rather than irrationality - but at least bearing on the issue of curial deference. Humphreys J said, obiter:

> *"The board has had a long run with O'Keeffe ….. but neither administrative law generally nor planning law in particular has stood still since, and nor has the nature of the wider society. Expertise is of course vital. But in our increasingly democratic age experts are expected to "show their workings" where that is reasonably practicable, rather than to have deference demanded for assertions or conclusions merely because of the position or qualification held by the speaker. I don't think judges would get very far these days in terms of public acceptance of their decisions on the latter basis, so I don't think it is unreasonable to expect such transparency from administrative decision-makers."*[132]

53. In **Kevin's**[133] Humphreys J offered an interesting view of a submission by the Board. He did not accept as an entirely accurate interpretation of Weston, or of the current state of the law, a view that *any* material on the file that could justify the decision suffices to defeat a challenge. He said:

- If there is something before the decision-maker that could justify[134] the decision, it is only a presumption that the decision-maker relied on that something to justify the decision.
- such a presumption can be displaced, although not necessarily just because the decision-maker does not specify in its reasons exactly what it did consider.
- If it can be established that the decision-maker *in fact* adopted an incorrect reasoning process, whether factually or legally, the outcome will not normally be upheld just because the decision-maker *could have* adopted a different and lawful reasoning process but didn't actually do so.[135]
- Weston is only about situations where there is nothing to the contrary.[136] Improper purpose and lack of good faith are among but by no means the only grounds of modern judicial review.[137]

54. All that said, and while it is clear that the bar for irrationality is very high, the line seems to remain to be mapped in each case between declining to quash the merely, but "clearly", wrong on the one hand and, on the other, remedying "*variance with reason or common sense"* or disproportionate interference with rights or disproportion to the evidence.[138] As Charleton J put it in 2017 in **AAA**[139], *"every case remains fact-specific*" – to which specific facts, Fennelly J says in Meadows, the Keegan and O'Keeffe test is sufficiently responsive as the test is flexible.

131 Clifford v An Bord Pleanála, O'Connor v An Bord Pleanála [2021] IEHC 459 (High Court (Judicial Review), Humphreys J, 12 July 2021).
132 It should be said that this is an extract from a longer segment of the judgment which canvasses the limits of the extent to which in general, a lack of detail or transparency in a decision-maker's analysis grounds certiorari.
133 Kevin's GAA (Flannery et al) v An Bord Pleanála [2022] IEHC 83.
134 Humphreys J used the word "justifies" but I think in the sense of possibility of justification.
135 Humphreys J added the caveat – "unless perhaps there could only have been one outcome anyway – although that happens less often than one might expect".
136 I understand this to refer to bases of attack on the impugned decision other than irrationality. For example, allegations of unfair procedures.
137 Citing Efe (A Minor) v Minister for Justice, Equality and Law Reform and Others [2011] IEHC 214, [2011] 2 I.R. 798.
138 To paraphrase Charleton J in AAA.
139 AAA & anor v Minister for Justice & ors [2017] IESC 80.

Burke - 2022

55. Finally, the decision of the Supreme Court in **Burke**[140] is notable for its view of **Meadows**. It differed appreciably from the present case and the common type of judicial review in that it concerned the question of impermissible interference with constitutional rights by exercise by the Government of the executive power of the State under Art.28 of the Constitution. It concerned the exclusion of certain home-schooled students from an administrative[141] scheme, effected in response to the Covid-19 pandemic, preventing the Leaving Certificate exams from proceeding as normal, whereby candidates could opt for calculated grades instead.

56. O'Donnell CJ for the majority[142] considered that in **Meadows** "*the legal issue of the correct test to be applied was a reasonably clear choice between a standard of what might be called Keegan rationality, and a higher proportionality standard".* He agreed with the Court of Appeal in **Burke** that "it is difficult to derive a clear ratio decidendi from the decision of the majority court in Meadows". That was "*partly because the particular circumstances of that case[143] made it an imperfect vehicle for the determination of the question" … "of the correct approach to a contention that an administrative decision is invalid because it amounts to an impermissible interference with a constitutional right."* The difficulty was "*compounded by the fact that proportionality appears to be used in a number of different senses in the judgments*" in **Meadows**. As between the two posited standards, O'Donnell CJ considered that:

> *"The question, in one case, is whether the reasoning leading to a conclusion can be said to follow from the premises, as Henchy J. put in Keegan, or perhaps at the most generous extreme of the test, was reasonable. In the case of proportionality, the question is whether a means adopted to achieve a legitimate end is matched to it, so that it intrudes no more than is necessary on a protected right."*

O'Donnell CJ said that

> *"<u>There is little doubt that in determining reasonableness[144] a court must apply the O'Keeffe/Keegan test</u>.[145] The question brought into focus by the present case is whether in determining validity where it is alleged fundamental rights have been breached must a court apply the O'Keeffe/Keegan standard?"*

57. O'Donnell CJ considered that the majority in Meadows was *"undoubtedly clear in relation to what it did not decide: rejection of the contention that, when it is alleged that an administrative*

140 Burke v Minister for Education and Skills [2022] IESC 1; [2022] 1 I.L.R.M. 73.
141 i.e. non-statutory.
142 Charleton J concurred as to the result but got there via a somewhat different route.
143 Upon which O'Donnell CJ expands in his judgment.
144 Irrationality means the same thing.
145 Emphasis added.

decision breaches a constitutionally protected right, the court should assess that on the standard of rationality set out in" Keegan as in the case of alleged breach of a constitutional right, "*it is not sufficient to establish*[146] *that the provision could be considered rational or reasonable at some level, still less that it does not fly in the face of fundamental reason."* O'Donnell CJ considered that the majority in Meadows was also clear "*that the principle of proportionality could be employed in the analysis and resolution of cases raising issues as to the impact of decisions on fundamental rights." Even on such an issue, O'Donnell CJ was of the view that, while the tool of proportionality provided a frame of analysis useful in considering the validity of any action, legislative or otherwise, which affects constitutional rights, he did not think it "necessarily a precise or a failsafe test".*

58. O'Donnell CJ had earlier observed that a decision found to breach constitutional rights can almost always be described as unreasonable, but it is *"not apparent that this is the optimal way of approaching and analysing the claim".* In this jurisdiction[147] the *"development of judicial review of administrative action paralleled the development of constitutional law, and if anything, was later and separate. The basic question where it is alleged that an administrative decision breached constitutional rights is the same as that which applies when it is argued that a legislative provision breaches those rights. While this question might be resolved by using the language of reasonableness, it is not facilitated by the merging of different approaches, particularly when they come encrusted with layers of case law decided in a different context."*

59. In this light, and though O'Donnell CJ did not essay a detailed consideration of the law of irrationality in judicial review, it seems possible to view Burke as confining the use of proportionality analysis to cases of alleged breach of constitutional rights - to which cases it deems irrationality analysis inapplicable. Having placed proportionality in in the realm of constitutional law, a realm the development of which was "separate" from the development of judicial review of administrative action, and though he was not immediately concerned with the latter, O'Donnell J, perhaps obiter, but unambiguously, opined as to irrationality that *"There is little doubt that in determining reasonableness a court must apply the O'Keeffe/Keegan test."*

Comment

60. I do not imagine that I can successfully encapsulate the decisions set out above. Nor do I imagine that I have reviewed all relevant cases – of which there is a profusion. It may well be that the O'Keeffe "*no materials*" test (perhaps as glossed in Kevin's) survives as the standard of review of planning decisions for irrationality in the form of a particular and narrow variant of the Keegan test of irrationality applicable to impugned decisions made by experts in their exercise of expert judgment. That is what Denham J appeared to envisage in Meadows and seems consistent with the cases cited above and with Burke. It considerably less clear that Fennelly J in Meadows approved of

146 i.e. for the respondent in judicial review to establish. O'Donnell CJ was speaking of Acts of the Oireachtas breaching Constitutional Rights but it seems a principle applicable to such a breach by any administrative decision.
147 He contrasted UK authority as to rights guaranteed under the ECHR.

it - or Hogan J in NM and at least some of the High Court decisions cited above. O'Keeffe's vitality seems likely to turn, at least in part and for now, on complexities of stare decisis. It also seems likely to turn on its adequacy to meet EU law requirements of effectiveness of remedy[148]. It may turn on the issue of the desirability of applying different standards of irrationality depending on the type of decision impugned, the expertise of the decision-maker and the types of rights and interests at stake. Fennelly J thought that approach "*wrong and confusing*" – though when the "*flexibility*" in the single test he envisaged would elide, not least by legitimate judicial enthusiasm for categorisation, into different tests or subtests may prove a subtle issue.

61. All that obiter said, even the more general Keegan test of "*fundamental variance from reason and common sense*" represents a very high bar to certiorari which is not surmounted even by a judicial view that an impugned decision was "*clearly wrong*" on its merits. And, as between Keegan and O'Keeffe, Fennelly J in Meadows preferred the former. I am content to apply that test in this case.

MATERIAL CONTRAVENTION – THE GENERAL LAW

62. Various of the Grounds assert breach of the law as to the grant of permissions in material contravention of development plans ("material contravention"). It is therefore convenient to initially address in general terms the law in that regard, which was the subject of submissions by counsel for all parties.

Permission in Material Contravention - S.9(6) of the 2016 Act, S.37(2)(b) PDA 2000

63. S.9(6) of the 2016 Act permits the Board to grant permission for an SHD even if it materially contravenes the relevant development plan other than as to the zoning of the land. But, even in the case of such a "non-zoning" material contravention, the Board may grant permission only in accordance with S.37(2)(b) PDA 2000.

64. S.37(2)(b) PDA 2000, as applied to SHD applications by S.9(6) of the 2016 Act, permits the Board to grant permission for an SHD in "non-zoning" material contravention only

> *"…… where it considers that—*
> *(i) the proposed development is of strategic or national importance,*
> *(ii) there are conflicting objectives in the development plan or the objectives are not clearly stated, insofar as the proposed development is concerned,*
> *or*

148 See NM and AAA, supra.

(iii) permission for the proposed development should be granted having regard to regional spatial and economic strategy for the area, guidelines under section 28, policy directives under section 29, the statutory obligations of any local authority in the area, and any relevant policy of the Government, the Minister or any Minister of the Government,

or

(iv) permission for the proposed development should be granted having regard to the pattern of development, and permissions granted, in the area since the making of the development plan."

Material Contravention – Standard of Review

65. Whether a planning permission would be in material contravention is, in the first instance, a matter for the decision-maker in the planning process. Given the obligations imposed on a decision-maker once a material contravention is discerned, it is necessary that the decision-maker take a view whether a grant of permission would be in material contravention. Indeed, and as will be seen as to Ground 9, statute requires the SHD planning applicant to take a view on this issue also. However, in judicial review the Court will often have the final word on the presence, absence, substance and materiality of an alleged material contravention. In that sense, many cases have correctly identified the question of material contravention as one of law[149] as to which planning decisions are subject to judicial review for correctness as opposed to merely for irrationality.

66. But counsel for the Board argued that the position in this regard is nuanced and that at least some determinations of material contravention are reviewable only for irrationality. As that is an argument running against recent trends in the caselaw, and as it engages a choice between two very different standards of review, and as it is likely to arise in other cases, it requires careful consideration.

67. Without attempting to be definitive and subject to a refinement I set out later, it can be said that the general question of material contravention can often be subdivided as follows:

- Interpretation - the first sub-question is as to the interpretation of the relevant development plan. One cannot discern contravention or non-contravention of a plan unless one first knows what it means. It is clear that the meaning of the development plan[150] is a matter of law for the court.[151] Error by the decision-maker in its interpretation is judicially reviewable for correctness – not just for irrationality. That is not controversial.

- But counsel for the Board submits that in reality in cases in which the decision-maker is found to have misinterpreted the development plan, a finding of contravention often follows without

149 e.g. Recently Redmond v An Bord Pleanála [2020] IEHC 151, Ballyboden Tidy Towns Group v An Bord Pleanála [2022] IEHC 7.
150 I will use the phrase "development plan" but the same observations apply to material contraventions of local area plans.
151 e.g. Ballyboden Tidy Towns Group v An Bord Pleanála [2022] IEHC 7.

much controversy. That, he says, has resulted in a general and correct, but incomplete, perception that the question of material contravention is one of law for the court. Put another way, he says that the cases in which the Court has found material contravention to be a matter of law are generally those in which the Court has found that the decisionmaker misinterpreted the development plan – as opposed to having interpreted it correctly but misapplied it to the facts.

- Application to the facts - the sub-question here is whether the development plan, once correctly interpreted, has been correctly applied to the facts of the planning application.[152] This sub-question, counsel for the Board says, can present in a variety of forms in respect of which the standard of review by the court may differ. I return to this issue below.

- Materiality - the third sub-question arises if, by reference to either of the two earlier sub-questions, contravention of the development plan appears. That is the question whether the contravention is material and is a question of law for the court.[153]

68. As to the second sub-question – that of application of the correctly-interpreted development plan to the facts of the planning application – counsel for the Board initially argued that such a task required the exercise of planning judgement by the decision-maker. And to this judgment the court must accord curial deference, such that the resultant decision is reviewable only for irrationality. He said that, other than on an O'Keeffe irrationality standard, the court has no role in interrogating whether an impugned decision was made in material contravention of the development plan by misapplication of the plan to the facts of the case. As argument progressed, this proposition became more nuanced in light of the variety of content of development plans.

69. The requirements of development plans vary widely on a spectrum from the highly prescriptive, clear, and quantified, to the expression of broad and general policies allowing considerable flexibility and the application of planning judgement in their application, with myriad gradations in between. Counsel for the Board ultimately agreed that, at the highly prescriptive, clear, and quantified end of the spectrum, the contravention/non-contravention question will be a matter of law for the court. But, counsel argued, in the application of broad and general policies allowing considerable flexibility and the application of planning judgement, the O'Keeffe irrationality standard applies. Though he didn't say so, the logic of his argument was that, between those extremes, on which side of the line a particular set of facts lies would be a matter of judgment on a case by-case basis.

70. Before I turn to those arguments, I will mention **SWR**[154] in which Costello J held that in deciding a planning application "the Board must make its own determination as to whether or not the proposed application as a matter of law and fact would materially contravene the development

152 Perhaps, more accurately, vice versa, but nothing turns on that.
153 e.g. Redmond v An Bord Pleanála [2020] IEHC 151, Ballyboden Tidy Towns Group v An Bord Pleanála [2022] IEHC 7.
154 South-West Regional Shopping Centre Promotion Association Ltd v An Bord Pleanála [2016] IEHC 84 §91.

plan." Costello J was concerned there with whether the Board had jurisdiction to determine the issue of material contravention but of present interest is her characterisation of that issue as one of "fact and law". It was not, as it did not need to be, a considered decision on that characterisation and was obiter in that respect. But I confess to the view that there was appreciable reality in the view expressed by Costello J.

Browne - 2021

71. As recorded above, **Browne**[155] echoes Hogan J in **NM** as to judicial unease with the manner in which O'Keeffe had come to be applied in practice - observing that *"One of the most serious criticisms of the doctrine of unreasonableness is that it is being over-applied."* He cites the issue of material contravention as an example[156]. Taking the example of a challenge to a local authority decision to advance a development of its own[157], Browne observes, of planning authority arguments that its decisions as to material contravention are reviewable only for irrationality, that

> *"Although the argument is superficially attractive, the High Court has rejected such an approach.[158] This is because the concept of "material contravention" — when properly understood — far from being a matter which has been entrusted under the legislation to a local authority, actually represents a fetter on the powers of a local authority. More specifically, the competence of a local authority to carry out development without planning permission is expressly limited to circumstances where same does not involve a material contravention of the development plan. Were a local authority to be allowed determine this issue conclusively, this would set the limitation at naught. To put the matter in blunt terms, it would not make much sense to impose a restriction on a local authority, and then to allow the local authority an almost unreviewable discretion to determine the parameters of that restriction. Accordingly, the question of whether a material contravention is involved is a question of law to be determined by the High Court without the necessity of showing any particular deference to the initial "view" taken by the local authority."*

72. The view of development plans as a "fetter" on development was expressed in **FIE v Ireland**.[159] While perhaps a view expressed in passing, as few other than lawyers these days use the word "fetter"[160] and it has a particular usage in administrative law, the use of the word seems notable.

155 Simons, Planning Law, 3rd Ed'n, Browne 2021 §13-260.
156 §13-264 et seq.
157 Local authority development is generally exempted development but S.178 PDA 2000, in brief, precludes a planning authority from carrying out development in material contravention of its development plan.
158 Citing Wicklow Heritage Trust Ltd v Wicklow County Council, unreported, High Court, McGuinness J., 5 February 1998, Cork City Council v An Bord Pleanála [2006] IEHC 192, [2007] 1 I.R. 761, Cork Institute of Technology v An Bord Pleanála [2013] IEHC 3.
159 Friends of the Irish Environment CLG v Government of Ireland [2022] IESC 42 (Supreme Court, Baker J, 9 November 2022) §75
160 Literally, a chain or manacle used to restrain a prisoner, typically placed around the ankles. (Oxford).

73. As to distinguishing questions of law to be determined by the Court from questions of fact and degree reviewable only for irrationality, **Browne** lists presumptions, the second of which is that:

> *"……. if a particular matter operates so as to limit or fetter the exercise of a statutory power, the decision-maker will not be permitted to determine that matter conclusively. This has already been illustrated above by reference to the significance of the concept of material contravention of the development plan in the context of local authority own development. The concept of material contravention also has significance in the context of an application for planning permission[161]: where such a material contravention is involved, the planning authority[162] is required to undertake special procedures before it can grant planning permission. …. The effect of all of this is to make it more difficult for a planning authority to grant planning permission for development in material contravention than in the case of ordinary development. The concept of material contravention, accordingly, operates as a fetter on the planning authority's power in this context also." [163]*

74. I might add that, if correct, the foregoing analysis would seem to be of general application. It seems difficult to suggest that answer to the question whether a particular development is in material contravention is or is not a matter of law depends on the identity of the intending developer as a local authority.

Byrne v Wicklow - 1994

75. The Board cites **Byrne**.[164] Keane J (a high authority in planning law) refused leave to seek judicial review of a decision that a planning application for an interpretive centre in Luggala, County Wicklow did not involve a material contravention. Keane J applied O'Keeffe principles to a planning judgement whether the proposal would be "obtrusive" in a landscape area of special control within the meaning of the development plan and decided that *"there was material before the manager which entitled him to arrive at the decision he did that no material contravention was involved."* Keane J also rejected that proposition, by reference to "*the other criteria*" referred to in O'Keeffe - in the words of Henchy J in Keegan, whether the decision *"flew in the face of common sense or was one which no rational decision-maker could have arrived at".* Keane J acknowledged that the decision[165] was one with "*which many people might disagree with and they would be fully entitled to disagree*". He said that even if, on the evidence, he would have decided the issue of material contravention differently,

> *"….. I would still be unable solely on that ground to set aside the decision arrived at by the Planning Authority. I stress that to show again, .. how high the hurdle is in a case of this nature."*

161 Citing generally Tennyson v Dun Laoghaire Corporation [1991] 2 I.R. 527.
162 And the Board.
163 §13–273.
164 Byrne v Wicklow County Council unreported, High Court, Keane J., 3 November 1994.
165 Presumably the manager's decision.

76. This decision clearly supports the proposition that decisions as to material contravention which involve the application of planning judgement are reviewable only for irrationality.

O'Reilly v O'Sullivan - 1996[166] & 1997[167]

77. The Board cites **O'Reilly** as a challenge to an order establishing a caravan halting site for members of the travelling community on grounds, it seems pleaded separately, of material contravention and irrationality[168]. The applicants argued that the issue of material contravention is determined as a matter of law without reference to O'Keeffe principles[169]. Laffoy J held:

> *"There are undoubtedly situations, as the cases cited illustrate, in which the O'Keeffe principles have no part to play in determining whether a proposal would constitute a material breach of a development plan. For instance, the second named Respondent's current development plan might have provided that halting sites are not permitted on lands zoned F and G, in which case the proposed development at Blackglen Road would clearly constitute a material contravention. However, as the evidence established, halting sites, which, in my view, includes temporary as well as permanent halting sites, are "permitted in principle" on the site at Blackglen Road "subject to compliance with relevant policies, standards and requirements" set out in the Development Plan. In my view, where a controversy arises on judicial review as to the application of the relevant policies, standards and requirements stipulated in a development plan, that controversy must be resolved by reference to the O'Keeffe principles."*

78. On the facts, Laffoy J concluded, as to material contravention, that the Applicants had failed to surmount the "*difficult hurdle*" of the O'Keeffe principles of irrationality and for that and other reasons refused relief.

79. The Supreme Court upheld Laffoy J. The appeal appears to have been moved not on a basis of material contravention but on a wider basis that the decision was ultra vires for irrationality. Keane J does not mention material contravention but rejects the ultra vires argument explicitly on the basis that Laffoy J had correctly applied O'Keeffe. However, as Laffoy J had applied those principles to both the general irrationality argument and the material contravention argument and, as Keane J was considering only the former, it is not clear that the Supreme Court upheld Laffoy J specifically on the application of O'Keeffe to material contravention issues. Neither, however, did it doubt her decision in that regard.

80. On that basis, and whether or not since O'Reilly the law of irrationality has moved on from O'Keeffe, O'Reilly remains a High Court authority that where a material contravention controversy

166 O'Reilly v O'Sullivan unreported, High Court, Laffoy J., 25 July 1996.
167 O'Reilly v O'Sullivan unreported, Supreme Court 26 February 1997, [1997] Lexis Citation 6336.
168 There was also an allegation of failure to do an EIA but that is irrelevant here.
169 Citing as examples Tom Chalke Caravans Limited & Anor v Limerick County Council, unreported, Flood J, 20 December 1991 and Keogh v Galway Corporation, unreported Carney J, 9 September 1994.

arises on judicial review as to the application of the relevant policies, standards and requirements stipulated in a development plan, that controversy must be resolved by reference to the current law of irrationality. Counsel for the Applicants accepted that O'Reilly was an authority to that effect – though he emphasised authority to the contrary.

Wicklow Heritage Trust - 1998 (& cases considered therein)

81. For his proposition that the High Court has rejected irrationality as the applicable standard as to material contravention, Browne cites **Wicklow Heritage Trust**[170]. Counsel for the Board very properly drew this case to my attention as a case against his argument. Counsel for the Applicants relied upon it. The Trust alleged that Wicklow County Council's decision to seek ministerial certification of an EIS[171] for a proposed landfill was ultra vires on the basis that the proposal was in material contravention of the development plan despite the county manager's certification that there was no such contravention.

82. McGuinness J held that that the question of material contravention was "clearly a matter of law" and "the various decisions of this Court and of the Supreme Court undoubtedly establish that the decision as to whether a particular development is or not a material contravention of the county plan is a matter for the court." Citing Keegan, but not O'Keeffe, she said she must consider the matter:

> *"… in the light of the County Development Plan itself, in the light of statute law, and in the light of the case law already laid down by this Court and the Supreme Court. The question is not whether the Senior Executive Planner or the County Manager were unreasonable in thinking that the Ballynagran site was not a material contravention; the question is whether they were correct in law in this opinion."*

83. McGuinness J identified the relevant development plan policies of which I will give only a brief account. It seems clear to me that they were very much of the 'policy/planning judgement' variety. The aim being to "*generally discourage sporadic development in rural areas, especially in rural landscape areas …… to preserve scenic amenity, to protect high quality agricultural land and to conserve the attractiveness of the county for the development of tourism and the creation of tourist related employment"*. Such that, for example, developments should not "*detract*" from rural scenery which *"should be preserved in support of the most attractive areas".* Policy endeavoured *"to retain the most important natural features and field patterns*" on agricultural land.

170 Wicklow Heritage Trust Ltd. v Wicklow County Council [1998] IEHC 19 (5th February, 1998).
171 A statutory EIA procedure no longer used.

84. McGuinness J cited **O'Leary**,[172] in which the Council found no material contravention of its development plan policy to conserve and to seek to expand high amenity areas for recreational use, on the basis that the proposed accommodation envisaged development of only a small section of a large high amenity area. The land was zoned "G" in the Plan, which stated that "Caravan Park - Residential" developments would not be permitted in areas so zoned. O'Hanlon J quashed the decision as in material contravention. I observe that this does seem to have been more a case of contravention of a clear-cut objective than an exercise of planning judgement.

85. McGuinness J cites **Roughan**[173] as a case in which Barron J applied O'Leary to essentially similar facts. Roughan cites **Tennyson**[174] for the proposition that *"What is or is not a contravention of the development plan is a matter to be determined by the Court."*

86. McGuinness J cited **McGarry**[175] as relating to a Council proposal to put a refuse dump in a sand and gravel pit at the site of the Carrowmore Passage Grave Cemetery. That was an important archaeological site which the development plan had listed for preservation or protection on foot of its policy to have regard to areas of scientific and amenity interest, buildings of archaeological, geological, and historical places or features of particular interest. McCarthy J in the Supreme Court held that "*the use of the quarry or pit as a refuse dump or tiphead is a clear and material contravention of the Development Plan* …… (which had) *clearly identified the local, national and international importance of this area of County Sligo; it cannot save by doing violence to the language of the plan - by a material contravention of it - permit the maintenance of a refuse dump in that area.*" McCarthy J also said:

> *"In my view, the development plan expresses with most commendable clarity the admirable objectives of Sligo County Council both in its executive and its elected members. It identifies the unique importance of the Carrowmore Passage Grave Cemetery not merely as part of the national heritage but also on a European scale. But such professions of intent and concern are mere window dressing if, without reference to the many skilled and interested bodies and groups, with the understandable wish to provide adequate refuse disposal for the demands of the county, the Council propose to use the site or part of the site or a part adjoining the site as a refuse dump."*

The foregoing passages suggest that McGarry was a case of clear-cut contravention as opposed to one of the exercise of planning judgement.

87. Of course, McGarry preceded O'Keeffe – though not Keegan. But Keegan is not cited in McGarry. It also preceded Byrne and O'Reilly. No explicit irrationality argument was made in McGarry – that seems significant. But McCarthy J did address the Council's argument that "*neither*

172 O'Leary v Dublin County Council [1988] IR 150.
173 Roughan v Clare County Council (High Court unreported 18th December, 1996).
174 See below.
175 Attorney General (McGarry) v Sligo County Council [1991] 1 IR 99.

the High Court nor this Court should, as it is said, act as a referee on the suitability of any particular project" - citing **An Taisce v Dublin Corporation**.[176] An Taisce had unsuccessfully challenged, as in material contravention of a plan objective to preserve Bull Island, use of part of the island as a refuse tip. McCarthy J pointed out that that case had involved considerable expert dispute on the likelihood of ecological damage. O'Keeffe P had declined to resolve that conflict as to do so would usurp the jurisdiction of the planning authority. McCarthy J commented[177]

> *"Essentially that case was different from the present. In that case there was a dispute as to the effect on the ecology of the island in particular as a bird sanctuary. Here the dispute concerns the area of Carrowmore Passage Grave Cemetery and whether or not the establishing of a refuse dump or refuse tip is a material contravention of the development plan.*
>
> *It does not require the resolution one way or the other of any particular conflict of evidence - there is no conflict of evidence in this regard; the conflict is as to the inferences to be drawn from the evidence with particular reference to the Plan. In my judgment, the use of the quarry or pit as a refuse dump or tiphead is a clear and material contravention of the Development Plan; ……. It is not the manner of use of the dump; it is not that the dump will not be an actionable nuisance that is relevant; it is the very existence of the dump in the area in question. Every part of the development plan to which I have referred clearly identified the local, national and international importance of this area of County Sligo; it cannot save by doing violence to the language of the plan - by a material contravention of it - permit the maintenance of a refuse dump in that area."*

88. Of McGarry, McGuinness J said in Wicklow Heritage that "this judgment made it abundantly clear, if it was not clear before, that it is for the court to decide whether a particular development is a material contravention of the county development plan." Interpreting that as a proposition applicable to all allegations of material contravention, I confess to wondering if I would have gone that far given irrationality was not argued, nor Keegan cited, in McGarry, and as Byrne and O'Reilly do not seem to have been cited to McGuinness J.

89. It does seem that McGarry exemplifies the observation of Charleton J in **AAA** that "*every case remains fact specific*". Sometimes the facts simply compel the conclusion of material contravention - that a decision is indefensible as flagrantly in the teeth of plain reason and common sense. The court was clearly and unsurprisingly appalled at the prospect of a dump at the Carrowmore Passage Grave Cemetery – "*not merely as part of the national heritage but also on a European scale*" – a sentiment expressed by McCarthy J as follows:

> *"I would not like to end this judgment without paying tribute to the courage of those who, at considerable monetary risk, challenged the conduct of the local authority in County Sligo thereby*

176 (Unreported, High Court, O'Keeffe P 31st January 1973 - considered to in some detail in Keane, The Law of Local Government in Ireland (1982) at page 214.
177 Layout changed for exposition.

going some way to answer the stated observation of an important archaeologist in the western world: "Do the Irish have no pride?" …"

90. McGuinness J next cited **Tennyson**[178] - in which the development proposed was at a density considerably exceeding the site classification in the Plan as "Density Class C" providing a maximum density per acre of 3 "normal houses". That case turned on the interpretation of the Plan: once it had been interpreted the contravention was obvious.

91. Of **Wilkinson**,[179] McGuinness J said that "*the court went even further in holding that a particular development was a material contravention*". The proposal was for a large caravan halting site – in accordance with the site zoning. Costello J held that there was no material contravention of the zoning and continued:

"But that does not end the matter. A development may still amount to a material contravention of the plan if it is one which was not consistent with the proper planning and development of the area. Accordingly, the question can be posed, as it was in O'Leary's case, suppose a private individual had applied for permission to erect "a residential caravan park" on this site catering for eighty-four caravans and about four hundred persons in accordance with the exiguous plans now proposed, would planning permission have been given? I have no hesitation in concluding that no reasonable planning authority could conclude that such a development would be consistent with the proper planning and development of the area. Let me suppose that a concerned voluntary organisation applied to erect a "halting site" for members of the travelling community, as is now proposed, would planning permission be granted? It is perfectly clear that it is the policy of the Council that halting sites should only be small in size but I conclude that, apart from this consideration, no planning authority could regard a development of this magnitude, catering for so many persons in such barely adequate conditions, as being consistent with the proper planning and development of the area."

"…… such a development, whether it is called a halting site or a residential caravan park, is a material contravention of the Plan because no reasonable planning authority could regard this development as being consistent with the proper planning and development of the area ……."

92. I comment that Wilkinson was clearly decided on the basis of irrationality but preceded the establishment of the "*no relevant material*" test in O'Keeffe. McGuinness J commented that the only reason Costello J. found a material contravention was that the development was so inordinately large that no reasonable planning authority could consider it to be consistent with the proper planning and development of the area. So, again, it may have been a case of compulsion of fact.

178 Tennyson v Dun Laoghaire Corporation [1991] 2 IR 527.
179 Wilkinson v Dublin County Council [1991] ILRM 605.

93. **Ferris**[180], cited by McGuinness J, also preceded O'Keeffe and concerned a proposed halting site. An assertion of material contravention of the zoning[181] failed. Finlay CJ turned to an apparently separate argument that this was a "*bad planning decision*". He cited **An Taisce**[182] and **McGarry** to the effect that the courts would not decide planning questions on planning standards and would intervene only if such a decision was unreasonable by **Keegan** standards. However, I observe that this latter analysis was applied not to the issue of material contravention but to the argument that this was a "*bad planning decision*". I do not see it as throwing much light on the role of the court in discerning material contravention.

94. From her survey of the cases McGuinness J identified principles, of which that of present concern is that:

> *"(1) It is for the Court and not for the planning authority[183] to decide as a matter of law whether a particular development is a material contravention of the local development plan."*

95. McGuinness J held herself "*constrained to hold that the proposed development of a waste disposal site at Ballynagran is a material contravention …*" based on the following observations:

> *"In interpreting the objectives set out in the Wicklow County Development Plan …. it would never occur to a reasonably intelligent person without particular expertise that the provision of an extremely large waste disposal site with all its ancillary development could come within the objectives of Wicklow County Development Plan in regard to an area of rural amenity and high quality agricultural land. Given the history of refusal of various types of planning permission in the Ballynagran and surrounding area which I have listed earlier in this judgment, I cannot accept that Wicklow County Council would give planning permission to a private developer to develop the size and type of waste disposal site which they themselves propose to develop. The very reasons which the County Council has given for refusing planning permission to the various private developments apply with equal and in some cases much more force to the development of an extremely large waste disposal site of the type described in the Environmental Impact Statement. In addition to being in an area of high quality agricultural land which is at present used quite intensively for agriculture the proposed site is adjacent to the N11 which is described by the Council itself as the main tourist route in the county. Ordinary common sense would inform one that it is bound to give rise to a considerable additional amount of heavy traffic. Even if managed with the utmost care as is set out in the Environmental Impact Statement it is hard to imagine it being anything other than a highly unpleasing intrusion on the surrounding landscape. The objective of providing waste disposal sites, for whatever reason, is not included in the 1989 Wicklow County Development Plan. The County Council has not adopted a waste*

180 Ferris v Dublin County Council (Supreme Court unreported 7th November 1990).
181 As opposed to the more general material contravention argument in Wilkinson.
182 (Unreported, High Court, O'Keeffe P 31st January 1973).
183 By which is meant not ultimately for the planning authority.

management plan which would provide for such waste disposal sites as an essential part of such a plan."

96. It must be acknowledged that the reasoning identified above appears to evince a preparedness on the part of the court to interrogate material contravention decisions based on planning judgements. The clear statement of principle by McGuinness J, that the issue is one of law, cannot be ignored. But whether the cases McGuinness J had reviewed went that far, save in compelling cases, I confess to being less sure. It does seem that McGuinness J was significantly influenced, as to requirements of consistency between planning decisions, by the fact that five of the six local planning permission refusals had been grounded in findings of material contravention in an area of high amenity. Also, it seems to me significant that neither Byrne nor O'Reilly was amongst the cases reviewed in Wicklow Heritage Trust.

Cork City Council v An Bord Pleanála 2006 & CIT v An Bord Pleanála 2013

97. Browne also cites **Cork City Council v An Bord Pleanála**[184] and **CIT**[185] - but for the narrower and well-established proposition that questions of interpretation of documents are not addressed on O'Keeffe principles. In the Cork City case, Kelly J refused to apply O'Keeffe to a question of interpretation of a development contribution scheme.[186] He instead applied Wicklow Heritage - to the effect that the question was whether the Board had been correct in law. That is unsurprising in a case as to interpretation of a planning document. While **CIT** did involve application of law to facts, the issue was at heart one of statutory interpretation.[187] Neither case raised issues of material contravention or, it seems to me, issues of planning judgement of the kind which arise as to issues of material contravention.

CHASE - 2021 & Decisions Cited Therein

98. I return to **CHASE** as a case emphasised by the Board. Importantly, CHASE was not a case in which material contravention was at issue. That said, and as indicated above, it undoubtedly endorsed O'Keeffe as remaining applicable to cases in which the exercise of planning judgement by a decision-maker is impugned as irrational.

99. The Board cites CHASE[188] for its citation of **Navan Co-Ownership**[189] as to a decision-maker's reconciliation of competing planning objectives in a development plan, in turn citing **Tesco**[190] and

184 Cork City Council v An Bord Pleanála [2006] IEHC 192, [2007] 1 IR 761.
185 Cork Institute of Technology v An Bord Pleanála [2013] IEHC 3; 2013 2 IR 13.
186 Having considered cases including O'Keeffe, Wicklow Heritage, O'Reilly and Tennyson.
187 The Board proceeded from an incorrect understanding of the phrase "voluntary organisation" in art 157(1) PDR 2001.
188 §387.
189 Navan Co-Ownership v An Bord Pleanála [2016] IEHC 181 (McGovern J.).
190 Tesco Stores Ltd v Dundee [2012] UKSC 13.

William Davis.[191] In Tesco, Lord Reid noted that development plans are "*full of broad statements of policy, many of which may be mutually irreconcilable…"* that many of their provisions *"are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse"*[192]. In William Davis, the court stated that *"The task of reconciling different strands of planning policy on the facts of a particular case has been entrusted to the planning decision-maker. Such planning judgements will only be subject to review by this court on very limited grounds."*

100. McGovern J in **Navan Co-Ownership** concluded that "Whether a particular development is in accordance with proper planning and sustainable development is a matter within the particular competence and expertise of the planning authority, or, as the case may be, An Bord Pleanála, a specialist body established by statute. Such an assessment would only be subject to very limited review on the grounds of unreasonableness or irrationality." For this proposition, McGovern J cites **O'Keeffe** and **Meadows**.

101. Barniville J in CHASE referred to his having applied these principles in **Kelly/ALDI**[193] and to Haughton J having done so in **Alen-Buckley**.[194] **Kelly/ALDI** was not a material contravention case[195]. **Alen-Buckley** was a material contravention case as to development plan objectives or policies potentially conflicting or contradictory when applied to a proposed development. Haughton J, citing Navan Co-Ownership (inter alia in citing O'Keeffe and Meadows) and William Davis, held that *"Reconciling potentially conflicting policy … in the Plan was a matter for the Board to consider, … in the context of the facts arising from the proposed development and what would be proper planning and sustainable development in the area*." Though not a material contravention case CHASE does support the Board's position here as to material contravention of development plan policies where compliance with those policies requires the exercise of planning judgement.

<u>Redmond - 2020 & Ballyboden - 2022</u>

102. Simons J in **Redmond**[196] took a very clear view on the role of the court in discerning material contravention:

191 William Davis Limited v Secretary of State for Communities and Local Governments [2013] EWHC 3058 (Admin).
192 Lord Hope held similar views: that "it was not unusual for development plan polices to pull in different directions" and the proposition was untenable "that if there was a breach of any one policy in a development plan a proposed development could not be said to be 'in accordance with the plan' …… the relative importance of a given policy to the overall objectives of the development plan was essentially a matter for the judgment of the local planning authority and that a legalistic approach to the interpretation of development plan policies was to be avoided."
193 Eoin Kelly v An Bord Pleanála and ALDI Stores (Ireland) Ltd [2019] IEHC 84.
194 Alen-Buckley v An Bord Pleanála (No.2) [2017] IEHC 541.
195 Barniville J had held that that the Board in that case had correctly interpreted the relevant guidelines and that its application to the facts of the guidelines as to interpreted was an exercise of planning expertise and judgement which had not been shown to be unreasonable or irrational in the O'Keeffe sense.
196 Redmond v An Bord Pleanàla [2020] IEHC 151 (High Court (Judicial Review), Simons J, 10 March 2020).

"25. It follows from this legislative scheme that the question of whether or not a proposed strategic housing development involves a material contravention of the development plan must be a question of law exclusively for the court. Were it otherwise — and were An Bord Pleanála to be allowed to determine conclusively whether or not a material contravention is involved — then this would set at naught the statutory restraints on An Bord Pleanála's ability to grant planning permission which are imposed by section 9(6) of the PD(H)A 2016. The board would, in effect, be allowed to determine its own jurisdiction."

84. …….. where the interpretation of a development plan, and, in particular, the determination of whether or not a proposed development would involve a material contravention of the development plan, is a question of law for the court, then the views of neither the planning authority nor An Bord Pleanála can be decisive.

91. ……. it is open to the court to make a finding of material contravention notwithstanding that the planning authority itself merely refers to the proposed development being "contrary" to §8.2.3.4 (xi). The question of whether or not there is a material contravention is, ultimately, a question of law for the court."

103. In **Ballyboden**[197] the view was taken, citing **Redmond** inter alia, that interpretation of the Development Plan and whether it has been contravened, and, if so, whether materially, are matters of law for the court to decide on a "*full-blooded review*"[198] basis rather than the attenuated irrationality review standard set in ***O'Keeffe*** and on these issues of interpretation, the views of the Board are entitled to appropriate weight but no particular deference on account of their source.[199]

104. The judgment in Ballyboden suggested, on the authority of Simons J, in **Heather Hill**[200] that the different statutory context in Ireland was such that **Tesco** and **William Davis** are inapplicable here as to irreconcilable policies in the development plan - such that the Board cannot avoid finding a material contravention by preferring one element of a development plan to a contradictory one. Simons J said:

"… that there is a conflict between two objectives of a development plan does not allow a decisionmaker to contravene one of the objectives and to dismiss that contravention as immaterial. Rather, the solution which the Oireachtas has put in place to address the contingency of conflicting objectives is that provided for under section 37(2)(b) of the Planning and Development Act 2000 (as applied to "strategic housing development" by section 9(6) of the PD(H)A 2016). More specifically, An Bord Pleanála is authorised to grant planning permission in material contravention of the plan where there are conflicting objectives in the development plan insofar as the proposed development is concerned."

197 Ballyboden Tidy Towns Group v An Bord Pleanála [2022] IEHC 7.
198 Heather Hill Management Company clg v An Bord Pleanála [2019] IEHC 450 (High Court (General), Simons J, 21 June 2019) §41.Redmond v An Bord Pleanála [2020] IEHC 151 (High Court (Judicial Review), Simons J, 10 March 2020) §26.
199 Citing Cicol v An Bord Pleanála [2008] IEHC 146.
200 Heather Hill Management Company v An Bord Pleanála [2019] IEHC 450.

105. It was also noted in Ballyboden, citing well-known authority, that a development plan constitutes an environmental contract with the community *"embodying a promise by the council that it will regulate private development in a manner consistent with the objectives stated in the plan …"*.[201] It is *"a representation in solemn form, binding on all affected or touched by it, that the planning authority will discharge its statutory functions strictly in accordance with the published plan*" and do so *"openly and transparently".*[202] The view was taken that *"so that the Court can discern whether the promise has been kept and the solemn representation honoured openly, transparently and strictly in accordance with the plan …. the Court must attribute clear meaning to the plan as best it can while respecting the tension between its proper flexibility (of which the decision-maker must have the benefit) and its being a plan by which the planning authority can be held strictly to account".*[203]

106. It is important to understand Ballyboden in its context. While the analysis in that case was (I hope necessarily) complex, the ultimate conclusion turned on the interpretation of the Plan (clearly a matter of law and of some complexity[204]) rather than difficulty in applying it to the facts. In finding a material contravention, it was stated that *"… 142 dph is out of the ballpark identified by the "numbers" used as to density in the Development Plan – as Simons J put it in* ***Heather Hill****, self-evidently."*[205] The judgment in Ballyboden also states:

> *"As Simons J accepted in Heather Hill*[206] *citing Tesco v Dundee, Eoin Kelly,*[207] *and Navan Co-Ownership the logically prior question of interpretation of Development Plans is for the court - the subsequent application of the Plan, correctly interpreted, to the facts of the particular case, is for the planning authority/the Board in the exercise of planning expertise and judgement and is reviewable only for irrationality. But Barniville J in Eoin Kelly, citing McGovern J in Navan Co-Ownership, observed that as between the interpretation and the application of development plans and also in considering "overlapping and sometimes competing, and arguably inconsistent, policies and objectives promoted in those documents" that division of roles is not always clear or straightforward."*[208]
>
> *"……. the distinction between the application of a Development Plan to a particular development proposal, as a matter of planning judgement entitled to deference on O'Keeffe principles*[209] *and the interpretation of a Development Plan, illustrated and illuminated by consideration of a particular development proposal, may not be always clear or straightforward. But I do not consider this case on this issue to be an issue of application of a development plan as to which the planning judgement of the Board is entitled to deference."*[210]

201 AG (McGarry) v Sligo County Council [1991] 1 IR 99 at p 113.
202 Byrne v Fingal County Council [2001] 4 IR 565.
203 Emphasis added.
204 Primarily as the plan had incorporated Ministerial Guidelines by reference.
205 §180.
206 §42.
207 Eoin Kelly v An Bord Pleanála & Aldi [2019] IEHC 84.
208 §130.
209 Emphasis added.
210 §183.

Conclusion on Material Contravention, Standard of Review

107. The heading to this section of this judgment may reflect hubris. As will have been seen, and as to the standard of review of the presence or absence of material contravention, there are weighty authorities both ways as between the O'Keeffe standard and the standard of "full-blooded" review. There are genuine tensions resulting from entirely legitimate, weighty and countervailing considerations. Notably these include that the application of broad and flexible planning policies should be left to the planning decision-maker as reviewable only for rationality and as decisions the court is not well-fitted to make and, on the other hand, that as material contravention goes to the jurisdiction of the planning decision-maker in the application of a development plan to which it should be strictly kept, it should not be allowed to determine its own jurisdiction.

108. Further, to refer simply to the "*question of material contravention*" and identify "it" as one of law may be to obscure the fact that it is in truth a number of questions, some or all of which may arise in a given case. The following may not be a complete list:

- First is the question of interpretation of the relevant content of the development plan; that is undoubtedly a question of law, subject to "*full-blooded review*".

- Second is the question, closely linked to the first, whether, on that interpretation, the plan leaves any or more or less discretion or planning judgement to the decision-maker, or, which may amount to the same thing, it sets broad policy, imprecise, or subjective standards, for example on matters aesthetic. Given the necessity to *"discern whether the promise has been kept and the solemn representation honoured openly, transparently and strictly in accordance with the plan* (such that) *the Court must attribute clear meaning to the plan as best it can…",* there is an obvious interpretative tension between attributing clarity (in the sense of precision) and the recognised necessity that a development plan, of general application to a wide and often complex locality and a wide range of circumstances, be flexible with holistic decision-making in mind.[211] However, in this context it can also be remembered that appreciable flexibility is provided by the statutory provisions allowing for material contravention.

- The third question is that of applying the plan, as so interpreted, to the facts – that is to say the substantive content of the planning application[212] - to discern whether there is a contravention of the plan.

- The fourth question is whether, in light of the answer to the second, the court should, as to the substantive decision of the decision-maker on the third question (whether the plan has been contravened), substitute its view for the decision-maker's.

- Fifth, and assuming contravention is found, the question arises whether it is material. The authority is strong that that is a question of law considered by reference to the test set in

211 Heather Hill Management Company CLG v An Bord Pleanála [2022] IEHC 146 §156.
212 Assuming the issue to have arisen in a planning application.

Roughan[213] and approved and applied since in such as **Maye**[214], **Byrnes**[215], **Heather Hill #1**[216] and **Ballyboden**[217] and centring on the "*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."*

109. The fourth question relates to an issue of fundamental principle – as to the choice of standard of review as between "full-blooded" and "irrationality". To some extent, in some cases, this choice of standard of review may be informed by the view taken as to what review for irrationality, in particular of planning decisions, means. Whether the **O'Keeffe** "*no materials*" standard or a more flexible and facts-responsive standard informed more strongly by considerations of proportionality and the view taken in decisions such as **NM** is adopted. The difficulty most clearly arises where, on a proper interpretation, the plan is expressed, as development plans often are, in terms which allow appreciable flexibility, discretion and/or planning judgement to the decision-maker.

110. Ordinarily, decisions requiring the exercise of planning judgement are reviewable only for irrationality (whatever that may precisely mean) rather than full-bloodedly for substantive correctness.[218] It is useful to recollect why that is so: it is because

- the legislature has entrusted the decisions requiring the exercise of planning judgement to the planning authorities and the Board – not to the Courts.
- planning authorities and the Board have, and the Court lacks, the planning expertise considered necessary to inform such judgments.

111. The view expressed by Browne[219] is impeccable in law that a development plan fetters the decision-maker by limiting its jurisdiction, and that, as a matter of law, no administrative body can be the final arbiter of the scope of its own jurisdiction. That is, at base, an issue of the rule of law. But, while the restrictions imposed by fetters must be delineated and enforced by law and the Courts, it does not seem to me that the law cannot recognise that fetters, of their nature, can be looser or tighter and may afford more or less scope for judgment to the fettered decision-maker. It is a question, not of the Courts abdicating their role as the final arbiter of the scope of a decision-maker's jurisdiction, but of the Courts recognising that the proper scope of that jurisdiction may afford scope for the exercise of judgment - especially expert judgment by the decision-maker - reviewable only for irrationality in its exercise. Incidentally, that is a view which does not seem to me to turn on the view one takes on curial deference and the continuing vitality, or not, of the **O'Keeffe** "no material" test. It seems to me that an insistence in such circumstances on "full-blooded" review

213 Roughan v Clare County Council unreported, High Court, Barron J., 18 December 1996.
214 Maye v Sligo Borough Council [20007] IEHC 146.
215 Byrnes v Dublin City Council [2017] IEHC 19, [23].
216 Heather Hill Management Company v An Bord Pleanála [2019] IEHC 450.
217 Ballyboden Tidy Towns Group v An Bord Pleanàla [2022] IEHC 7.
218 Leaving aside for present purposes the possibility of review on other possible grounds such as failure to proceed from premises or factual error.
219 See above.

is unnecessary to the rule of law and undesirable as forcing the court to purport to deploy planning judgement – invoking an expertise it does not possess.

112. Accordingly, I confess to the view that, on questions of material contravention there is much to be said for the analysis of Keane J in **Byrne** and Laffoy J in **O'Reilly**. That view is that where a development plan, on a proper interpretation,

- allows appreciable flexibility, discretion and/or planning judgement to the decision-maker, review is for irrationality rather than full-blooded.
- does not allow appreciable flexibility, discretion and/or planning judgement to the decision-maker, review is full-blooded as the issue is one of law.

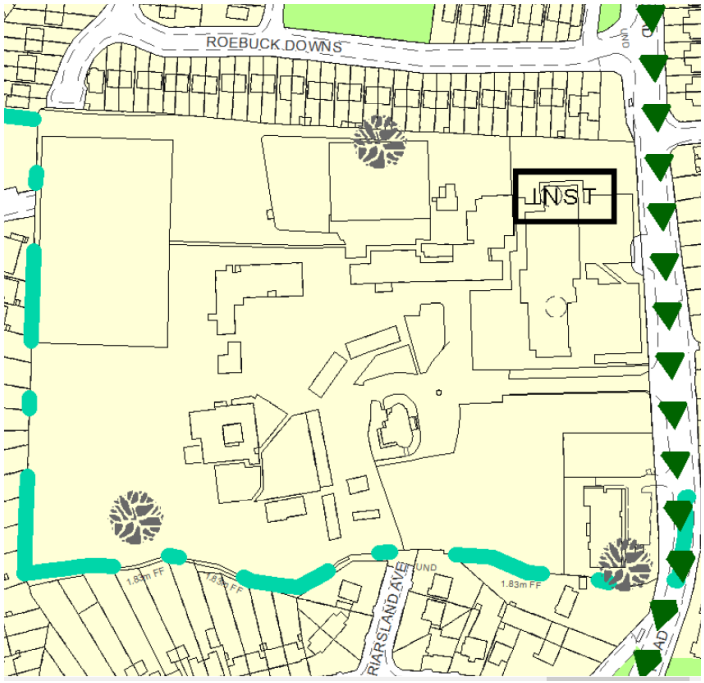
113. That conclusion requires a focus on the terms of the aspect(s) of the plan allegedly materially contravened and on which side of the dividing line a particular part of the plan lies may be a difficult question in a particular case.

THE DEVELOPMENT PLAN, PLANNING HISTORY & REDMOND V AN BORD PLEANÁLA

Development Plan Map 1

114. The relevant Development Plan map extract is set out as Figure 5 below. As will be seen, the greater Our Lady's Grove Campus extended to about 6 hectares on a roughly square site which is,

- zoned, by Objective A of the Development Plan, "*To protect and/or improve residential amenity*".
- designated "INST" as Institutional Lands – "*To protect and/or provide for Institutional Use in open lands*". **Redmond** confirms that this designation applies to the entire Campus, including the Site.
- subject to an objective "To protect and preserve Trees and Woodlands".



USE ZONING OBJECTIVES

Objective A To protect and-or improve residential amenity.

OTHER OBJECTIVES

To protect and preserve Trees and Woodlands

To protect and/or provide for Institutional Use in open lands

INST

Figure 5 – Extracts from Development Plan Map 1 & Legend

- On this figure, "The Grove" has not yet been built in the south-eastern quadrant of the Campus. Errew House lies in the south-eastern corner.
- The western half of the Site and the area now occupied by the Grove[220] are depicted as open space.
- The Hockey Pitch, in its earlier orientation, occupies the north-western corner of the Site.
- What seems to be the old primary school is depicted in the eastern section of the Site, south of the Afterschool. Whether the old primary school was still present when the Development Plan took effect is unknown to me.

220 Between Errew House to the Southeast and Roebuck House to the Northwest.

Development Plan Policies

Institutional Lands - §2.1.3.5 Policy RES5[221]

115. §2.1.3.5 Policy RES5: Institutional Lands provides, inter alia, that:

- *"Where distinct parcels of land are in institutional use (such as education, residential or other such uses) and are proposed for redevelopment, it is Council policy to retain the open character and/or recreational amenity of these lands wherever possible, subject to the context of the quantity of provision of existing open space in the general environs."*

- *"Protecting and facilitating the open and landscaped 'parkland' settings and the activities of these institutions is encouraged."*

- *"Where a well-established institution plans to close, rationalise or relocate, the Council will endeavour to reserve the use of the lands for other institutional uses, especially if the site has an open and landscaped setting and recreational amenities are provided. Where no demand for an alternative institutional use is evident or foreseen, the Council may permit alternative uses subject to the zoning objectives of the area and the open character of the lands being retained."*

- *"A minimum open space provision of 25% of the total site area (or a population based provision in accordance with Section 8.2.8.2 whichever is the greater) will be required on Institutional Lands. This provision must be sufficient to maintain the open character of the site with development proposals structured around existing features and layout, particularly by reference to retention of trees, boundary walls and other features as considered necessary by the Council (Refer also to Section 8.2.3.4(xi) and 8.2.8)."*

- *"In the development of such lands, average net densities should be in the region of 35 - 50 units/ha. In certain instances higher densities will be allowed where it is demonstrated that they can contribute towards the objective of retaining the open character and/or recreational amenities of the lands."*

- *"In cases of rationalisation of an existing institutional use, as opposed to the complete cessation of that use, the possible need for the future provision of additional facilities related to the residual retained institutional use retained on site may require to be taken into account. (This particularly applies to schools where a portion of the site has been disposed of, but a school use remains on the residual part of the site.)"*

116. It is agreed that, in requiring "*open space*", Policy RES5 does not require public open space nor is specifically public open space necessary to "*open character*".

221 Development Plan, Chapter 2 Sustainable Communities Strategy.

Institutional Lands - §8.2.3.4(xi)[222]

117. §8.2.3.4(xi) as to "Institutional Lands" provides, inter alia, that:

- *"Where no demand for an alternative institutional use is evident or foreseen, the Council may permit alternative uses subject to the area's zoning objectives and the open character of the lands being retained."*

- *"The principal aims of any eventual redevelopment of these lands will be to achieve a sustainable amount of development while ensuring the essential setting of the lands and the integrity of the main buildings are retained."*

- *"… a masterplan must adequately take account of the built heritage and natural assets of a site and established recreational use patterns. Public access to all or some of the lands may be required."*

- *"A minimum open space provision of 25% of the total site area … will be required on Institutional Lands. This provision must be sufficient to maintain the open character of the site - with development proposals built around existing features and layout, particularly by reference to retention of trees, boundary walls and other features as considered necessary by the Council."*

- *"In addition to the provision of adequate open space, on Institutional Lands where existing school uses will be retained, any proposed residential development shall have regard to the future needs of the school and allow sufficient space to be retained adjacent to the school for possible future school expansion/redevelopment."*

Open Space and Recreation - §8.2.8
Public/Communal Open Space - §8.2.8.2 - Quantity - §8.2.8.2(i) Residential / Housing Developments

118. §8.2.8.2(i) Residential/Housing Developments, as relevant, states:

- *"……. the requirement of 15 sq.m - 20 sq.m. of Open Space per person shall apply … based on a presumed occupancy rate of 3.5 persons in the case of dwellings with three or more bedrooms and 1.5 persons in the case of dwellings with two or fewer bedrooms. A lower quantity of open space (below 20 sq.m per person) will only be considered acceptable in instances where exceptionally high quality open space is provided on site …"*

- *"It is council policy to retain the open space context of Institutional Lands which incorporate significant established recreational or amenity uses, as far as is practicable. In the event of permission for development being granted on these lands, open space provision in excess of the*

222 Development Plan, Chapter 8 Principles of Development §8.2.3.4 Additional Accommodation in Existing Built-up Areas.

normal standards will be required to maintain the open character of such parts of the land as are considered necessary by the Council."

- *"For this purpose a minimum open space provision of 25% of the total site area …… will be required ….."*

- *"There may also be a requirement to provide open space in excess of the 25% if an established school use is to be retained on site in order to facilitate the future needs of the school (refer also to Section 8.2.3.4(xi))."*

The 2019 Permission & Redmond v An Bord Pleanála

119. SHD Permission 304420-19 was granted in 2019 ("the 2019 Permission") for 132 residential units (19 houses and 113 apartments) and a childcare facility on the Site. The Applicants rely on the development layout of that permission to demonstrate that removal of protected trees – including the line of trees in the north-western quadrant of the Site running from the western boundary, east into the Site - envisaged in the Impugned Permission, is not necessary, which necessity, they say, is a precondition of the Development Plan to their removal.

120. As to the 2019 Permission, the Chief Executive of the Planning Authority had recommended refusal of permission on three material contravention grounds:[223]

- The development would render the Site unavailable for expansion by the existing schools and render them operating on sites smaller than recommended by the Department of Education.

- The development would reduce the provided and potential public open space across the Campus to below 25% and remove of the vast majority of trees from the Site.

- Deficiency of public open space available to the residents of the scheme.

121. The 2019 Permission was quashed in **Redmond**[224] on the following bases:

- The Inspector and Board erred in considering that the Development Plan "*Institutional Lands*" designation did not apply to the Site. It applied to the entire Campus, including the Site[225]. That "*principal issue*" took up the "*lion's share*" of the judgment.[226]

223 For fuller detail see the Appendix to Redmond v An Bord Pleanála [2020] IEHC 151 (High Court (Judicial Review), Simons J, 10 March 2020).
224 See §157 et seq - Summary of Conclusions & other content footnoted below.
225 See also §47.
226 §§4 & 5.

- At adoption of the Development Plan, the Site accommodated part of the secondary school hockey pitch in its original north/south orientation and open lands in institutional use. That former hockey pitch (including the part of it on the Site) continued (and continues) to have an established sports and recreation use, ancillary to institutional use.[227]

- The Development Plan policies and objectives as to change of use of "Institutional Lands" remained applicable to the Site despite, and can't be by-passed by, its sale to a developer. Such bypass would "*make an absurdity of the development Plan*". Simons J said "*as of the date of the adoption of the development plan, the lands had an established institutional use. This established use and designation is not lost by dint of a transfer of ownership*".[228]

- The applicable Development Plan zoning objective is "*Objective A To protect and/or improve residential amenity*". The Institutional Lands designation is not a zoning objective. It recognises that residential development may in principle be permissible but seeks to regulate the precise circumstances in which it might be authorised and the conditions, for example, in respect of open space, which might be attached to a permission.[229]

- The Council's[230] Chief Executive had reported on the basis that the "Institutional Lands" designation applied and hence assessed the planning application by reference to Development Plan §8.2.3.4(xi).[231] His consequent reasons for recommending refusal of permission were as to the provision of public open space and tree retention. Their taking the view that the "Institutional Lands" designation did not apply to the Site led the Inspector and the Board into error in engaging with the Chief Executive's recommended reasons for refusal.[232]

- The 2019 Permission was in material contravention of the Development Plan policies and objectives applicable to institutional lands as to (i) housing density and (ii) public open space. As the Board had not invoked its power under S.9(6)(c) of the 2016 Act to grant permission in material contravention, the permission was invalid.

- The Board breached S.9(1)(a) of the 2016 Act[233] in failing to explain what approach it took to the question of possible future expansion of the schools and as to why it disagreed with the Chief Executive's recommended reason for refusal in that regard.

227 See also §40 & §46(1) & 47.
228 See also §55 & 56.
229 See §68.
230 I use the terms "Council" and "Planning Authority" interchangeably.
231 See above.
232 as required by s.9(1)(a) of the 2016 Act.
233 9(1) The Board shall, before making a decision …. in respect of the proposed strategic housing development, consider—
(a) (i) the report of the planning authority (inter alia it relates to) (A) the likely consequences for proper planning and sustainable development in the area in which it is proposed to situate the development.

POSITION IN THE SHD PROCESS OF THE SCHOOLS, THE DEPARTMENT OF EDUCATION AND THE PLANNING AUTHORITY

Schools & Department of Education

122. The primary school board of management and the secondary school principal, by brief letters[234], supported the planning application and said any expansions of their schools would take place within their own grounds and they had room to do so. Colbeam's planning report includes a map[235] identifying areas for potential expansion within both schools' grounds. The secondary school principal said the Site[236] had been owned by a religious congregation[237] and was never in the control of the secondary school. Both schools welcomed the public open space to be provided in the Proposed Development as a much-needed amenity for the benefit of the schoolchildren.

123. In some contrast, the primary school parents' association[238] objected to the planning application at some length and in closely-argued detail by reference to planning policy. It asserted that the Goatstown area was "*already significantly under-resourced in terms of public infrastructure, educational facilities and recreational amenities*" and that the proposed development would be in material contravention, particularly of the Institutional Lands designation and of Development Plan Policy SIC8 (Community Strategy for Schools) as to such issues as insufficiency of public open space, loss of open character, excessive density and height, loss of protected trees and lack of sufficient future expansion space for the primary and secondary schools. In particular, the parents' association dispute, in quantified terms and citing the Department of Education, the assertion that the schools have room to expand. They say the primary school is already 28% below the Department's recommended site size for a school of its existing size and will be even more so when 3 already-planned additional classrooms are built. They say the land identified for expansion of the primary school sits atop an attenuation tank.

124. The Department of Education, though on notice of the planning application, expressed no view. One must conclude that it was not perturbed by the planning application.

Chief Executive's Report

125. By the statutory report of its Chief Executive, the Council recommends refusal of the planning application as the Proposed Development:[239]

234 See Thornton O'Connor Planning report pp 73 & 74.
235 See Thornton O'Connor Planning report pp 75.
236 Save for part of the hockey pitch before its realignment.
237 Presumably the congregation which had founded the school and now occupies the convent.
238 Representing 20 named members. Observation by Suzanne Cotter, 13 Larchfield Road, Goatstown, Dublin 14, and John O'Carroll, 23 Annaville Park, Dundrum, Dublin 14, co-chairs of the Parent's Association of Our Lady's Grove Primary School.
239 I have re-ordered the reasons slightly.

a. would deprive the schools of the Site - such that they would be operating on sites smaller than recommended by the Department of Education. It would also deprive them of the possibility of extension to meet already-identified demand for school places in the area. All this is in material contravention of Development Plan Policy SCI8, §8.2.12.4[240] and the zoning objective to "*protect and/or improve residential amenity*" - of which the provision of community facilities, including schools, forms part.

b. would fail to retain existing high-quality trees contrary to the Development Plan – specifically:

- the site-specific objective to protect and retain existing trees and woodlands,
- Policy RES5 and the INST Objective,
- and so be contrary to the proper planning and sustainable development of the area.

c. would materially contravene Policy RES5 and the INST Objective and §8.2.3.4(xi) of the Development Plan by

- reducing the open space across the Campus to below 25%,
- failing to maintain the Site's open character due to its layout and massing.

d. would be contrary to §8.2.8.2 of the Development Plan and the proper planning and sustainable development of the area as

- the public open space is deficient in quality and usability.
- the communal open spaces would function primarily as circulation areas and would receive sunlight levels below relevant recommendations, offering inadequate and sub-standard communal amenity.

e. in its proposed density,

- exceeds the range for lands in institutional use and so would materially contravene the INST Objective.
- when viewed in tandem with the reasons above, is a significant deviation from the existing pattern of development and would lead to overdevelopment.

f. At only 2m wide, the proposed en-suite rooms do not provide adequate amenity for future residents.

GROUNDS 1 & 2 – OPEN SPACE, OPEN CHARACTER & INSTITUTIONAL DESIGNATION

Introduction

126. It is convenient to deal with Grounds 1 and 2 together. Ground 1 asserts that the Impugned Permission materially contravenes the open space requirements of §8.2.8.2(i) of the Development

240 Citing the Department of Education and Skills Technical Guidance Documents TGD-025 and TGD-027, the 'Code of Practice on the Provision of Schools and the Planning System' 2008, prepared jointly by the Department of Environment, Heritage, and Local Government and the Department of Education and Science in, and by extension §8.2.12.4 of Development Plan, which cites this Code of Practice.

Plan such that the Board acted ultra vires in breach of S.9(6)(c) of the 2016 Act in granting permission without considering whether such material contravention could be justified by reference to S.37(2)(b) PDA 2000.

127. Ground 2 asserts that the Impugned Permission materially contravenes the Development Plan Institutional designation requirements/objectives as to:

(a) minimum 25% open space requirement for the overall holding,
(b) the requirement to maintain the open character of the lands,
(c) as to densities and/or
(d) as to future Institutional Use/Additional facilities.

Ground 2 asserts that the Board breached S.9(6)(c) of the 2016 Act in concluding that the proposed Development did not materially contravene (a) (b) and (d) and failed to take relevant considerations into account in purporting to justify the material contravention of (c) as to densities by reference to S.37(2)(b)(iii) of the 2000 Act.

128. Ground 2 also pleads irrationality of the Impugned Permission as to the conclusion that the Proposed Development would not materially contravene the Institutional Lands designation of the Site in the Development Plan on the basis that:

- The public open space to be provided is of exceptionally high quality - Ground 2(a).
- The Site does not have an open character, such that there was no such character to preserve - Ground 2(b).
- The Proposed Development would support the provision of an open character and provide recreational amenity such that it would accord with §2.1.3.5 of the Development Plan which allows for higher densities on such basis - Ground 2(c).
- ".. the subject site is unlikely to be required for future school expansion in the short to medium term" or to be required as a new school site - Ground 2(d).

General Observations on Open Space, Open Character and Recreational Amenity of the Campus

129. Counsel for the Board submits, and I accept, that the designation of Institutional lands is not particular to this Campus. It applies to various and varying lands across Dun Laoghaire/Rathdown. Some may have extensive open and landscaped parkland settings. Some not. Hence the word "if" in the phrase "*especially if the site has an open and landscaped setting*". Nonetheless, it is clear that "*open space and/or open character*" are considered at least typical features of Institutional lands and where open space and/or open character exist, the Institutional land designation attributes considerable value to those elements. To put the matter as its very lowest, if one is told that lands have an institutional designation and only thereafter looks at the development plan map and perhaps some aerial photos, it is no surprise to find that map and those photos of those lands to display "*open space and/or open character*". And that is so of this Campus and in very considerable

degree due to this Site and to the area on which the Grove has been built since the Development Plan took effect.

130. In considering the distinct, though linked, concepts of "open space", "public open space", "amenity" and "recreational amenity", **Christian**[241] assists. Clarke J said:

> *"…… there was some debate … as to the justification in using the zoning of privately owned lands to retain open space. While there is no doubt that the public amenity in lands to which the public have access is significant, it does not seem to me that there is also no possibility of there being a public amenity to privately owned open space lands. Even though the public may not have a right of access to private but open lands, the presence of such open lands in an area has the potential to contribute to the amenity of the area generally. There is a very great difference between a heavily built on quarter of an urban area, on the one hand, and a quarter which, while largely in private ownership, contains a significant amount of un-built on lands, on the other hand. It is, of course, the case that a planning authority cannot, by means of a development plan, turn private land into public land. However, the maintenance of some degree of open space in an area seems, at least at a general level, to be potentially a legitimate and desirable object which can inform the contents of a development plan even where some of the lands in question may not be publicly owned or are not such as the public generally have a right of access to."*

Clarke J later used the phrase, in terms which seemed to me to accept his premise, *"… to the extent that the maintenance of open space, even though not publicly accessible, may be a desirable end …"* Humphreys J echoed these views in **Clonres**.[242] So, lands may be open space and merit protection as such and provide amenity to the community as such without being public open space or recreational lands.

131. Clearly, open character and recreational amenity are distinct concepts. Lands may very well provide both but may just as well provide one only. Similarly, the concepts of "open character" and "open space" are closely linked but not the same. Open character is lent to land by the presence of open space. But the mere presence of open space may not lend open character. For lands to have open character they must be characterised to appreciable degree by that open space. It does not seem to me that to draw these distinctions is to step outside **XJS**[243] principles of interpretation of development plans as if by the intelligent informed layperson.

132. As relevant here, what is at issue is not primarily the open space to be provided on the Site or the open character of the Site but the open space to be left on the entire Campus designated as Institutional Lands and it is the open character of that Campus generally which the Development Plan, via the Institutional Land designation, seeks to maintain.

241 Christian v Dublin City Council [2012] 2 IR 506 §91.
242 Clonres CLG v An Bord Pleanàla [2021] IEHC 303 (High Court (Judicial Review), Humphreys J, 7 May 2021) §34.
243 Re XJS Investments Limited - [1986] IR 750.

Grounds 1 & 2(a) – Open Space Requirements

133. The Board found no material contravention as to open space provision.[244]

134. §8.2.8.2(i) of the Development Plan says that less than 20m^2 of open space per person is acceptable only where exceptionally high-quality open space is provided on site. I reject the Board's submission that the Plan is unclear in this regard. Read as a whole, the relevant content is clear.

135. The Inspector accepted Colbeam's calculation that 15.8m^2 was provided.[245] She found that acceptable in terms of §8.2.8.2(i) of the Development Plan as the public open space to be provided was of "*high-quality usable open space*"[246]. The Applicants say that conclusion did not identify exceptionality and so did not suffice to avoid material contravention. Given the Inspector repeatedly recited the criterion of exceptionality[247], including in the sentence immediately prior to the allegedly insufficient finding as to "*high-quality usable open space*", and given also her explicit view[248] that the Proposed Development is in accordance with §8.2.8.2 of the Development Plan which states the exceptionality criterion, I cannot conclude that she did not have it in mind in making that finding. I reject the Applicants' plea in this regard as formalistic and insubstantial.

136. The Applicants also plead as to Ground 1 that any finding that the open space was of exceptionally high quality is wholly inconsistent with and/or contradicted by the evidence accepted by the Inspector and the Board. Accordingly, the Applicants submit that the Inspector failed to give adequate reasons for any finding of high or exceptionally high-quality open space and/or any such conclusion is irrational in light of the evidence and/or took into account irrelevant considerations.

137. The Applicants analyse that evidence and the Development Plan in its bearing on assessment of quality of open space, in part as to the availability of sunlight to open spaces. The two communal amenity open spaces, taken individually, do not meet the relevant BRE Guide standards but the open amenity spaces of the entire Proposed Development, assessed as a whole, very comfortably meet those standards[249], such that "*Future residents of the proposed development, would have access to areas capable of receiving good levels of sunlight throughout the year…*".[250] As counsel for the Board observed, against a 50% standard, the Public Park and Woodland Trail is at 87% and the Public Recreational Area is at 96%. Were I an Inspector or the Board I might or might not find the Applicants' analysis convincing. But I am neither, nor an expert like either. With some hesitation – not least as, over time, decisions which fail to convince on the merits could erode confidence in the

244 The reference to that effect in its Order being agreed to have been a clerical error.
245 Inspector's report §10.14.2.
246 Inspector's report §§10.3 .11 & 10.14.2.
247 Inspector's report p20 and §10.3.11 and p85 and p90.
248 Inspector's report §§10.3 .16.
249 Daylight/Sunlight report Table 6.26 Criterion: Area Capable of Receiving 2 Hours of Sunlight on March 21st - The BRE Guidelines recommend that for a garden or amenity appear adequately sunlit throughout the year, at least half of a garden or amenity area should receive at least two hours of sunlight on March 21st. BRE Target: 50.0% - Actual: 73.5%. It was not suggested that the exclusion of the relatively small Afterschool External Amenity Area would undermine this general conclusion.
250 Daylight/Sunlight report §7.4.

Board's decisions, especially if findings of exceptionality became less than exceptional – I find this to be an instance in which it will not suffice, in order that I would quash the Decision, for me to find even, as Humphreys J put it in **Holohan**[251], that the decision was, as to its merits, "clearly wrong".

138. This seems to me to be a case of alleged material contravention in which the Inspector was called upon to make, not merely a planning judgement as to an issue of quality, but a relative planning judgement as to the exceptionality of that quality. While the Planning Application documents did not use the word "exceptional" they did repeatedly assert high quality[252] and the plans plainly illustrated the open space. The issue is not the use of "magic words" but is one of substance. Colbeam relies, and I accept its relevance, on the observation of Hogan J in **Waltham Abbey**[253] to the effect that *"The Board was perfectly capable of interpreting the data and the analysis furnished by the developers and it is well used to navigating complex environmental and planning documents."* And in the present case they were not very complex.

139. I am also of the view, contrary to that expressed by counsel for the Applicants, that exceptionally high quality can include elements of open space of poor quality. In my view, the Inspector was entitled to take an overview of the entire of the open space, the better with the worse, and form a view whether the entire was of exceptionally high quality. It is clear that she did form that view. It therefore seems to me to fall into the category of material contravention identified by Laffoy J in **O'Reilly** as reviewable, not "*full bloodedly*"[254] but rather for irrationality. And whatever view one takes of the present state of the law of irrationality[255], remembering that its requirement is "*extremely high and .. almost never met in practice*",[256] I cannot find the Impugned Decision irrational on this issue.

140. The Development Plan states as to open space provision that "*narrow linear strips of open space will not be acceptable*."[257] The Applicants criticise the proffered open space to the extent that it consists of 443m of walkway essentially around the site boundaries. They criticise especially what they say is the narrow northern section. The Development Plan does not deem linear strips unacceptable. It deems narrow linear strips unacceptable. Narrowness is inevitably a matter of

251 Holohan v An Bord Pleanála [2017] IEHC 268.

252 The Landscape Development Report p 5 asserts "high quality public space with a strong landscape character." The Planning Report p54 & 56 asserts that

- "The provision of 7,956 sq m of high-quality public open space represents a significant planning gain for the local community."
- "The linear nature/parkland trail will provide a valuable community resource"
- "The trail has a length of 443 metres (by comparison a standard running track is 400m) and thus is a very useable track for a daily jog with exercise enthusiasts also benefitting from the outdoor gym equipment interspersed along its length. When compared with other public amenity spaces, the quality and functionality of the proposed linear nature trail is proven to be favourable. For example, the East pier in Dún Laoghaire harbour is approximately 19m in width compared to the proposed nature trail which extends to 30m in width along the western boundary."
- "The external communal/student amenity space has been subject to a high-quality landscape design to allow it to be highly functional. It includes outdoor exercise areas and a putting green in addition to general lounge spaces."

253 Waltham Abbey v. An Bord Pleanála [2022] IESC 30 (Supreme Court, Hogan J, 4 July 2022).

254 Heather Hill Management Company clg v An Bord Pleanála [2019] IEHC 450 (High Court (General), Simons J, 21 June 2019) §41; Redmond v An Bord Pleanála [2020] IEHC 151 (High Court (Judicial Review), Simons J, 10 March 2020) §26.

255 See above.

256 Stanley v An Bord Pleanála [2022] IEHC 177 §§ 49 & 77; Board of Management of St. Audeon's National School v An Bord Pleanála [2021] IEHC 453 (Simons J.).

257 8.2.8.3 Public/Communal Open Space – Quality.

degree and context and, hence, planning judgement. The Inspector described the linear walk in detail.[258] The width varies. The shorter northern strip is 7.7m wide, but, as the inspector notes, is adjacent the new hockey pitch. She notes that on this boundary a 1.8m high paladin fence with native hedge is proposed, which she considers appropriate.[259] She recommends, and the Board imposed in the interest of visual amenity, a condition that all boundary treatments be as submitted with the application, unless otherwise agreed in writing with the planning authority/An Bord Pleanála. It seems clear that, along this strip, she considered the hockey pitch relevant to the sense of openness. One need only imagine a high solid wall on this boundary to see her point.

141. As the Inspector records, travelling east, the shorter northern strip gives directly onto the pocket park in the north-eastern corner of the Site. That park is much wider - varying from 28m to 36m. It is accessible from the entrance plaza and incorporates a basketball area, outdoor table tennis, seating and soft landscaping.[260] The south-eastern part of the linear walkway varies from 12m to 14m wide, the southern part varies from 17m to 22m, and the western part varies from 17m to 30m[261]. The linear walkway incorporates existing mature trees, additional soft landscaping, lighting and exercise stations. She acknowledges as correct third party concerns that retained trees would reduce the width of the linear park but welcomes their retention in terms of both biodiversity and screening.[262] She records her view that photomontages included with the application reasonably represent how the Proposed Development will appear.[263] They have not been impugned and include images of the linear park. It is quite clear that the Inspector considered the concerns raised and, whether or not I agree with her view is beside the point – though I am not to be taken as disagreeing – I cannot see her judgement as irrational or that her reasons are defective in law.

142. The Applicants stress the strong view of the Planning Authority[264] that the proposed open space was substandard as to both quantum and quality. Inter alia, it expressed "*serious concerns with regards to the quality of the space proposed, particularly the external communal spaces*" which *"fail to achieve the recommended level of sunlight".* It considered the quantum of open space insufficient to provide an adequate level of amenity to the expected student population of the Proposed Development and criticised the nature trail. It concluded that the provision of high-quality open space was critical in the context of Institutional Lands. It was not satisfied that the current proposal, in particular the nature trail, achieves the required standard and concluded that the proposed public open space is deficient in terms of its quality and usability. It states that "*The quality of open space within the scheme is lacking. All of the proposed open space is compressed and shoe-horned in around the footprint of the complex*."

258 Inspector's report §10.3.8.
259 §10.4.7.
260 It can be seen in Figure 3B above.
261 The papers include a helpful comparison that the East pier in Dún Laoghaire harbour is approximately 19m wide.
262 Inspector's Report §10.4.8.
263 Inspector's Report §10.7.6.
264 Chief Executive's Report p23 & 24 & 29 & attached Parks Report.

143. But, just as the Planning Authority was entitled to that view as a matter of planning judgement, the Inspector and the Board were entitled to theirs. They were so entitled as long as they considered the Planning Authority's – which they did[265] - and they concluded that the Proposed Development accords with §8.2.8.2 of the Development Plan and Policy RES5. Inter alia, they took that view having regard to the quantity and quality of the open space proposed within the scheme and the overall institutional landholding, the urban nature of the Site and the lack of existing publicly available open space within the overall Campus and within the Site. As to the latter consideration, while space may be open and valuable whether public or private,[266] it seems to me entirely legitimate to attribute additional value to the provision of specifically public open space.

144. Having said that, and by way of an aside which does not contribute to my decision, I respectfully observe that, while disagreement – even significant disagreement - in matters of professional judgment is, per se, entirely unremarkable (judges are often overturned on appeal), it is nonetheless the expectation that such disagreements are framed in a context of commonly understood and consistently applied professional standards. That is in the nature of a profession – though I entirely accept that planning is a profession particularly concerned with at least some issues requiring considerable subjectivity of judgement. Nonetheless, in at least generally similar circumstances, and with a considerable margin of appreciation, generally similar judgements are generally to be expected. It seems to me regrettable, in terms of confidence in the planning process and the prospect of public acceptance of planning decisions, that two sets of impartial and professional planners could look at this Proposed Development as to open space and not merely disagree but conclude in the one case that it is of exceptionally high quality and in the other that it doesn't even meet the basic standards. That is a gulf of difference rather than a difference of degree. In a slightly different context, Humphreys J has recently expressed similar concerns as to public confidence in the planning process as it affected by the relationship between the Board and planning authorities.[267] That said, the reasons given by the inspector for her view seem to me to be legally adequate.

145. Generally, I reject the reasons point made in this respect. It is very adequately clear what the reasons are. As Clarke CJ said in **Connolly**,[268] *"The law on reasons does not require that one agrees with the reasons given. In a challenge based on allegedly inadequate reasoning, the law only entitles an interested party to know what the reasons were."*

146. Ground 2(a) raises the issue of open space in the context of the requirement, as to lands designated "Institutional" as, that development proposals maintain a minimum of 25% of the entire

265 Inspector's Report §10.3.13 et seq.
266 Christian v An Bord Pleanála [2012] 2 IR 506 §91. See above.
267 Sherwin v An Bord Pleanála [2023 IEHC 26] §238
268 Connelly v An Bord Pleanála and Clare County Council and McMahon Finn Wind Acquisitions [2018] IESC 31 [2018] 2 I.L.R.M. 453 [2021] 2 IR 752 §95.

designated area as open space.[269] The Inspector addresses this issue, having noted[270] that the total open space in the Proposed Development is 11,088m^2 or 52% of the Site, as follows[271]:

> *"I agree with the planning authority that the provision of open space on the overall Institutional Lands must also be considered. The applicant states[272] that the overall lands have an area of 60,264sqm. If the scheme were permitted there would be a total of 29,135sqm of open space provided across the institutional landholding, which equates to 48% of the total site area.[273] It is, therefore, considered that both the subject site and the overall complex would retain a minimum of 25% of open space in accordance with Section 8.2.3.3(xi)" [274]*

147. The assertion of 48% open space provision across the Campus derives from the Planning Report, which addresses the issue in some detail.[275] A figure illustrates the provision and a table quantifies it.[276] While the Applicants dispute, for example, that space occupied by trees and a small area of open space associated with the afterschool should be included, they do not quantify what they say is the resulting and lesser open space and there is no substantive suggestion that any such disputes exhaust the 23% margin over the 25% standard, claimed by Colbeam.[277] The Inspector notes[278] that the Planning Authority disagrees with the inclusion of the playgrounds, hockey pitch and tennis courts in the open space calculation. Counsel for the Applicants puts that in terms that "functional open space" should be excluded from the calculation. The Inspector agrees that these lands to the north of the site do not contribute to the open character of the Campus but does not agree that they should be excluded from the open space calculation, as they are currently in use as open space. I cannot see anything wrong with that observation. I do not see why "functional open space" should be excluded from the calculation nor does the Plan say so. After all, all or almost all open space can be identified as having some function or other. Nor should this decision be quashed on the basis of a view that the Inspector erred in not excluding from open space the space occupied by trees. In any event, the Inspector calculates that excluding the playgrounds, hockey pitch and tennis courts would reduce the open space by 11,207m^{2} [279] to 17,928m^{2} [280] – which is still almost 30%[281] of the Campus. That exceeds the 25% requirement by almost 20%.[282]

148. Grounds 1 and 2(a) fail accordingly.

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269 See Redmond v An Bord Pleanàla [2020] IEHC 151 (High Court (Judicial Review), Simons J, 10 March 2020) §87 & §88.
270 Inspector's Report §10.3.9 - See Thornton O'Connor Planning report §6.6.
271 Inspector's Report §10.3.10.
272 See Thornton O'Connor Planning report §3.1.6 & §6.6.
273 It is clear from the Thornton O'Connor Planning report §6.6. that this refers to the Campus, not to the Site.
274 Of the Development Plan.
275 See Thornton O'Connor Planning report §6.6.
276 Figure 6.6: Open Space Provision within the Site and within the wider Institutional Landholding. Table 6.7 Key Site Statistics.
277 i.e. 23% of the entire Campus.
278 §10.3.13.
279 (6,851 + 4,356)m^2.
280 (29,135 - 11,207)m^2.
281 17,928/60,264 x 100 = 29.76%.
282 5/25 x 100 = 20%.

Ground 2(b) Open Character

Introduction & Pleadings

149. The Board found no material contravention as to open character.[283] Counsel for the Board accurately suggested that this issue boils down to a question whether the inspector was entitled to conclude that the lands currently don't have an open character. Notably, the Board's submissions assert that, on that conclusion "… *the question of maintaining an open character did not arise* …".

150. Development Plan §2.1.3.5, Policy RES5 and §8.2.3.4 (xi), both as to Institutional Lands, provide, inter alia, that:

- "It is Council policy to retain the open character and/or recreational amenity of these lands wherever possible …"
- "A minimum open space provision of 25% of the total site area …will be required on Institutional Lands. This provision must be sufficient to maintain the open character of the site …"

151. Clearly, if the "minimum" 25% open space is insufficient to maintain the open character of the site, a greater quantum of open space will be required. And, as the Applicants say, the words "*wherever possible"* denote a significant degree of ambition.

152. As observed earlier, what is at issue is not primarily the open space to be provided on the Site or the open character of the Site but the open space to be left on the entire Campus designated as Institutional Lands and it is the open character of that Campus which the Development Plan, via the Institutional designation, seeks to maintain.

153. The Applicants plead that the inspector:

- failed to adequately assess the application by reference to these standards.
- failed to consider that the Proposed Development on a large greenfield site will itself mean that the open character of the lands will cease to be maintained.
- erroneously stated that the institutional lands *"…. currently do not have an open character".*[284] and
- therefore failed to take into account a relevant consideration and/or acted irrationally and/or gave inadequate reasons.
- They plead that the Proposed Development constituted a material contravention of §8.2.8.1 of the Development Plan - despite which the Board unlawfully granted permission without satisfying the requirements of s.37(2)(b) PDA 2000.

283 The reference to that effect in its Order being agreed to have been a clerical error to be amended. See above.
284 Inspector's Report §10.3.6.

154. The Board pleads that:

- generally, the inspector considered the issue of open character.
- it stands over the Inspector's finding that the Site lacks open character.
- Ground 2b is inconsistent with the fact that the *quantum* of open space is addressed by the 25% threshold in the relevant Development Plan provisions.
- the premise of the Institutional designation and of the necessity to maintain open character, is that the lands can be developed. Therefore, the Board pleads that the Applicants' plea that the Proposed Development on a large greenfield site will itself mean that the open character of the lands will cease to be maintained is misconceived.

155. It seems to me that, as to the last-mentioned plea, the premise is correct, but the conclusion misconstrues the Applicants' plea. Their complaint is not that any and every development will fail to maintain the open character of the campus; it is that it is obvious that this Proposed Development will do so. They also observe that it is difficult to see how the Inspector can have found the maintenance of an open character the pre-development existence of which she denies.

156. For reasons I have set out above, the Board's plea in simple reliance on satisfaction of the 25% open space requirement is not, per se, an answer: 25% is a minimum. More open space may be required to maintain open character. However, I do not think the conclusion on this ground turns on that misconceived plea.

Redmond on the Site – Open Space and Open Character & the present Inspector's Report

157. In determining that the "Institutional Lands" designation applies to the entire Campus, and specifically the Site, Simons J in **Redmond** observed, inter alia, that

> *"… the very description of the ["institutional lands"] objective as per the legend to Map 1 emphasises the open character of the lands so designated. The stated objective is to protect and/or provide for institutional use in open lands. This is underscored by the relevant provisions of the written statement of the development plan, in particular at §2.1.3.5 (Policy RES5: Institutional Lands) and §8.2.3.4 (xi) (Institutional Lands), which expressly refer to the "open character" of the lands. It is the stated policy of the planning authority to retain the open character and/or recreational amenity of institutional lands wherever possible. It would be entirely inconsistent with these objectives to interpret Map 1 as confining the designation to the depicted buildings or structures within the immediate vicinity of the "INST" symbol. To do so would exclude the open lands, which are the very thing to which the development plan objectives and policies are directed."* [285]

285 Redmond v An Bord Pleanàla [2020] IEHC 151 (High Court (Judicial Review), Simons J, 10 March 2020) §36.

158. Ultimately, counsel for the Board accepted[286] that, in this passage and as to the facts of this Site, Simons J did equate open character and open lands. I should explain that by "equate" was meant that the two coincided in this Site and that the former was created by the latter. I confess that I failed to understand counsel's gloss on that acceptance that Simons J did so "*at a purposive level in the abstract*" and that he did not "*necessarily accept*" that Simons J had made a finding of fact that these lands have an open character.

159. Specifically in considering the interpretation of the Institutional designation of the Campus in the Development Plan and in rejecting the argument that it did not encompass the Site, Simons J said, inter alia[287]

- "*The "open lands" to the south-west remained in the ownership of the religious congregation as of March 2016.[288] The written statement of the development plan expressly refers to the "open character" of the lands. It would be illogical to exclude open lands, which are the very thing to which the objectives and policies are directed, from the designation."*

160. Though recreational character is distinct from open character, they may well coincide spatially. Recreational lands may well have an open character. Of some interest also here, remembering that Plan speaks of the lands in their condition when designated Institutional – when the Plan took effect - Simons J noted that in its north-south alignment at that time, the school hockey pitch was depicted on the Development Plan Map[289] as straddling the Site.[290] And in granting permission for the replacement east-west aligned pitch, the Board had expressly relied on the "*established use of the site for sports and recreation*". Clearly, for purposes of any planning application considered under the 2016 Development Plan, that remains to the present the established use of the north-western part of the Site.

161. Remembering that the interpretation of a development plan is a matter of law for the Court and having regard to Development Plan Map 1[291] and to the subject of the dispute in Redmond as to whether the INST designation applied to the Site, it is clear that, in referring to *"The "open lands" to the south-west"* and "*the open lands which are the very thing to which the Development Plan objectives and policies are directed"*, Simons J was referring to lands which included – indeed largely consisted of - the Site. The Board accepts that is so.[292] This is also clear from his observation that the Site accommodated part of the secondary school hockey pitch in its original north/south orientation and open lands in institutional use.

286 Day 3 10:56.
287 §46.
288 When the Development Plan was adopted.
289 See Figure 5 above.
290 §36 – see also §46(1).
291 Figure 5 above.
292 Day 3 10:29.

162. In this light – not least of his identification of "*the very thing to which the Development Plan objectives and policies are directed*" - I reject the Board's contention that Simons J, in referring to the fact that a religious congregation owned the entire Campus at the time the Development Plan was made, deemed the fact of that ownership to be the planning rationale for the Institutional designation of the Campus - to the exclusion from that planning rationale of the open lands and open character of the Campus. That approach would slice the ratio of Redmond far too thinly. And it is contradicted by the decision in **Clonres**.[293] Simons J[294] regarded the unified ownership of the entire Campus at that time as relevant to the identification of the planning unit to which the Institutional Designation applied. That is merely one element of the rationale for the Institutional designation of the Campus.

163. It appears to me inescapable that the Development Plan has been authoritatively interpreted in Redmond as identifying the Site both as "*open lands*" and as contributing "*open character*" to the entire Campus and, indeed, as having an "*established use of the site for sports and recreation*" in its north-western part. And if the Site contributes "*open character*" to the entire Campus, it logically must possess that character itself. Misapplying somewhat, but to a proper end, a maxim from another area of law: Nemo dat quod non habet. I also reject the Board's argument, if I understood it correctly, that the fact that the Site is undeveloped, by which I understood unused, deprives it of open character.

164. For my own part, [and even were it open to me to disagree with him, which it is not] and on the evidence before me, including Figures 2A&B and 5 above[295], I see no reason to disagree with Simons J in his interpretation of the Development Plan in this regard. I find it very easy to see how he took the view he took.

165. Therefore, as a matter of authoritative interpretation of the Development Plan, the Site, as contemplated and designated by the Development Plan, consists of over 2 hectares of open space and thereby contributes significantly to the open character of the Campus. In its north-western section, where the old hockey pitch was, it also has an established recreational use for purposes of the Development Plan.

166. It must be remembered that the Institutional Lands designation was of the Campus as a whole. So, it is with reference to that whole that the importance of the Site as open space and as contributing open character must be considered for the statutory purpose of having regard to the requirements of the Development Plan. And it seems to me undeniable that development of The Grove since the Development Plan was made – by developing open space cannot but have amplified the significance to the Campus of the Site as open space and as contributing open character. In considering the development potential of this Site from the point of view of maintenance of the

293 Clonres CLG v. An Bord Pleanála [2021] IEHC 303 (High Court (Judicial Review), Humphreys J, 7 May 2021) §31 & 32.
294 §41.
295 And allowing for the demolition of buildings shown on the eastern part of the site in Map 1.

open character of the Campus, one cannot ignore that at least part of both the open space and the development opportunity represented by the Campus at the time of its designation in the Development Plan has already been, as it were, "used up" by The Grove – whether in greater or lesser degree. Any other view would facilitate "death by a thousand cuts" – though recognition of that consideration does not imply the rejection of any particular development proposal. It merely requires that the proposal be correctly analysed in accordance with the Development Plan.

167. The foregoing derives from the interpretation of the Development Plan. That does not mean that one could not, as a matter of planning judgement, disagree with the identification in the Development Plan of the Campus generally or the Site in particular as "open lands" and as contributing "open character" to the entire Campus, as the Inspector and the Board did[296] (though I confess to finding that surprising). But to act on that disagreement required acceptance that in doing so one was likely to be acting in contravention of the Development Plan. It is not open to the Board or its inspectorate to rewrite the Development Plan or to reject its authoritative interpretation in Redmond as a means of purporting to act other than in material contravention of the Development Plan as to open character.

168. In the present case, the Inspector[297], recording that third parties have stated that the Site was previously available as open space to the schools and general public, notes *"however ……. that the lands are no longer in the ownership of the Religious Congregation and are currently located behind hoarding/fencing and appear to have been used as a compound for the 'The Grove' development."* In light of the view the Inspector later took, the word "however" clearly implies a counterweight to the previous availability of the Site as open space to the schools and general public. This, it seems to me, repeats the error, identified by Simons J in **Redmond**, of deeming events after the Development Plan was made - sale of the lands to the intending developer and enclosure of the lands and their use as a construction compound – relevant to their designation, character and status in planning policy as identified in the Development Plan. Subsequently created "*facts on the ground*" can be recognised in planning decisions by appropriate means (for example, by material contravention procedures). Possibly (I do not so decide) such "*facts on the ground*" may also affect the weight to be given to objectives and designations set out in a development plan. But they cannot alter the interpretation of the Development Plan and its application to lands designated by it – any more than did the sale to the developer. That would be a recipe for evasion of the Development Plan.

169. The Inspector[298] later observed:

> *"Having regard to the current layout and existing developments within the overall landholding, it is my opinion that the institutional lands currently do not have an open character and due to the limited size (784sqm) of the 2 no. available green spaces within 'The Grove' do not provide*

296 §10.3.6 – see extract below.
297 §10.3.3.
298 §10.3.6.

> *any recreational amenity for the wider area. In my view the proposed public open space (7,956sqm) would enhance the open space areas within 'The Grove' development and provide an amenity to existing and future residents that does not exist at present. Therefore, the proposed development would not be contrary to Policy RES5 as it would support the provision of an open character and recreational amenity within the site."*

170. This passage[299] in the Inspector's report as to "*current layout*", when taken with the passage on the previous page to the effect that "*the lands … are currently located behind hoarding / fencing",* suggests that the error described above, of deeming events after the Development Plan was made relevant to their designation and character and status in planning policy as identified in the Development Plan, is here repeated. That would explain, at least in physical terms, the counterintuitive conclusion of the inspector that the lands currently do not have an open character. I so interpret the report. Though that amplifies my conclusion on this Ground, it is not necessary to it.

171. As I have said, the Inspector is entitled to, and to express in her report, the professional opinion that the Institutional Lands (i.e. the Campus) currently do not have an open character. The Board correctly submits that I may not form a planning judgement that her opinion is incorrect and can review that opinion only on O'Keeffe principles. But that opinion does not change the meaning of the Development Plan in its explicit application to this Site, as authoritatively interpreted by Simons J in Redmond. The Development Plan has deemed the Site to be, at least in large part, open lands lending open character to the Campus. What matters as to interpretation of the Development Plan, and as to the question whether the Proposed Development would be a material contravention, is not whether the lands *"currently"* have an open character but that at the time of the adoption of the Development Plan they were deemed to have such character (in my view correctly, but in any event the view of Simons J in Redmond binds me on this issue).

172. Events since that plan was made - whether by change of ownership of the Site or by its enclosure - are irrelevant to the interpretation of the Development Plan and the planning policy status of the Site pursuant to that plan. And as to materiality and as I have said, on any logical view, given the development of The Grove on what was open space when the Development Plan was made, and especially as the Inspector considered The Grove, as developed, "limited" in open space, the importance of the Site as open space and in its contribution to the open character of the Campus can only have increased since the Development Plan was made. Indeed the Board did not argue materiality.

173. The Inspector accepts that the proposed public open space (7,956m^2) equates to 37.5% of the Site area.[300] It is, of course, entirely proper to point out, as a matter of proper planning and sustainable development and a desirable aspect of the Proposed Development, that this will be 7,956m^2 of public and recreational open space to which the public does not at present have access.

299 §10.3.6.
300 §10.14.2 – see also Colbeam's Planning Report §6.6.

But that is not at all the same thing as answering the question whether the Proposed Development will preserve the open character of the Campus – which depends neither on public access nor on recreational use. The Inspector also makes the 37.5% observation immediately after adopting[301] Colbeam's misstatement that *"The sites INST objective and Section 2.13.5 and Section 8.2.3.4 (xi) of require that 25% of the site be provided as open space."* The 25% requirement relates, not to the Site but to the Campus. However, for reasons stated above, I consider that her finding as to open space survives challenge. The error in this respect is notable as informing her view[302] that the open space to be provided would support the provision of open character and recreational amenity space on these institutional lands.

174. As to open character, it seems necessary to have regard to the fact that the Proposed Development will build a substantial development on a Site as yet consisting of open space, resulting in at least a significant diminution of that open space, which diminution will no longer contribute to the open character of the Campus.

175. Though an observation not essential to the view I take, I think I may also properly observe that the Proposed Development will also and inevitably dominate the open space to remain on the Site, not least by sitting in the centre of it. That observation especially applies to the Western half of the Site which, on any view, has always been open space. Figures 3A and 3B above render any other view untenable beyond any scope for planning judgement. It seems likely that this is significant given Simons J has observed, that "*It would be illogical to exclude"* specifically "*open lands"* to the south-west – that is, the Site - from the Institutional designation as those open lands *"are the very thing to which the objectives and policies* (of the institutional designation) *are directed".*

176. The conclusion that "*the proposed development would not be contrary to Policy RES5 as it would support the provision of an open character and recreational amenity within the site"* is also to misapply the Institutional designation discretely to the Site rather than to the Campus to which that designation properly applies and of which the Site merely forms part.

Open Character - Conclusion

177. The Applicants plead that the Inspector failed to adequately assess the application by reference to the standards set in the Institutional designation, in that she erroneously stated[303] that the institutional lands *"…. currently do not have an open character"* and therefore failed to take into account a relevant consideration or, to put it another way, to have regard to the Development Plan. This, in substance, is an allegation that she misinterpreted the Development Plan in its application to this Site as its proper interpretation and application to the Site is laid down by Simons J in **Redmond**.

301 §10.14.2.
302 §10.14.2.
303 Inspector's Report §10.3.6.

178. As counsel for the Board fairly put it: "If the court thinks that the Inspector erred in saying that it doesn't have an open character and that this[304] would, therefore, be an improvement because it's actually creating an open character that isn't presently there, then obviously that's an error."

179. One cannot have regard to a Development Plan unless one first correctly interprets it. In this regard, see **Redmond**[305] to the effect that *"A decision-maker cannot be said to have properly had regard to objectives or policies which it has misunderstood"* and **Tesco v Dundee**[306] in which Lord Reed said that *"the planning authority is required by statute to have regard to the provisions of the development plan: it cannot have regard to the provisions of the plan if it fails to understand them"* - citing Lord Clyde in a Scottish case[307] to the effect that

> *"…….. it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it."*

180. So, the Inspector and the Board failed properly to interpret the Development Plan and to consider whether the Proposed Development would materially contravene the Development Plan by failing to retain the open character and/or recreational amenity of the Campus "*wherever possible*" – words which, as I have said, denote a significant degree of ambition. Accordingly, the Impugned Decision will be quashed on this account.

181. The exercise of discerning material contravention or not must be performed by the Board on foot of a correct interpretation of the applicable Development Plan. In that light, it is unnecessary and undesirable to go further and find whether the Proposed Development would be in material contravention of the Development Plan. I will quash the permission on the narrower ground stated. Therefore, and to any extent the foregoing analysis could be taken as a finding of material contravention or the expression of planning judgement, it is obiter. Nor, of course, does this finding prevent a grant of permission on this Site in material contravention of the Development Plan should that be thought proper by the decision-maker and justified by reference to the applicable statutory criteria.

304 i.e. the Proposed Development.
305 §94.
306 Tesco Stores Ltd v Dundee City Council - 2012 SC (UKSC) 278.
307 City of Edinburgh Council V Secretary of State for Scotland 1998 SC (HL) 33.

Ground 2(c) - Density

Density - Introduction

182. The Impugned Decision acknowledges a material contravention as to density higher than that envisaged in the Development Plan and, "*having regard to*" to S.37(2)(b)(iii) PDA 2000, the Board considered that permission "*would be justified for the following reasons and considerations*", being NPF Objective 35 "*which supports increased residential densities at appropriate locations*" and RPOs[308] 5.4 and 5.5 of the applicable RSES which "*encourage the provision of higher densities and the consolidation of Dublin and suburbs*".[309] The Inspector's report does not appreciably expand on the reasoning or analysis as it relates to these policies.[310]

183. §5.10 of the Urban Residential Guidelines 2009[311], specifically as to "Institutional lands", provides in part that the:

> *"… objective to retain some of the open character of the lands … should be assessed in the context of the quality and provision of existing or proposed open space in the area generally. … average net densities at least in the range of 35-50 dwellings per hectare should prevail and the objective of retaining the open character of the lands achieved by concentrating increased densities in selected parts (say up to 70 dph[312]) ...".*

184. The Development Plan, at §2.1.3.5 "*Policy RES5: Institutional Lands*", states that average net residential density on Institutional lands should be in the region of 35-50 units per ha. It allows higher densities where it is demonstrated that they can contribute to retaining the open character and/or recreational amenities of the lands. Policy RES5 is the same as §5.10 of the 2009 Guidelines as to the average density figure of 35-50 units per ha but differs that it does not, even indicatively, quantify the higher density permissible in selected areas.

Density - Inspector's Report & Impugned Decision

185. The Board relies on the Inspector's report in respects I set out here.

186. §6 of the Inspector's Report considers planning policy. §6.7.1 records that:

- The average net density on institutional lands in the region of 35-50 units per ha cited in Policy RES5 and §2.1.3.5 of the Development Plan and in the Urban Residential Guidelines 2009 relates to housing units. There is no standard for student accommodation which, though a type

308 Regional Policy Objective.
309 The Eastern and Midland Regional Assembly Regional Spatial and Economic Strategy 2019.
310 Inspector's Report §6.2 & §10.6.6 & §10.14.6.
311 Sustainable Residential Development in Urban Areas Guidelines 2009.
312 Dwellings per hectare.

of residential development, has its own use class. It cannot be assessed in terms of units per hectare due to the wide range of possible unit types - from small studios through medium-sized to larger clusters. This results in a quantitative standard not comparable to apartment / housing developments, such that it is not possible to accurately determine the density of a student scheme by an equivalent method to determining the density of a housing/apartments.

- Due to the scale and massing of the scheme, it may be considered that the Proposed Development would have a higher net density than is set out in the Development Plan.

- The policy and objectives of the Development Plan do not accord with national policy, in particular the NPF and the Height Guidelines. Therefore, the proposed material contraventions are justified by reference to section 37(2)(b)(iii).

187. §10.6 of the Inspector's Report addresses Quantum of Development. It acknowledges that the Planning Authority considered that the proposed density would contravene the Development Plan range of 35 - 50 units per ha for institutional lands and that third parties thought density excessive.[313] It records[314] dispute as to actual density of the Proposed Development: the Planning Authority said 82 units per ha using a cluster-based assessment of 4-persons per unit[315]; Colbeam cites a density of 55.6 units per ha based on 99 clusters plus 19 studios on a 2.12 ha site.[316] Counsel for the Applicants suggested a different method and a higher density, calculated by dividing the 698 bedspaces by the average household size of 2.7 people to yield a density of 123 units per ha.[317] The Inspector confirms the 2.7 average.[318] I have no way of saying which method, if any, is correct or best, or whether the density criterion of units per ha can sensibly be applied at all. But it is of interest to note that counsel for the Applicants' method appears to have been adopted by the Inspector in determining that the Proposed Development would be sub-threshold for EIA purposes by reference to the number of dwelling units proposed (i.e. below 500 units).[319] The Inspector states that there is no standard for assessing density for a student accommodation scheme and she does not resolve the dispute or herself quantify the actual density.[320] But in her view "*due to the proposed scale of the development … it would exceed the 35 – 50 units per ha as set out in policy RES5*". However she states that the Proposed Development would still conform to Development Plan §2.1.3.5 Policy RES5 - which allows for higher densities where it is demonstrated that they can contribute towards retaining the open character and/or recreational amenities of the lands and

313 Inspector's Report §10.6.1.
314 Inspector's Report §10.6.4.
315 The phrase "cluster-based" is somewhat confusing here. Whether correct or not, the Council's system was fairly simple. In fact it was a population-based rather than a cluster-based calculation. It started by assuming that at the Development Plan figure of 50 units/ha, and assuming an average 4-person, 2-bed apartment, the 2.12 ha site could accommodate about 424 residents (50 x 2.12 x 4 = 424). The proposed development will accommodate 698 students. That it considered equivalent to 82 units per hectare (50 / 424 x 698 ≈ 82). The rationale for this method of assessment is that "Ultimately, density provides an indication of the expected population on a given area. That information is useful, inter alia, to inform the sustainability of a development having regard to existing infrastructure or its appropriateness based on its context."
The Council considers that Colbeam's use of each cluster and studio as a proxy for a residential unit is inadequate as clusters range from 5 to 8 bedrooms so their comparison with ordinary apartment units is not of like-with-like. See §8.6 of the Council's report.
316 (99+19)/2.12 = 55.66
317 698 bedspaces / 2.7 people/2.12 ha = 123 units per ha.
318 Inspector's report §10.3.12 - citing the Central Statistics Office.
319 Inspector's report §12.2 - citing Class (10)(b) of Schedule 5 Part 2 of the Planning and Development Regulations 2001.
320 Inspector's report §10.6.4.

would not be a material contravention.[321] But, as counsel for the Applicants observed, nothing turns on that as the Board did find a material contravention as to density.

188. The Inspector states[322] that various policies, NPO35 of the NPF, RPOs 5.4 and 5.5 of the RSES and SPPR3 and SPPR4 of Height Guidelines, *"all support higher density developments in appropriate locations, to avoid the trend towards predominantly low-density commuter-driven developments.".* She considers the Site capable of accommodating a "*high density*" scheme and the proposed quantum is appropriate having regard to, inter alia, "*national policy*".[323]

189. As to "*Material Contravention – Density*", the Inspector essentially repeats[324] content set out above[325] and repeats her view that the Proposed Development would not be a material contravention as to density. She continues: "*However, having regard to the concerns raised by the planning authority and third parties regarding the proposed density, it is my opinion, that a cautionary approach should be taken and the issue of material contravention be addressed and justified."* Citing S.37(2)(b)(iii) PDA 2000*,* her report reads:

> *"The proposed material contravention to the Density provision is justified by reference to:*
> *• Objective 35 of the National Planning Framework which supports increased residential densities at appropriate locations.*
> *• RPO 5.4 and RPO 5.5 of the Eastern and Midland Regional Assembly – Regional Spatial and Economic Strategy (RSES) 2019 which encourage the provision of higher densities and the consolidation of Dublin and suburbs."*[326]

190. With inconsequential textual changes, the Impugned Decision adopts the Inspector's opinion in this regard.

Density - Grounds & Applicants' Submissions

191. In essence, the Applicants plead and submit that the Board unlawfully applied s.37(2)(b)(iii) PDA 2000 Act ultra vires in that:

a. The Board failed to calculate the densities in parts of the Proposed Development, considered only the average densities across the entire development and then simply vaguely accepted that the densities exceeded 35 to 50 dph[327], without determining what they were.

321 Inspector's report §10.6.4.
322 Inspector's report §10.6.6.
323 Inspector's report §10.6.6.
324 Inspector's report §10.14.1.
325 Inspector's report from §10.6.
326 Inspector's report §10.14.6.
327 Dwellings per hectare.

b. NPF Objective 35 and RPOs 5.4 and 5.5 of RSES are generic objectives which do not relate to Institutional lands.

c. The Board failed to have regard to a relevant consideration in that it failed to consider national and regional policy for density on institutional lands in Dublin as set out in RPO 5.4 and §5.10 of the Urban Residential Guidelines 2009. Had they done so, they would have realised that §5.10 provides for the same average density on Institutional lands as did the Development Plan - 35-50 dph - and for higher densities "*say up to 70 dph*" only on "*selected parts*" and then only to maintain the open character of the land. The average density of 82dph in the Proposed Development identified by the Planning Authority[328] exceeds even the up to 70dph allowable only on selected parts and to maintain the open character of the land. The Applicants cite **Ballyboden**[329] as to the interpretation of these Guidelines.

d. To grant permission for an "average" of 82 dph could not be justified by reference to RPO 5.4 as it expressly invoked the Urban Residential Guidelines 2009, §5.10 of which does not permit an "average" of 82 dph on Institutional lands.

e. SPPR4(1) of the Height Guidelines confirms that the minimum densities set in the Urban Residential Guidelines 2009 must be met on greenfield or edge of town/city sites - further confirming the 2009 Guidelines as reflecting national policy relating to densities.

192. The phrase "*selected parts*" above is taken from §5.10 of the Urban Residential Guidelines 2009 and prompts the question – selected parts of what? The Applicants' case is that the Inspector and Board misunderstood the purpose behind §2.1.3.5 of the Development Plan "*which is to concentrate higher densities on small portions of the site in order to allow the open character of the remainder of the site to be maintained."* And "*The purpose behind allowing higher densities on selected parts is to allow the remaining parts of the site to remain undeveloped as open space thereby maintaining its open character."*

Density - Opposition & Board's & Colbeam's' Submissions

193. The Board asserts that the Applicants' claim that the Board "*acted contrary*" to the 2009 Guidelines does not allege legal error. The Board asserts that it only bore the light obligation to "*have regard to*" the 2009 Guidelines.[330] It cites **Cork County Council v Minister for Housing**[331] and **Ballyboden**[332] to the effect that it need not comply with - may act contrary to – the 2009 Guidelines, as long as it takes them into account.

328 Using a cluster-based assessment of 4-persons per unit.
329 Ballyboden Tidy Towns Group v ABP & Shannon Homes [2022] IEHC 7.
330 it cites s.9(2)(b) of the 2016 Act.
331 Cork County Council v Minister for Housing [2021] IEHC 683 §§58.
332 Ballyboden Tidy Towns Group v An Bord Pleanála [2022] IEHC 7 §220.

194. The Board asserts that it did consider the Urban Residential Guidelines 2009. It cites:

- Item (l) in the Board Order cited, under the heading "*Reasons and Considerations*".
  - (I observe that, while there is nothing per se wrong with the Board's Order in that respect, it simply box-ticks those Guidelines. As Clarke CJ said in **Connolly**,[333] "*it is of the utmost importance, however, to make clear that the requirement to give reasons is not intended to, and cannot, be met by a form of box-ticking*").
- §6.7.1 of the Inspector's Report (set out above).
- §6.5 and §15 of the Inspector's Report. (Both name-check the 2009 Guidelines - neither adds to the matter).

195. The Board says[334] the 2009 Guidelines:

- also contemplate higher densities on part of 'Institutional' lands where this can contribute towards retaining the open character of Institutional lands
- suggest an approximate density in this respect, ("*say up to 70 dwellings per hectare").*

196. Having recited §5.10 of the Urban Residential Guidelines 2009, the Board asserts that the inspector considered them as to using density to preserve open character, citing her report as follows:

- §10.3, entitled "Open Character/Open Space", opines that the Site does not have an open character and that the Proposed Development will "*support the provision of an open space character*" (issues addressed elsewhere in this judgment).
- §10.6, entitled "Quantum of Development", I have set out above.
- §10.14 largely repeats §6.7.1 of the Report (see above) but without mentioning the 2009 Guidelines (that is not a fault in context) and adds the opinion that "*due to the proposed scale of the development … it would exceed the 35 – 50 units per ha as set out in the plan."* But, the Inspector says, as the Development Plan allows higher densities where it is demonstrated that they can contribute towards the objective of retaining the open character and/or recreational amenity of the lands, in her opinion *"the proposed development would not be a material contravention of the plan.* Nonetheless, and as recorded above, the Inspector goes on to suggest that on a cautionary basis *"the issue of material contravention be addressed and justified."*

197. Next, the Board asserts that the Inspector considered the objective of §5.10 of the Urban Residential Guidelines 2009 - achieving average net densities of 35-50 dwellings. §10.1.3 of the Inspector's Report simply recites RES5 to the effect that average net densities should be in the region of 35-50 units p/ha; the content of §10.6.4 and §10.14.1 I have reflected above.

333 Connelly v An Bord Pleanála, Respondent and Clare County Council and McMahon Finn Wind Acquisitions Limited [2021] 2 IR 752.
334 Submissions §46.

198. The Board asserts that the Inspector concludes that the objective identified in §5.10 of those Guidelines, of concentrating densities in selected parts of the site, is achieved. These paragraphs of her report[335] do not refer to §5.10 but to Policy RES5 – which says nothing about concentrating densities in selected parts of the lands. Rather, Policy RES5 appears to contemplate higher general densities.

199. The Board states, as to the reference in §5.10 of the Guidelines to "70 dph", that a student accommodation unit is not a dwelling. And with reference to the question of specific density targets, the Board relies on the fact that the Inspector concludes that "*it is acknowledged that there is no standard for assessing density for a student accommodation scheme.*"

200. Colbeam points out that the 2009 Guidelines stipulate[336] that development of institutional lands must ensure "that an efficient use is made of the land" and that "residential yield should be no less than would be achieved on any comparable residential site".

Densities - Discussion and Decision

201. Policy RES5 of the Development Plan and §5.10 of the 2009 Guidelines apply to the entire of the lands designated Institutional – in this case the Campus – and not just to the site for which permission is sought. The Applicants have failed to appreciate that the site of a proposed development on Institutional lands may well, as the Site does here, consist of only part of those Institutional lands. If so, despite higher average densities on the entire Site, the average across the lands designated Institutional (i.e. the Campus in this case) will be lower. And, in terms of §5.10 of the 2009 Guidelines, the entire Site is a "selected part" of the Campus designated Institutional, such that concentration of "*increased densities in selected parts (say up to 70 dph)*" may equate to increased densities as an average across the entire Site. So the Applicants' argument based on the words "*selected parts*" fails.

202. S.9(6) of the 2016 Act stipulates that, "*even*" in a case of material contravention, the Board may "*only*" grant permission via, in effect, S.37(2)(b) PDA 2000. S.37(2)(b)(iii) provides that "*the Board may only grant permission*" in material contravention of the development plan where it "*considers*" that:

> *"… 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."*

335 Inspector's report §§10.6.4 and 10.14.1.
336 §4.20.

203. Objective 35 of the NPF is to "Increase residential density in settlements, through a range of measures including ……, infill development schemes, …… and increased building heights." This may fairly be seen as reflecting the National Strategic Outcome, identified in the NPF, of compact growth of cities, towns and villages using suitable potential development areas capable of re-use. Generally as to housing, the NPF states "it is clear that we need to build inwards and upwards, rather than outwards." And it states, "Activating these strategic areas and achieving effective density and consolidation, rather than more sprawl of urban development, is a top priority." As to Dublin, the NPF "seeks a more compact urban form, facilitated through well designed higher density development".[337]

204. RPOs 5.4 and 5.5 of the 2019 RSES[338] are part of the Dublin Metropolitan Area Strategic Plan ("MASP") and, as to Housing and Regeneration, state:

> *"RPO 5.4: Future development of strategic residential development areas within the Dublin Metropolitan area shall provide for higher densities and qualitative standards as set out in the 'Sustainable Residential Development in Urban Areas'[339], 'Sustainable Urban Housing: Design Standards for New Apartments' Guidelines'[340] and 'Urban Development and Building Heights Guidelines for Planning Authorities'.[341]*
>
> *RPO 5.5: Future residential development supporting the right housing and tenure mix within the Dublin Metropolitan Area shall follow a clear sequential approach, with a primary focus on the consolidation of Dublin and suburbs, …. as set out in the .. (MASP) ….."*

205. As they are explicitly invoked in RPO 5.4 as to density, I note also that the Height Guidelines 2018[342], while they do not specifically address Institutional lands, do invoke the Urban Residential Guidelines 2009 as "*complementary policy ... for consideration in combination with these guidelines*".[343] This observation must also be placed in the context of the immediately preceding[344] text of the Height Guidelines to the effect that they set out policy that expands on and applies the requirements of the NPF and consider increased building height in various locations but principally (a) urban and city-centre locations and (b) suburban and wider town locations. Indeed, updated Apartment Guidelines[345], also invoked in RPO 5.4,[346] confirmed the currency of the Urban Residential Guidelines 2009 as late as December 2020.

337 P36.
338 The Eastern and Midland Regional Assembly Regional Spatial and Economic Strategy 2019.
339 Sustainable Residential Development in Urban Areas Guidelines 2009.
340 2018 – later updated in 2020.
341 2018.
342 Urban Development and Building Heights Guidelines for Planning Authorities December 2018.
343 §1.12.
344 §1.11.
345 Sustainable Urban Housing: Design Standards for New Apartments December 2020 §1.18.
346 In their 2018 iteration.

206. Thus, and as the Applicants submit, the continuing currency and vitality of the Urban Residential Guidelines 2009, at both national and regional level, including in the implementation of the NPF, is clear.

Density - Ballyboden on §5.10 of the Urban Residential Guidelines 2009

207. In **Ballyboden**,[347] as they had been incorporated by reference in the South Dublin County Council development plan, it was necessary, in addressing a question whether a density of 141.7 units/ha was in material contravention of that plan, to consider §5.10 of the Urban Residential Guidelines 2009 as to densities in developing Institutional lands. The judgment observes that §5.10 clearly views "*open character*" as potentially achievable via increased density and that §5.10 addresses the issue of density in numerical terms.[348] It focusses on the words "*say up to 70 dph*" as expressing, not an average density, but a density exceptional to the average range of at least 35-50 and allowable only if "*concentrated*"[349] in selected parts for "*the objective of retaining the open character of the lands*". The conclusion was that "*I need not, and do not attempt to, define where a numerical density limit lies in the Urban Residential Guidelines 2009 as bearing on this site. But I do not consider that the intelligent layperson would read them as envisaging an average 142 dph for the entire site."*

208. The judgment also observed[350] that "*35-50 dph*" is not, in terms of the Urban Residential Guidelines 2009, low- or even medium-density. Though only on an "*at least*" basis, "*35-50 dph*" is an example of the "higher" densities to which the 2009 Guidelines generally aspire - in particular for specified types of location, of which Institutional Lands is one. And the Apartment Guidelines 2018 consider >45 dph to be "*medium-high density*". The words "*at least*" are important: an average 35-50 dph is a baseline not a limit.[351] But had the drafters of the 2009 Guidelines wished, as the Board had argued, to avoid conveying any maximum number on the issue of density on Institutional lands, it would have been far simpler (indeed clearer) to omit the phrase "(*say up to 70 dph*)".[352] The Board's argument in that case did not explain or ascribe meaning to the inclusion, as opposed to the omission, of those words.[353]

209. By §5.10 of the Urban Residential Guidelines 2009, the concentration of increased densities in selected parts of the lands designated Institutional is explicitly for the purpose of retaining the open character of those lands – it is not an end or development opportunity in itself or intended to achieve aims of increased housing provision or alter or increase the average net density across the

347 Ballyboden Tidy Towns Group v ABP & Shannon Homes [2022] IEHC 7.
348 Ballyboden §156.
349 The word used by Simons J in Redmond v An Bord Pleanála [2020] IEHC 151 (High Court (Judicial Review), Simons J, 10 March 2020) §79.
350 Ballyboden §165.
351 Ballyboden §177.
352 Ballyboden §166.
353 Ballyboden §167.

institutional lands.[354] So, 70 dph is at least indicative of an order of increased density exceptionally permissible on part of the lands to achieve retainer of their open character: all the while maintaining the average density of "at least" 35-50 dph. The words "*say up to*" were construed in **Ballyboden** as "*a form of bureaucratic hedge-betting intended to introduce some flexibility beyond 70 dph. But even assuming flexibility, the numbers are not meaningless and do set a context and, in general terms, influence the expectations of the intelligent layperson*" in interpreting §5.10 the Urban Residential Guidelines 2009. While it contains no prescribed maxima or minima in any narrow or strict numerical sense, the number 70 was presumably deliberately and carefully chosen by the drafters to convey at least some worthwhile and more or less reliable meaning.[355] The words "*up to*" tend to convey a limit and "*say … 70*" numerically identifies, though does not precisely delineate, the ballpark of acceptability as to an exceptionally concentrated increased density which does not increase the average net density on the lands designated Institutional.[356]

210. The general view taken in Ballyboden of the phrase "(*say up to 70 dph*)" in §5.10 of the Urban Residential Guidelines 2009 is,

> *"……. that a number is used at all tends to that effect ….. [i.e. to convey some worthwhile and more or less reliable meaning] …. – especially a number which could have been simply omitted if the Board's interpretation is correct. Where indicative numbers appear they must be taken to indicate something – and something capable of being relied upon. I do not think the intelligent layperson will try to infer from the 2009 Guidelines and phrase "up to 70 dph" a precise numerical upper limit to density. But s(he) will consider that the density numbers given are intended to shape expectations in useful and practically applicable indicative terms and that flexibility as to densities is not the same as carte blanche open-endedness such as would deprive the Guidelines of useful meaning on this issue."*[357]

211. As to Colbeam's observation that the 2009 Guidelines stipulate[358] that development of institutional lands must ensure "*that an efficient use is made of the land*" and that "*residential yield should be no less than would be achieved on any comparable residential site*", these are clearly general propositions given particular expression in §5.10 of the 2009 Guidelines. §5.10 describes of what efficiency is deemed to consist.

354 Ballyboden §177.
355 Ballyboden §179.
356 Ballyboden §179 & 180.
357 Ballyboden §179.
358 §4.20.

"Have regard to"

212. Here we are concerned, as to the 2009 Guidelines invoked in RPO 5.4, not with S.9(2)(b),[359] but with S.9(6) of the 2016 Act and S.37(2)(b)(iii) PDA 2000 as to material contravention - in the latter of which the phrase "*having regard to*" appears. The Board, predictably, cites authorities to the effect that its "*have regard to*" obligation is light – citing S.9(2)(b) of the 2016 Act.

213. The phrase "*have regard to*" is generally well-understood, in light of much authority, as imposing a light burden on decision-makers – not least as relates to guidelines such as those at issue here. For example, in **Killegland**,[360] Humphreys J recently observed that *"the requirement was to "have regard to" those guidelines, not to comply with them. This is not a heavy bar…"*. And the antecedents of the phrase[361] are such that its general interpretation must be presumed to have been known to the State in enacting S.37(2)(b)(iii). In **Ballyboden**[362] it was noted that S.9(6) PD(H)A 2016 and S.37(2)(b)(iii) impose a "*have regard to*" obligation as to permitting material contravention. It was held that the language of the Guidelines, however imperative, cannot translate a statutory obligation limited to "*having regard*" into a legal imperative to apply guidelines. That was in the particular context of an argument, which was rejected, that that the Board was not entitled to pick and choose relevant elements of a guideline as it, in its planning judgement, considered useful in a particular case.

214. Yet, more generally, the phrase "*having regard to*" as it appears specifically in S.37(2)(b)(iii) is not without its problems. Taken in its usual meaning, it would empower the Board to grant permission in material contravention of a development plan merely on the basis that it had "*had regard*" to national and regional policy, without any requirement whatsoever that the proposed material contravention complied with such policy in even the least degree – as Humphreys J said in **Cork County Council v Minister for Housing** [363] regarding the usual meaning of the phrase - *"no kind of compliance is required by a have regard obligation".*

215. But here the phrase appears in the particular context of the conferring on the Board of a power explicitly exceptional and in terms clearly intended to be restrictive of its exercise and to require justification of its exercise by reference to identified criteria – both S.9(6) and S.37(2)(b) use the word "*only*" - "*the Board may only grant permission*". This is further amplified by S.37(2)(a) and S.9(6)(a) which allow the Board to grant permission "*even*" in material contravention of the development plan. This is in a context in which the Board's opinion must be "*bona fide, not unreasonable & factually sustainable*".[364] It is also in the context that what is being contravened is

359 9(2) "In considering the likely consequences for proper planning and sustainable development in the area in which it is proposed to situate the strategic housing development, the Board shall have regard to— ….. (b) any guidelines issued by the Minister under section 28 of the Act of 2000, …"
360 Killegland Estates Limited v Meath County Council [2022] IEHC 393.
361 Which go back to Glencar Explorations v Mayo County Council [2002] 1 IR 84.
362 Ballyboden Tidy Towns Group v An Bord Pleanála [2022] IEHC 7 §220.
363 Cork County Council v Minister for Housing [2021] IEHC 683.
364 Cork Institute of Technology v An Bord Pleanála, and Cork City Council [2013] 2 IR 13.

- the environmental contract with the community "*embodying a promise by the council that it will regulate private development in a manner consistent with the objectives stated in the plan …"*.[365]
- the "*representation in solemn form, binding on all affected or touched by it, that the planning authority will discharge its statutory functions strictly in accordance with the published plan*".[366]

As has been observed, material contravention decisions are by no means unusual in practice but departure from the development plan democratically adopted by a local government organ having a status recognised by Article 28A of the Constitution (see generally, **Christian #1**[367]) and in pursuance of a statutory obligation to adopt a development plan is no small matter.[368] Humphreys J has recently adverted to the importance of the development plan in **Cork County Council v Minister for Housing**.[369] And as Simons J said in **Redmond v An Bord Pleanála**:[370]

> **"***In the case of a non-zoning objective, (of a Development Plan), the board has jurisdiction to grant planning permission in material contravention of the objective provided that certain prescribed statutory criteria are fulfilled."*[371]

216. Accordingly, that statute specifies a mandatory proviso whereby the Board must justify a decision in material contravention of a development plan is no surprise. The usual interpretation of the phrase "*have regard to*" would undermine that proviso. It sits very uneasily in S.37(2)(b) if it is considered to imply a more or less unrestricted power of material contravention - as opposed to a power the exercise of which requires justification in terms of actual accordance with the substantive content of the statutory criteria.

217. In the foregoing context, it would be surprising indeed - and would arguably significantly undermine the prescription of "*statutory criteria*" for the exercise of the power - if the Board's obligation, in granting permission in material contravention of a development plan, as to the national and regional policies and guidelines on which it relies for purposes of S.37(2)(b)(iii) in doing so, was merely to have regard to them in the very undemanding sense in which the phrase "*have regard to*" is understood in other contexts. Remembering that statutory text must always be interpreted in context, it seems at least arguable that, in the particular context of S.37(2)(b)(iii), the requirement is that a permission to be granted in material contravention of the development plan be, in respect of the subject-matter of that material contravention, consistent with the policies[372] relied upon by the Board in invoking S.9(6) of the 2016 Act and S.37(2)(b) PDA, as those policies differ from the Development Plan.

365 AG (McGarry) v Sligo County Council [1991] 1 IR 99 at p 113.
366 Byrne v Fingal County Council [2001] 4 IR 565.
367 Christian v. Dublin City Council (No. 1) [2012] IEHC 163; [2012] 2 I.R. 506, [17]. Cited in Redmond [2020] IEHC 151 from §115.
368 Ballyboden Tidy Towns Group v An Bord Pleanàla [2022] IEHC 7 §106.
369 Cork County Council v Minister for Housing Local Government and Heritage et al. [2021] IEHC 683.
370 [2020] IEHC 151 §3 & §159.
371 Emphasis added.
372 i.e. as S.37(2)(b) PDA recites: "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".

218. In fairness, my impression is that the Board has generally sought to justify material contravention – and did so here. It is perhaps revealing, though not at all surprising, that the Inspector repeatedly addresses the material contravention issue in terms of "justification". For example, and as directly relevant here, she says that:

> *"The policy and objectives of the development plan do not accord with national policy, in particular the National Planning Framework and Building Height Guidelines. Therefore, the proposed material contraventions are justified by reference to section 37(2)(b)(iii) of the act."*

219. Fortunately, I do not consider that I need here resolve any question whether the "*have regard to"* obligation imposes a higher burden in this context than the usual interpretation of that phrase implies. That is because, in my view, the Inspector and the Board misinterpreted the relevant policy documents to which they were obliged to have regard.

Density - Conflict between Development Plan & National Policy & Conclusion

220. Whatever view one takes of the demands of the "*have regard to"* obligation, it is clear that the policies to which regard is had by the decision-maker must first be correctly interpreted and understood by it – see **Redmond**[373] and **Tesco**.[374] In **Redmond**, Simons J said: *"A decision-maker cannot be said to have properly had regard to objectives or policies which it has misunderstood."* As will be seen, in my view the Inspector's view that the policy and objectives of the development plan do not accord with national policy, was in error.

221. The Board found that permission would materially contravene, as to density, Development Plan §2.1.3.5 Policy RES5: Institutional Lands. So the Inspector's doubts in that regard are irrelevant, as are the Inspector's – by no means inconsiderable – difficulties in applying density standards to student accommodation. Indeed, the Board did not decide on a density on the Site. Further, it did not decide what that density would mean for average densities across the Campus[375] which, inferentially, must be a lot lower and is the relevant consideration. And, as the Inspector has said, as Colbeam submits and as I have said, the calculation of residential density, as applied to this type of student accommodation, by no means lacks difficulties. But, whether correctly or not, the Board found a material contravention as to density and must, and does, stand by its Decision. It does not, argue that there was no material contravention as to density. Material contravention as to density is a given in my further consideration of the matter.

373 Redmond v An Bord Pleanàla [2020] IEHC 151 §94.
374 Tesco Stores Limited v Dundee City Council [2012] UKSC 13 "a planning authority must proceed upon a proper understanding of the development plan … the planning authority is required by statute to have regard to the provisions of the development plan: it cannot have regard to the provisions of the plan if it fails to understand them".
375 Including for example, the Groves.

222. While the Board is not to be criticised for its reliance on RPO 5.5, as to consolidation of Dublin and suburbs, in truth it is very general and lacks bite as to density issues – which it does not mention. By itself, it could not justify the material contravention as to density in this case. It adds little to the other two policies cited. NPO35 is appreciably more relevant but does not provide any useful standard for, or guide to, quantification of density. That is not of itself a flaw in the NPO – not least remembering that the NPF is a high-level framework to be fleshed out in guidelines. And neither RPO 5.5 nor the NPF says anything about Institutional Lands. The Board says that the fact that these policy provisions are not specific to institutionally designated lands does not disentitle the Board from relying on them for the purposes of Section 37(2)(b)(iii). That could be true but for the fact that there is current national policy specific to density of development of Institutional Lands – it is found in the 2009 Guidelines. And I agree with the Applicants that it is (indeed explicitly) complementary with the NPF and the cited RPOs.

223. Of the policies cited in the Impugned Permission by the Board for purposes of S.37(2)(b)(iii), RPO 5.4 seems most relevant. Significantly, it espouses "*higher densities … as set out in*"[376] inter alia the Urban Residential Guidelines 2009. So, by invoking RPO 5.4 the Board necessarily invoked also, and as to density, those 2009 Guidelines as its justification[377] for permitting higher densities than allowed by the Development Plan.

224. In my view, the Inspector's finding that the policy and objectives of the Development Plan do not accord with national policy, is wrong. Specific national policy as to density on Institutional lands was set, and remains set, by the Urban Residential Guidelines 2009 §5.10. It was not, as her report necessarily implies, changed by the NPF and the Height Guidelines. The former is general in its terms and has nothing to say of the quite particular planning considerations clearly and specifically applicable to development of Institutional lands. The latter, in 2018 explicitly apply the NPF and in so doing specifically invoke the continuing vitality of the Urban Residential Guidelines 2009 as "*complementary policy .. for consideration in combination with these guidelines*"[378]. The Apartment Guidelines of December 2020[379] also invoked the Urban Residential Guidelines 2009 as "*complementary policy.* And, of course, the 2009 Guidelines are invoked in RPO 5.4.

225. Development Plan §2.1.3.5 Policy RES5: Institutional Lands, as to average net density of 35-50uph, clearly accords with §5.10 of the Urban Residential Guidelines 2009 which continues to set national policy as to density of development on Institutional lands. I can see no basis in published policy for any suggestion to the contrary.

376 Emphasis added.
377 The word used by the Inspector.
378 §1.12. Also, and as the Applicants point out, SPPR 4(1) of the Height Guidelines 2018 also invokes the 2009 Guidelines (incorrectly describing them as dated 2007 but the error and the true meaning are clear) specifically as to densities.
379 Sustainable Urban Housing: Design Standards for New Apartments December 2020 §1.18.

226. And such a conclusion is entirely consonant with the view of Simons J in **Redmond**,[380] in respect of this same Site, that Development Plan Policy RES5 "*reflects the rationale underlying*" §5.10 of the Urban Residential Guidelines 2009 of concentrating increased densities in selected parts of the overall lands. By "*overall lands*" he is referring to the entire Campus designated Institutional.

227. Indeed, Development Plan Policy RES5 permits that "In certain instances higher densities will be allowed where it is demonstrated that they can contribute towards the objective of retaining the open character and/or recreational amenities of the lands" without, as does §5.10 of the 2009 Guidelines, citing higher densities of "up to say 70 dph" and without, as does §5.10 of the 2009 Guidelines, limiting such higher densities to concentration in selected areas without increasing average density across the lands designated Institutional. Thereby, and unlike §5.10, Policy RES5 may arguably allow for higher <u>average</u> densities on the entire Institutional Lands. If anything, Policy RES5 is more, not less, permissive of higher densities for the purpose of retaining open character than is §5.10 of the 2009 Guidelines. However, I read them as consistent. I agree with Simons J that Policy RES5 "reflects the rationale underlying" §5.10 of the 2009 Guidelines. No doubt the latter informed the former and so RES5 should be interpreted consistently with the 2009 Guidelines. Also, the idea of higher densities on the entire Institutional Lands, as opposed to their concentration in specified parts, seems, if only generally, unlikely to "contribute towards the objective of retaining the open character and/or recreational amenities of the lands".

228. Accordingly, I cannot see how in logic, sense or lawfulness, the Board could invoke RPO 5.4, thereby necessarily invoking §5.10 of the 2009 Guidelines as to density, as its justification for permitting higher densities than allowed by Development Plan RES5 and in material contravention thereof, when §5.10 and RES5 are explicitly consistent with each other and §5.10 is not permissive of higher densities than allowed by RES5. Indeed, I consider counsel for the Applicants to be correct in asserting that, far from differing from and so justifying a departure from RES5, national policy as to density in residential development of Institutional lands, as expressed in §5.10 of the 2009 Guidelines is given expression in RES5.

229. Either the Board:

- misinterpreted one or more of the Development Plan, RPO 5.4 and §5.10 of the 2009 Guidelines. Misinterpretation of Development Plans and planning policy guidelines is a matter of law and to have regard to them one must first interpret them correctly.[381]
- or
- despite invoking them, failed properly to consider a relevant consideration - being RPO 5.4 and §5.10 of the 2009 Guidelines.

Accordingly, the Impugned Decision must be quashed on this account.

380 §79.
381 See above as to the Redmond & Tesco decisions.

Ground 2(d) - Future Institutional Use

Future Institutional Use - Applicants' case

230. The Applicants rely on Development Plan §2.1.3.5 RES5 Institutional Lands and §8.2.3.4 (xi) Institutional Lands. Both state:

> *"Where no demand for an alternative institutional use is evident or foreseen, the Council may permit alternative uses subject to the zoning objectives of the area and the open character of the lands being retained."*

§2.1.3.5 states:

> *"In cases of rationalisation of an existing institutional use, as opposed to the complete cessation of that use, the possible need for the future provision of additional facilities related to the residual retained institutional use retained on site may require to be taken into account. (This particularly applies to schools where a portion of the site has been disposed of but a school use remains on the residual part of the site.)"*

§8.2.3.4 (xi) states

> *"… on Institutional Lands where existing school uses will be retained, any proposed residential development shall have regard to the future needs of the school and allow sufficient space to be retained adjacent to the school for possible future school expansion/ redevelopment"*

231. The Applicants plead that the Chief Executive's Report noted that, as to potential shortage of school spaces, Colbeam provided no comprehensive school demand and capacity assessment for the area and did not engage with the Department of Education to confirm whether the subject site may be required in the future for additional capacity at the existing campus. Therefore, the planning authority was not satisfied that §8.2.3.4(xi) had been met. It is also considered that recent planning permissions[382] outline how, despite potential new schools in the vicinity, the need may arise to expand the existing primary and/or post primary school to meet potential future demand. The Applicants plead the planning authority's first recommended reason for refusal of permission. It asserts that the Proposed Development would result in the existing schools operating on sites smaller than those recommended by Department of Education Technical Guidance[383], contrary to the Government's 'Code of Practice on the Provision of Schools and the Planning System'[384], and so would materially contravene the Development Plan as contrary to Policy SIC8 and §8.2.12.4 of the Development Plan which cite that Code.

382 D20A/0192 and D20A/0198.
383 Technical Guidance Documents TGD-025 and TGD-027.
384 prepared jointly by the Department of Environment, Heritage, and Local Government and the Department of Education and Science in 2008.

232. The Applicants plead that the Inspector rejected reliance on the Technical Guidance as applicable only to new schools but failed to appreciate that §8.2.12.4 of the Development Plan applied the Technical Guidance to any school developments - not just new schools. The Inspector's reliance on Note 2 to the Technical Guidance[385] - that due to land scarcity in urban areas it is not always possible to achieve the ideal site size for school buildings - failed to appreciate that such scarcity would only arise if the Proposed Development was permitted on the scale sought in the planning application. In essence, they argued that while existing land scarcity may constrain school site size that is not a warrant, at least as to institutional lands, for actively creating such scarcity by permitting other types of development. They say the Inspector and the Board failed to consider that the onus was on Colbeam to demonstrate that alternative institutional use is not evident or foreseen and that Colbeam had failed to satisfy that requirement by submitting a comprehensive school demand and capacity assessment in the area and/or by demonstrating engagement and/or confirmation from the Department of Education. So, the Applicants say, there was no basis for the Inspector's conclusion that *".. the subject site is unlikely to be required for future school expansion in the short to medium term"*[386] - which conclusion was unreasoned, irrational and/or failed to take into account relevant considerations.

233. The Applicants plead that, in rejecting the planning authority submission that there was no comprehensive school demand and capacity assessment for the area, the Inspector relied on a February 2021 planning permission[387] for a temporary post-primary school 550m south of the Site and on Colbeam's reference to a media article stating that it is envisioned that this site would accommodate a permanent primary school and an 800-pupil secondary school and so concluded that "*Having regard to the proximity of this site to the subject site .. it is unlikely that the subject site would be required as a new school site*". The Applicants say that the Inspector erred in drawing such conclusions and failed to take into account relevant considerations and took into account irrelevant considerations as the Inspector:

- had no basis for drawing such a broad inference merely from one recent permission granted in the absence of an assessment of capacity - any such conclusion was irrational.
- failed to take into account that the permission was temporary and so may not be permanent and media reports are irrelevant to whether a permanent permission would be granted.
- failed to consider that this recent permission - merely for a temporary school -demonstrated a need in the area for appropriate sites for schools.

234. The Applicants say that the Board misinterpreted the Institutional Land designation and failed to take into account relevant considerations in failing to consider the need for *any* (current or future) institutional use such as hospitals, schools, etc and not just the current educational use.

385 Both Technical Guidance Documents TGD-025 and TGD-027 contain the same note.
386 Inspector's Report §10.2.13.
387 D20A/0268.

Future Institutional Use - Opposition

235. The Board pleads that the Applicants' pleas that the Impugned Decision, in concluding that the Site is unlikely to be required for future school expansion in the short to medium term[388] or for a new school[389] was irrational and/or failed to take account of relevant considerations must fail:

a. as to irrationality, as the Applicants have not pleaded that there is no evidence for the conclusion and there is a substantial body of evidence for it.[390] In addition, Colbeam plead
- the letters from Our Lady's Grove Primary and Secondary Schools confirming that they would not need the Site.[391]
- that the Technical Guidance applies only to the design of new school sites and not to existing schools. Nor does the Development Plan so apply it.
- that the Board was entitled to reject the view of the Applicants and the Planning Authority.

b. as to failure to take account of relevant considerations, that there is no onus on the developer to demonstrate that alternative institutional use is not evident or foreseen. The Board considered whether demand for alternative institutional use was evident or foreseen and concluded, on comprehensive and detailed consideration of the materials before it, that it was not.

c. the challenge is to the merits of the conclusion. The Applicants pleads that the Inspector incorrectly weighed certain factors -for example, the temporary school permission. Such matters of planning judgement are reviewable only for irrationality.

d. residential use was open in accordance with the Development Plan zoning objectives.

236. The Board pleads that the Applicants' pleas that the Board misinterpreted the Institutional designation and failed to take account of relevant considerations by failing to consider the current or future need for any other institutional uses fail as:
- the Inspector correctly understood the Institutional Land designation. The question was whether such uses were "*foreseen or evident*" - not hypothetical or theoretical. Nothing suggested such a need.
- the Inspector correctly considered whether any alternative educational use need was evident or foreseen and concluded it was not.[392]
- the only other institutional use the Applicants say the Board should have considered is "*hospitals etc*". But the Applicants advanced no evidence that hospital use is even conceivable.

388 Inspector's report §10.2.13.
389 Inspector's report §10.2.8.
390 Inter alia at §§10.2.1 to 10.2.13 of the Inspector's Report.
391 Figures 7.5 and 7.6 of the Planning Report.
392 Inspector's report §§10.2.1 to 10.2.13.

Chief Executive's Report & Department of Education

237. The Planning Authority – responsible for preparation of the Development Plan - analyses the prospect of future institutional use entirely in terms of school use. It does not suggest that any other form of institutional use is evident or foreseen. Despite the letters from the schools, it says that "*is possible that the need may arise to expand existing primary and/or post-primary school facilities in order to meet potential future demands*" – that seems to me to fall short of "*evident or foreseen*".

238. The Planning Authority says, no doubt correctly, that the Department of Education is the relevant interlocutor. As noted above, the Department was notified of the planning application and did not respond.[393]

Future Institutional Use - Inspector's report

239. The Inspector addresses this issue at length.[394] She explicitly considers the arguments both for and against the proposal by reference to the possibility of future institutional need for the Site. She canvasses the Development Plan policies, the objectors' views that the posited school expansion areas within their existing lands are unsuitable, the views of the planning authority, the absence of response by the Department of Education, that Department's Guidance, the Code of Practice and the absence of a school demand and capacity assessment and of details of the size or capacity of the existing schools or their amenities.

She concludes, having regard to the information submitted with the application, and in particular as

- the Site has not been identified by the planning authority, the Department of Education and Skills or the Board of Management of either school as lands for a future school site or for future school expansion,
- permission was recently granted for a school within 550m of the Site,

that the Site is unlikely to be required for school expansion in the short to medium term or for a new school. Given the urban location, for any long-term future expansion consideration should be given to the consolidation of the urban environment and the development of the car park or open spaces currently associated with the schools.[395]

240. The Inspector cites the targets in the Department of Education National Student Accommodation Strategy and the under-supply of purpose-built student accommodation in the area, which includes UCD Belfield campus.[396] She also noted[397] that the Planning Authority raised no

393 Inspector's report §§9.0 & 10.2.9.
394 Inspector's report §10.2
395 Inspector's report §10.2.13. §10.2.9.
396 Inspector's report §10.5.7.
397 Inspector's report §10.5.7.

objection in principle to the proposed use and considered the Site an acceptable location for purpose-built student accommodation.[398]

241. Having so concluded, the Inspector also noted that the Site is no longer owned by the religious congregation and is currently closed off by fencing/hoarding and not providing any amenity for the schools or the overall Campus. I do not read these observations as informing the conclusion. And the Applicants have not pleaded them – I think correctly. But they are unhelpful in the context. I do not see that they should – or even could – have properly informed the conclusion. It is very clear from **Redmond**[399] that selling to a developer part, no more than all, of a site designated Institutional does not dilute, much less disapply, the designation. For purposes of application of the designation, the entire Campus subject to the designation, as it was when the development plan was made, remains the planning unit of analysis. So, for example, the fact that part of a designated area may already have been developed may, of itself and depending on circumstances, diminish the development prospects of the remainder. That the Site is temporarily enclosed by fencing/hoarding cannot, in logic be weighty on this issue – such fencing/hoarding is as easily taken down as put up. Nor could its presence inhibit future institutional use. I also fail to see that the factor that the Site does not currently "*provide any amenity for the schools or the overall campus*" – perhaps a dubious proposition given **Christian**,[400] as even private open spaces may, per se, have amenity value to the community - is relevant to the question whether it may be required for future institutional use.

Future Institutional Use - Conclusion

242. Whether, were I the planning inspector, I would have taken the same view on this issue of future institutional use is neither here nor there. Clearly, more than one view is possible. Notwithstanding my reservations as to certain aspects of the content of the Inspector's report[401], on a fair reading of the report overall and of the factors she identified as informing her conclusion, I cannot say that it was irrational or took irrelevant considerations into account. I refuse relief as to the issue of reservation of land for future institutional use.

243. Incidentally, this finding also disposes of a concern expressed that the Development Plan forbids, as to lands required for school expansion, "double counting" that land as open space.

398 Chief Executive's Report §8.4 Site Location and justification of need for Student Accommodation Facility.
399 Redmond v An Bord Pleanála [2020] IEHC 151 (High Court (Judicial Review), Simons J, 10 March 2020) §48 et seq.
400 Christian, v Dublin City Council, [2012] 2 IR 506 §91 - While there is no doubt that the public amenity in lands to which the public have access is significant, it does not seem to me that there is also no possibility of there being a public amenity to privately owned open space lands. Even though the public may not have a right of access to private but open lands, the presence of such open lands in an area has the potential to contribute to the amenity of the area generally. There is a very great difference between a heavily built on quarter of an urban area, on the one hand, and a quarter which, while largely in private ownership, contains a significant amount of un-built on lands, on the other hand. It is, of course, the case that a planning authority cannot, by means of a development plan, turn private land into public land. However, the maintenance of some degree of open space in an area seems, at least at a general level, to be potentially a legitimate and desirable object which can inform the contents of a development plan even where some of the lands in question may not be publicly owned or are not such as the public generally have a right of access to.
401 §10.2.13.

GROUND 3 – PART V

Part V - Introduction

244. Colbeam's planning application did not propose any social housing pursuant to Part V PDA 2000. The Board found a material contravention of §7.6 of Appendix 2 (the Housing Strategy) of the Development Plan as to Part V. The Development Plan as to Part V provided that, as to all permissions for student accommodation not on the campus of a third level institution, a 20% social housing requirement will apply.[402] There can be no doubt but that, regardless whether the Planning Authority was correct in its view that Part V applies to SHD Planning Applications for Student Accommodation, Colbeam's application was in material contravention of that requirement of the Development Plan. The Board justified that material contravention, invoking S.37(2)(b)(iv) PDA 2000 – i.e. having regard to the pattern of development and permissions granted, in the area since the making of the Development Plan.

245. The Applicant's attack is not on the reasons for, or justification of, material contravention offered by the Board. Rather, Ground 3 asserts that the Board acted *ultra vires* its statutory obligations*:*

- in granting permission in breach of S.96 PDA 2000 and s.15 of the 2016 Act, without any provision for Part V social housing,
- and/or in not rejecting/considering rejecting the application on the basis of non-compliance with Article 297(2)(h) PDR 2001 and S.4(1)(a)(iv) of the 2016 Act requiring the application to address Part V requirements, and that
- the Board further erred in considering that such a breach could be justified by invoking S.9(6) of the 2016 Act and S.37(2)(b) PDA 2000.

246. The Applicants complain of the incongruity of the Board's defending this ground by asserting that Part V does not apply to SHD Planning Applications for Student Accommodation. They say this was not the approach the Board took in its decision and that it can't rewrite its decision. At first blush this criticism seems fair – until one realises that the Board's position now is a direct response to the Applicants' case that Part V provision, in addition to being a requirement of the Development Plan, was a mandatory statutory requirement applicable to SHD Planning Applications for Student Accommodation. Faced with that particular case, the Board is entitled to meet their attack on the ground chosen by the Applicants.

402 Development Plan Housing Strategy §7.6.

Part V - The Statutory Scheme

247. Part V PDA 2000 deals with Housing Supply. Save where indicated, the statutory provisions described below are in Part V. Its provisions are complex and have been amended over time. I will describe them as applicable to the present decision.

248. The Long Title to the 2016 Act declares its purpose as being to facilitate the implementation of the Government's policy response to a housing crisis - "*Rebuilding Ireland - Action Plan for Housing and Homelessness*"[403]. The short title of the Act[404] is the "*Planning and Development (Housing) and Residential Tenancies Act 2016*". It is to be construed, inter alia, as one with the Planning Acts generally. Part 2, Chapter 1 of the 2016 Act (which includes most of the sections of the Act canvassed in these proceedings) is entitled "*Strategic Housing Developments"* – but I cannot have regard to that description in interpreting the Chapter.[405] Chapter 1 creates the SHD planning procedure under which the Planning Application was made.

Ss.94, 95 & 96 PDA 2000

249. **Ss.94 and 95 PDA 2000**, inter alia, require planning authorities to include housing strategies in their development plans, addressing, inter alia, requirements and planning policy as to social and affordable housing. The planning authorities must include objectives in their development plans to secure implementation of the housing strategy – including that *"as a general policy a specified percentage"* - maximum 10% - of lands zoned residential be reserved for social and affordable housing.

250. **S.96 PDA 2000**, inter alia, broadly[406] requires that where a development plan objective requires that a specified percentage of lands zoned residential be made available for social and affordable housing, relevant planning permissions for the development of "houses" on land[407] subject to such an objective must include conditions requiring developers to make agreements with the planning authority to transfer part of the site to the planning authority for the provision of social and affordable housing. That rarely happens. S.96 allows for various forms of alternative agreement – for example lease or transfer to the planning authority of "houses" on the site or on a different site. These conditions are colloquially known as "*Part V Conditions*" and the resultant agreements as "*Part V Agreements*". S.96 requires planning authorities, in making Part V Agreements, to have regard, inter alia, to their housing strategies. S.15 of the 2016 Act applies S.96 to SHD applications.

403 Published by the Government in July 2016. See also Pembroke Road Association v An Bord Pleanála [2022] IESC 30 §17.
404 S.1 of the 2016 Act.
405 Interpretation Act 2005, S.18(g)(ii).
406 There are variables depending on the date of purchase of the land and the date of the grant of permission, but this broad description suffices for present purposes.
407 From 2002 by the Planning and Development (Amendment) Act 2002 (32/2002). The reference to houses was retained in the amendment of September 2021, after the Impugned Decision - Affordable Housing Act 2021 (25/2021).

Where S.96 applies to a planning application its application is mandatory, not discretionary – though there is a discretion as to the type of Part V provision to be made.

251. The net issue under this Ground, is whether student accommodations are houses for the purposes of S.96. If so, Part V provision was mandatory in this case and the permission would be quashed for its non-provision.

S.2 PDA 2000 - Definition of House

252. **S.2(1) PDA 2000** defines a "house" as ".. a building or part of a building which is being or has been occupied as a dwelling or was provided for use as a dwelling but has not been occupied, and where appropriate, includes a building which was designed for use as 2 or more dwellings or a flat, an apartment or other dwelling within such a building". So, the central characteristic of a "house" is that it is a "dwelling".

S.3 of the 2016 Act - Definition of Student Accommodation & Strategic Housing Development

253. The 2016 Act introduced the concept of "*student accommodation*" to the Planning Acts. **S.3 of the 2016 Act** defines it as follows:

> *"'student accommodation'—*
> *(a) means a building or part thereof used or to be used to accommodate students ……. and that is not for use —*
> *(i) as permanent residential accommodation, or*
> *(ii) subject to paragraph (b), as a hotel, hostel, apart-hotel or similar type accommodation, and*
> *(b) includes residential accommodation that is used as tourist or visitor accommodation but only if it is so used outside of academic term times;"*

Note that the definition is in "residential" terms.

254. Theoretically, that definition might apply to many and varied accommodation types and to very small accommodations. However, and importantly, for practical purposes that is only part of the definition as the purpose of the definition is to identify the student accommodation to be deemed strategic housing development. And that encompasses only student accommodation of at least 200 bedspaces.

255. **S.3 of the 2016 Act** defines "*strategic housing development*" in terms which include the development of:

- *(a) … 100 or more houses on land zoned for residential use or for a mixture of residential and other uses,*
- *(b) … student accommodation units which, when combined, contain 200 or more bed spaces …"*
- *(c) … shared accommodation units*[408] *which, when combined, contain 200 or more bed spaces …"*

The definition also states that an SHD permission may include other uses but only if,

> *"(i) the cumulative gross floor space of the houses, student accommodation units, shared accommodation units or any combination thereof comprises not less than 85 per cent, …. of the gross floor space of the proposed development or the number of houses or proposed bed spaces within student accommodation or shared accommodation to which the proposed alteration of a planning permission so granted relates, and*
> *(ii) the other uses cumulatively do not exceed —*
> *(I) 15 square metres gross floor space for each house or 7.5 square metres gross floor space for each bed space in student accommodation or shared accommodation in the proposed development or to which the proposed alteration of a planning permission so granted relates, subject to a maximum of 4,500 square metres gross floor space for such other uses in any development, or*
> *(II) such other area as may be prescribed, by reference to the number of houses or bed spaces in student accommodation or shared accommodation within the proposed development or to which the proposed alteration of a planning permission so granted relates, which other area shall be subject to such other maximum area in the development as may be prescribed;"*

Other Provisions

256. **S.5(5) of the 2016 Act** requires that a request to the Board by a prospective applicant for SHD permission for pre-application consultations with the Board shall include, inter alia, such "*information as may be prescribed*". **S.5(8)(a)** specifies that regulations so prescribing

> *"… may include but shall not be limited to a brief description of —*
> *(a) the proposed types of houses, student accommodation units or shared accommodation units and their design, including proposed internal floor areas, housing density, plot ratio, site coverage, building heights, proposed layout and aspect, …"*

257. Reference was also made in argument to **S.8(1)(a) of the 2016 Act** as to the publication and content of public notice of a proposed SHD application. At the relevant time[409] that content was to include "*a brief description of the proposed development, including a description —*

408 S.3 defines shared accommodation in terms which exclude student accommodation.
409 Substituted (19.07.2018) by Planning and Development (Amendment) Act 2018 (16/2018), s. 53(1)(a).

"(I) of the number of houses, student accommodation units or shared accommodation units of which the proposed development is intended to consist, and

(II) in the case of student accommodation units or shared accommodation units, of —

(A) the combined number of bed spaces of which the proposed development is intended to consist, and ….

258. The Board relies on the presumption, in statutory interpretation, against surplusage (superfluous words)[410], to argue that in **S.5(8)(a)** and **S.8(1)(a)** of the 2016 Act, the Oireachtas intended here to differentiate between houses and student accommodation units. While not conclusive, that argument is persuasive.

259. **S.8(3) of the 2016 Act** provides that *"The Board may decide to refuse to deal with"* an SHD Application where it considers it inadequate or incomplete having regard in particular to the permission regulations.[411] **S.4(1)(a)(iv)**[412] and **Article 297(2)(g) & (h) PDR 2001**, as applicable here, combine to prescribe that an SHD planning application be accompanied, where Part V applies to the proposed development, by

- details as to how the applicant proposes to comply with a Part V condition - colloquially known as a "Part V Proposal".
- a layout plan showing the location and types of houses proposed to be transferred or leased to the planning authority under Part V. ("Part V Proposal Layout Plan").

- While the Applicants pleaded Article 297(2)(h) but not Article 297(2)(g), and while pleading rules in judicial review are strict, the thrust of the plea is perfectly clear. It would be unfair to disadvantage the Applicants on that account and I will not do so.

<u>Legislation postdating the Impugned Permission</u>

260. Reference was also made in argument to legislation postdating the Impugned Permission as, it was argued, shedding light on the interpretative issue as to Part V. Since December 2021, and by **S.2 PDA 2000** as amended by the *Planning and Development (Large Scale Residential Developments) Act 2021* which replaces the SHD process:

"LRD" means "large-scale residential development", which, in turn, is defined as including development that includes the development of —

(a) …….. 100 or more houses,

(b) … student accommodation that includes 200 or more bed spaces,

(c) both …. 100 or more houses and of student accommodation,

410 Grange v The Information Commissioner [2022] IECA 153 §127 7 135.

411 S.2 PDA 2000 defines "permission regulations", inter alia by references to S.33 PDA 2000 and in terms which includes the PDR 2001.

412 S.4(1)(a)(iv) of the 2016 Act was since repealed given the termination of the acceptance of new SHD planning applications.

Or

(d) both .. student accommodation that includes 200 or more bed spaces and of houses, where the LRD floor space of—

(i) in the case of paragraph (a), the buildings comprising the houses,

(ii) in the case of paragraph (b), the student accommodation,

(iii) in the case of paragraphs (c) and (d), the buildings comprising the houses and the student accommodation,

is not less than 70 per cent, or such other percentage as may be prescribed, of the LRD floor space of the buildings comprising the development;

261. Reference was also made in argument to **S.32B PDA 2000**, inserted in December 2021[413] in the context of the replacement of the SHD process by the LRD process. S.32B relates, inter alia, to the information a prospective LRD applicant must supply to the Planning Authority when requesting an "LRD Meeting". In that regard the Minister may prescribe information regarding, inter alia,

"(a) the proposed types of houses and student accommodation units and their design, including proposed internal floor areas, housing density, plot ratio, site coverage, building heights, proposed layout and aspect;"

262. **S.247(1A) PDA 2000** as amended since the Impugned Decision[414] and in the context of the replacement of the SHD process by the LRD process reads, in part, as follows:

"(a) …… prior to making an application to a planning authority or authorities under section 34 in respect of a development that —

(i) consists of or includes either or both residential development of more than 10 housing units or non-residential development

(ia) consists of or includes the development of student accommodation that includes 200 or more bed spaces, or

(ii) such other development as may be prescribed,

a prospective applicant shall have consulted the appropriate planning authority ……."

263. This can be contrasted with **S.247(1A)(a) PDA 2000** as applicable to the subject Planning Application[415] which provided, in part, that, subject to s.5 of the 2016 Act, a prospective applicant shall have consulted the appropriate planning authority prior to making a planning application to a planning authority under S.34 PDA 2000 for

" …. a development that —

413 Inserted (17.12.2021) by Planning and Development (Large Scale Residential Developments) Act 2021 (40/2021), s. 3, S.I. No. 715 of 2021.

414 By the Planning and Development (Large Scale Residential Developments) Act 2021 (40/2021).

415 Inserted (22.10.2018) by Planning and Development (Amendment) Act 2018 (16/2018), s. 43(b), S.I. No. 436 of 2018.

(i) consists of or includes either or both residential development of more than 10 housing units or non-residential development ……., or

(ii) such other development as may be prescribed,

a prospective applicant shall have consulted the appropriate planning authority …."

Part V - Residential Tenancies Acts 2004 to 2019 - definition of "dwelling"

264. Both sides rely on the definition of "dwelling" in these Acts. As originally enacted, **S.4 of the 2004 Act** defined ''*dwelling*'' as meaning generally:

"… a property let for rent or valuable consideration as a self-contained residential unit and includes any building or part of a building used as a dwelling and any out office, yard, garden or other land appurtenant to it or usually enjoyed with it and, where the context so admits, includes a property available for letting but excludes a structure that is not permanently attached to the ground and a vessel and a vehicle (whether mobile or not)"

But S.4(2) provides that in specific instances "dwelling" was to mean

"… any building or part of a building used as a dwelling (whether or not a dwelling let for rent or valuable consideration) and any out office, yard, garden or other land appurtenant to it or usually enjoyed with it."

265. The Residential Tenancies (Amendment) Act 2019 inserted **S.3(1A)(a)** in the 2004 Act to apply the 2004 Act[416] to

" … to every dwelling …. in a building, or part of a building, used for the sole purpose …. of providing residential accommodation to students during academic term times under a tenancy …" but not if the landlord also resides in the building.

By S.3(1A)(c) the definition of 'dwelling' in s.4 shall apply for the purposes of S.3(1A) *"as if 'residential unit (whether or not self-contained)' were substituted for 'self-contained residential unit'".*

266. It will be seen that, in these Acts, the central characteristic of a dwelling is that it is "residential" and that accommodation to students during academic terms is considered "residential".

416 save for certain of its provisions - listed in S.3(1A)(7) – Sections 16(k)&(n), 70, 71, 72, 73, 78(2)&(3), 81, 135(4)(e)(i)(II), 185, 186 and 195; Part 4; and Schedule 1.

Part V - Rebuilding Ireland - Action Plan for Housing and Homelessness - July 2016

267. As recorded above, the Long Title to the 2016 Act describes it as an Act to facilitate the implementation of "Rebuilding Ireland - Action Plan for Housing and Homelessness"[417] ("the Action Plan"). The Impugned Decision cites the Action Plan as Government Policy to which the Board has had regard in making that decision.

268. The Forward to the Action Plan cites "*The challenge of tackling the housing crisis*". The "*Overview of the Action Plan*" addresses the question "*Why we need an Action Plan for Housing and Homelessness*" in unsurprising terms, recording:

- that "*Housing is a basic human and social requirement. Good housing anchors strong communities, a performing economy and an environment of quality*."
- past "*under-provision of housing*".
- that "*Accelerating delivery of housing for the private, social and rented sectors is a key priority for the Government. Ensuring sufficient stable and sustained provision of housing that is affordable, in the right locations, meets people's different needs and is of lasting quality is one of the greatest challenges facing the country at present*."

269. Table 1 of the Action Plan[418] describes "*Key Action Areas*" as including "*Measures to support greater provision of student accommodation"*. The Action Plan states[419] that "a *series of Pathfinder Projects will be the focus of particular attention, to test and demonstrate the Action Plan's effectiveness*". One of these, entitled "*More Accommodation for Students*" records that 500 new student accommodation places will be developed in the new Dublin Institute of Technology campus in Grangegorman in Dublin to establish a model for funding that will be rolled out to other locations. Table 2[420] identifies "*Key actions to be delivered under the Action Plan*" and states "*Address the obstacles to greater private rented sector delivery, to improve the supply of units at affordable rents*" - of which an example is to "*Support greater provision of student accommodation*". Under the heading "*Housing Challenges*",[421] it is said that "*As an integral part of preparing this Action Plan, a number of pressing challenges relating to the current profile of the housing sector in Ireland have been considered.*" As an example of such pressing challenges and under the sub-heading "*The Rental Sector*"[422] it is said that "*A strong rental sector should support a mobile labour market that is better able to adapt to new job opportunities and changing household circumstances. The rental sector must also cater for a diverse range of households, including students, low-income households and mobile professionals*". The Action Plan is based on 5 Key Pillars,[423] to each of which a chapter is devoted. Pillar 3 is entitled "*Build More Homes*" and under the heading "*Supporting Infrastructure Investment*"[424] it is envisaged that the NTMA[425] will finance investments in student accommodation.

417 Published by the Government.
418 P11.
419 P13.
420 P15.
421 P20.
422 P27.
423 P17.
424 P63.
425 National Treasury Management Agency. via the Ireland Strategic Investment Fund.

It states that "*The primary housing-related benefit …. is in the consequential freeing up of significant rental accommodation in the vicinity of third-level institutions that is currently occupied by students."*[426] "*Pillar 4: Improve the Rental Sector*"[427] identifies its "*Key objective"* as "*Addressing the obstacles to greater private rented sector delivery, to improve the supply of units at affordable rents*." In this regard, "*Key actions*" include "*Support greater provision of student accommodation*". That chapter includes a lengthy section headed "*Student Accommodation*"[428] inter alia highlighting "*the importance of providing well designed and located student accommodation in order to avoid additional pressures in the private rental sector*" and that "*an even greater level of provision of student accommodation is required*". In a reference to what became the SHD process, it is said that "*Student accommodation complexes of 100 or more units will benefit from the new fast-track application process directly to An Bord Pleanála*". A national student accommodation strategy is envisaged as to specific needs and mechanisms for the development of appropriate on-campus and off-campus student accommodation.[429] The "*Table of Actions*" commits to "*work with stakeholders to prioritise and progress viable projects to provide additional student accommodation in key urban areas*."[430] and lists other actions in similar vein – including sending planning applications student accommodation projects for 100 units or more to what became the SHD process[431].

270. It must be remembered that this is a political Action Plan – a government policy document, not a statute. It is not to be interpreted by highly technical linguistic dissection as if a contract or statute. But as to the Action Plan in its own terms, it is clear that

- its purpose is to address the "*Housing Crisis*".
- encouraging the development of Student Accommodation is a key action in doing so. It repeatedly addresses that subject.
- One means of doing so is by including Student Accommodation in what became the fast-track SHD planning process.
- Students are included in the concept of "*household*".
- The importance of providing student accommodation is to avoid additional pressures in the private rental sector and its primary housing-related benefit is in the consequential freeing up of rental accommodation in the vicinity of third-level institutions that is currently occupied by students.
- In that way, the provision of student accommodation is part of the means of addressing the housing crisis.
- While quality is not for the Court to assess, the reference to ensuring "*lasting quality"* is notable, as are the words "*well designed".* It is government policy that expedition in the housing crisis is not to be at the expense of quality and design.

426 Colbeam observes that in 2018 the National Planning Framework echoes this view at p 95 – "Demand for student accommodation exacerbates the demand pressures on the available supply of rental accommodation in urban areas in particular. In the years ahead, student accommodation pressures are anticipated to increase. The location of purpose-built student accommodation needs to be as proximate as possible to the centre of education, as well as being connected to accessible infrastructure such as walking, cycling and public transport. The National Student Accommodation Strategy supports these objectives."
427 P71.
428 P75.
429 See also p102.
430 P102.
431 P103.

271. As stated, the Long Title to the 2016 Act identifies its purpose as being to facilitate the implementation of the Action Plan. In **E.L.G.** the Supreme Court recently said that the long title of an Act can be a useful recital of its purposes.[432] But, like all recitals, the long title is an expression of purpose and not a creation of rights and structures to enforce those rights. It may aid interpretation of the Act, but such aid may not always be required.[433] The long title may not be used to modify or limit the interpretation of plain and unambiguous language.[434] I have not found authority as to the use of a policy an interpretive aid in interpreting an Act where its long title identifies the purpose of the Act as to facilitate the implementation of that policy. But it seems to me that the principle stated in E.L.G. does apply in such an instance. This is subject to the necessity for care that it is used only to illumine the purpose of the Act in the objectively discerned intendment of the Oireachtas, where purposive interpretation is admissible within the limits identified in E.L.G. Most obviously, that occurs in interpreting ambiguous content of an Act.

272. As far as that goes, the Action Plan clearly considers student accommodation to be housing and as part – albeit somewhat indirectly – of the solution to the housing crisis and suggests interpretation of the 2016 Act accordingly.

The Planning Authority Chief Executive's report & the Inspector's Report & Impugned Decision

273. The Planning Authority Chief Executive's report states[435] that:

- Off-campus student accommodation is not exempt from Part V requirements.
- Non-application of Part V would be both a material contravention of the Development Plan and contrary to S.96.
- If permission is granted, a Part V condition should be included (a draft condition is suggested).
- On-site social housing would not be appropriate. Off-site social housing is preferred.

274. The Inspector records the content of the Development Plan Housing Strategy and the view of the Planning Authority as set out above and states[436] that *"The proposed development is located outside of a college campus and, therefore, is not in accordance with the provisions of the plan."* The last phrase of this sentence is difficult to understand literally but its intended meaning is clear – that as the Proposed Development is off-campus, the Development Plan applies "*the standard 20% social housing requirement*". The Inspector states:

> *"In the absence of clear guidance at a local and national level in relation to student accommodation and Part V and to the technical difficulties that might arise in terms of*

432 E.L.G. v Health Service Executive [2022] IESC 14 (Supreme Court, Baker J, 11 March 2022) §105 et seq. See also Fennelly J. in Sheedy v The Information Commissioner [2005] 2 I.L.R.M. 375.
433 Minister for Industry and Commerce v Hales [1967] I.R. 50.
434 The People (Director of Public Prosecutions) v Quilligan [1986] I.R. 495 at 519.
435 §8.16 citing the annexed Housing Section Report. See also Inspector's report p44.
436 §10.14.1.

ownership and the management of units within a student block (term time and non-term time use) and to the configuration of the student units, which would not comply with the floorspace and amenity requirements for a conventional house/apartment. I am satisfied that Part V of the Planning and Development Acts should not be applied to the proposed student accommodation of the development.

Notwithstanding this, it is my view that the proposed development would be a material contravention of Section 7.6 of Appendix 2 of the development plan."[437]

275. The inspector justifies the non-application of Part V in material contravention of the Development Plan on the basis that:

"Since the making of the … Development Plan … the Board did not apply Part V requirements for off campus student accommodation developments at [3 listed sites in Dun Laoghaire/Rathdown[438]*].*

Having regard to the recent permissions granted in the area since the making of the plan the proposed material contravention to Section 7.6 of Appendix 2[439] *as it relates to Part V Social / Affordable Housing is justified by reference to section 37(2)(b)(iv) of the Act."* [440]

276. S.9(6) of the 2016 Act empowers the Board in SHD applications to grant permission in material contravention of the development plan[441] where it considers that, if s.37(2)(b) PDA 2000 were to apply, it would grant permission. S.37(2)(b)(iv) PDA 2000 permits the grant of permission in material contravention where:

"… permission for the proposed development should be granted having regard to the pattern of development, and permissions granted, in the area since the making of the development plan."

277. The Board agreed with the Inspector. It recorded that it had had regard to the Action Plan[442] and it did not impose a Part V Condition.

437 §10.13.4 – I have altered layout for exposition purposes.
438 Vector Motors site, Goatstown Road (ABP-308353-20); Avid Technology International site, Carmanhall Road, Sandford Industrial Estate, (ABP 303467-19); Blakes and Esmonde Motors Site, Lower Kilmacud Road, Stillorgan (ABP-300520-18). As to the Blakes and Esmonde Motors Site I have been provided with a copy of the Board Order. The development in that case was to comprise 179 student accommodation units (576 bed spaces) and student amenities and 103 residential apartments (i.e. not student accommodation). Condition 6 of that permission-imposed Part V requirements – but only with respect to the apartments and explicitly not with respect to the student accommodation.
439 i.e. of the Development Plan Housing Strategy.
440 §10.14.7. See also §10.13.3.
441 Other than as to zoning.
442 Though it did not expressly say so, I infer that the Board regarded S.143 PDA 2000 as its authority to have regard to the Action Plan in making the Impugned Decision. S.143 requires the Board, performing its functions, to have regard to, inter alia, "the policies and objectives for the time being of the Government", and "the national interest and any effect the performance of the Board's functions may have on issues of strategic economic or social importance to the State".

Part V - The Applicants' Pleadings & Written Submissions

278. The Applicants plead that student accommodation constitutes a dwelling within the meaning of the definition of "*house*" in S.2(1) PDA 2000 - such that Part V applies to student accommodation. They note that student accommodation is treated as a dwelling for the purposes of the Residential Tenancies (Amendment) Act 2019. In submissions they cite dictionary definitions[443] defining dwelling as a "*house, flat or other place of residence*" and stating that *"A dwelling or a dwelling place is a place where someone lives."* This they contrast with the Board's reliance in opposition[444] on the assertion that student accommodation is not *"houses*" within an alleged "*ordinary meaning*". They submit also that the whole, and explicit[445], purpose of the 2016 Act is to provide "strategic *housing*[446] development" – which S.3 defines as including "*the development of student accommodation".*

279. Accordingly, the Applicants plead that, in omitting a Part V Condition in the Impugned Permission, the Board failed to appreciate that S.15 of the 2016 Act and S.96 PDA 2000 combined to afford a Development Plan Part V Objective statutory status and to require a Part V Condition in permissions to which Part V applies and while S.9(6) of the 2016 Act (and thereby s.37(2)(b) PDA 2000) allows permissions in material contravention of a development plan, it does not allow breach of S.15 of the 2016 Act and S.96 PDA 2000. In other words, the issue is not just one of material contravention of the Development Plan – it is one of breach of a statutory obligation.

280. Also, breach of S.4(1)(a)(iv) of the 2016 Act and Article 297(2)(h) PDR 2001 is pleaded on the basis of failure to include a Part V Proposal Layout Plan in the Planning Application. It is also pleaded that the Board erred in not refusing and/or in failing to consider refusing under S.8(3) of the 2016 Act to deal with the Planning Application.

Part V - The Board's & Colbeam's Pleading & Written Submissions

281. The Board pleads that S.92 PDA 2000, which mandates Part V Conditions, does not apply to a proposed development of student accommodation as:

a. The PDA 2000 and the 2016 Act make apparent that the Oireachtas did not intend that
   - "*house*" be understood as including student accommodation or unit of student accommodation: see for example the definitions of "*large scale residential development*" and "*strategic housing development*" and ss.32B(3) and 247(1A)(a) PDA 2000, and ss.5(8)(a) and 8(1)(a) of the 2016 Act.
   - Part V requirements apply to student accommodation.

443 Oxford English Dictionary, Cambridge Dictionary, and Collins.
444 §64.
445 My observation.
446 The Applicants' emphasis.

b. The obligation in s.96(1) applies to "an application for permission for the development of houses on land"

c. S.2 PDA 2000[447] defines "*house*" in terms[448] which, in their ordinary meaning, do not include student accommodation.

d. S.15 of the 2016 Act does not alter the position.

e. That an amendment in 2019 was required[449] to bring student accommodation within the meaning of "*dwelling*" for the purposes of the Residential Tenancies Act 2004, supports the view that such accommodation is not otherwise within the meaning of "*dwelling*". The definition of 'dwelling' for the specific purposes of S.3(1A) of the Residential Tenancies Act 2004 as amended does not 'read across' or apply to the 2000 Act.

282. In addition to these pleas, the Board and Colbeam submit that:

- The word "dwelling" connotes a degree of permanence, or year-round residence, which is absent from student accommodation.
  - As will be seen, I reject this argument.

- A dwelling must be a self-contained, separate residential unit. The proposed student accommodation units are not individual self-contained residential units.
  - Even accepting the premise, it is unclear what Colbeam identifies as the "unit" for this purpose. As will be seen, the unit seems to me to be the "cluster", not the "bed-space", so I reject this argument.

- The Development Plan objective that the social housing requirement will apply to off-campus student accommodation has no statutory basis and so is amenable to the material contravention provisions of s.9(6) of the 2016 Act and s.37(2) PDA 2000.
  - The Applicants have not identified any flaw in the Board's invocation of those provisions. As will be seen, I accept this argument.

- Part V and the 2016 Act have different purposes.
  - As will be seen, I agree, but not for the reasons Colbeam advances.

447 The Statement of Opposition refers to section 2 of the 2016 Act – but that is clearly a typo.
448 See above.
449 By means of the Residential Tenancies Amendment Act 2019.

Part V - The Essential Issue

283. The essential issue is not whether the permission was in material contravention of the Development Plan and Housing Strategy as to requiring Part V Conditions in permissions for student accommodation. The Board accepts it was. Neither is it, at least in the narrow sense, the validity of the Board's reasons for and justification of that material contravention by reference to S.9(6) of the 2016 Act and S.37(2)(b)(iv) PDA 2000 and a pattern of earlier permissions for student accommodation in which Part V Conditions were not imposed. Rather that issue was part of the context in which the essential issue was argued. Neither is the alleged breach of S.4(1)(a)(iv) of the 2016 Act and Article 297(2)(h) PDR 2001 the central issue – that issue does not arise unless Part V applies to SHD applications as to student accommodation and if Part V does apply

- the breach of S.4(1)(a)(iv) of the 2016 Act and Article 297(2)(h) PDR 2001 is clear and,
- reliance on S.9(6) of the 2016 Act and S.37(2)(b)(iv) PDA 2000 could not excuse a breach of that imperative - as they allow justification only of material contraventions.

284. So, the essential issue is whether the imposition of a Part V Condition was not merely an objective of the Development Plan and Housing Strategy but was also a statutory imperative imposed by S.96 PDA 2000.

Part V - Discussion & Decision

285. First, the question whether S.96 PDA 2000 imposes Part V Conditions on SHD Permissions for Student Accommodation is one of statutory interpretation. The purpose of statutory interpretation is to discern the intent of the legislature as expressed in the statute being interpreted. The default method of statutory interpretation is to discern that intention as expressed in the "plain and ordinary" meaning of the words it has, presumedly carefully, chosen to use in the statute. Sometimes the words "literal and grammatical" or, just, "literal" are used instead of "plain and ordinary". They all mean the same thing. S.5 of the Interpretation Act 2005 assumes literal interpretation as the norm. The Oxford and Cambridge Dictionaries define the literal as the "usual or most basic" sense of a word "applying the ordinary rules of grammar". Merriam Webster defines it in terms of the "ordinary or primary" meaning. As the 2005 Act uses it, I will use the word "literal".

286. By its literal meaning, and though students often occupy houses, student accommodation as contemplated in the legislation is not encompassed in the word "house". In literal meaning, "housing" is a broader term than "house" and encompasses forms other than houses. While the borders between the concepts may not be precise, in literal usage "houses" are not the same as "apartments" or "flats" but all are encompassed by "housing", and all are "dwellings". It may be that whether a dwelling is or is not a "house" is a matter of impression, but it is generally an impression easily and confidently formed. I know a house when I see it. Apartments are not houses. Blocks of apartments are not houses. Yet both are "housing" and apartments are "dwellings". At least as far as literal meaning is concerned, and by the same reasoning, blocks of student accommodation are not

houses. And "clusters" of "bedspaces" accommodated by common kitchen/sitting/dining areas are not houses – nor are buildings containing multiple such "clusters". As a matter of literal meaning of the word "house", S.96 would not require Part V Conditions in planning permissions for Student Accommodation of the kind at issue in this case.

287. While it is the starting point of statutory interpretation, so much for literal meaning. By S.1(2) of the 2016 Act it[450] is to be construed with the PDA 2000. As has been seen, S.2(1) of the 2000 Act defines a "*house*" as *"... a building or part of a building which is being or has been occupied as a dwelling or was provided for use as a dwelling but has not been occupied, and where appropriate, includes a building which was designed for use as 2 or more dwellings or a flat, an apartment or other dwelling within such a building".* So, S.2(1) extends the statutory meaning of "*house*",

- beyond its literal meaning – to apartments and flats.
- beyond even apartments and flats, to *"a building which was designed for use as 2 or more dwellings".* That, at least in its general sense connoting a block of dwellings such as an apartment block[451], broadens the scope for inclusion also of "*student accommodation*" in the definition of houses if student accommodation consists of dwellings.
- beyond even apartments and flats and buildings designed for use as 2 or more dwellings, to "*other dwelling(s)".* That implies the existence of dwellings which are not houses (in the ordinary sense), apartments or flats or such buildings but which yet fall within the statutory meaning of "*house*". As to examples in the PDA 2000 of such "*other dwelling(s)",* none have been drawn to my attention and, as far as my searches of the Acts reveal, the only candidates are student accommodation and shared accommodation.

288. The possibility arises of applying ejusdem generis reasoning to the question of statutory interpretation[452] of the definition of house by S.2(1) PDA 2000. That is an interpretive technique to be applied with caution and not where a contrary interpretation is discernible.[453] The principle is to "*give all the words their common meaning*"[454] - that "*Where a list or string of genus-describing terms are followed by wider residuary or sweeping-up words, the ordinary or wide meaning of the residuary words is presumed to be limited to things of that class or genus*."[455] While it is usually a technique to restrict the meaning of the wider residuary or sweeping-up words, one may suggest as a corollary – and as long as the need for caution is remembered - that where something comes within that restricted meaning it is intended to be included in that meaning. The wider residuary, or sweeping-up, words here are "*other dwelling*".

289. If, given for example the title of the Act, one considered the genus here to be "*housing*", it would be easy enough to include student accommodation in the phrase "*other dwelling*" as it

450 Other than paragraphs (b) and (c), Parts 3 to 5 and the Schedule.
451 Technically it would also include the not uncommon case of a house above a bottom floor/basement flat.
452 See generally Dodd on Statutory Interpretation §5.68 et seq.
453 Dodd §5.71 & RDS v Revenue Commissioners [2000] 1 IR 270.
454 RDS v Revenue Commissioners [2000] 1 IR 270.
455 Dodd §5.68.

appears in the definition of house by S.2(1) of the 2000 Act. The context of the Act makes clear that student accommodation is considered to be housing. However, I do not think the genus is "*housing*". I think the genus is identified by S.2(1) itself, and indeed by the words "*other dwelling*" themselves – the genus is "*dwellings*". That prompts the question – are student accommodation units dwellings?

290. Dwelling is not defined in the PDA 2000 or the 2016 Act.

291. The Applicants in this case propose an attractive and simple definition of a dwelling as a *"place where someone lives".* They say that the actual unit is a flat or apartment. As has been seen, S.3 of the 2016 Act defines "*strategic housing development*" in terms which include *"… student accommodation units which, when combined, contain 200 or more bed spaces …"*. This necessarily differentiates the bed spaces from units and so "unit" seems to me to refer, at least in the proposed development with which I am concerned, to what Colbeam calls a "cluster" of bedspaces served by a single kitchen/dining/sitting room. I have considered the floor plans and broadly agree with the Applicants that the clusters are at least closely analogous to apartments with untypically large numbers of en-suite bedrooms. That each bedroom will be occupied under a separate legal agreement does not seem to me to affect the question whether the student accommodation or a cluster within it, or, indeed, a bedroom within a cluster, is a dwelling.[456]

292. As was said in **Clonres/Conway #2**[457] - *"there's nothing unusual about a term being defined to mean different things in different Acts."* It can be misleading to rely too strongly on statutory definitions of a word as a guide to their meaning outside that statutory context.[458] That is because the very purpose of a statutory definition may be to lend the word defined a meaning other than its literal and ordinary meaning – a meaning particular to the statute in question. That, indeed, is at issue in this case inasmuch as S.3(1) PDA 2000 defines "*house*" in a manner which extends beyond its literal meaning. The Planning Acts are not stipulated as being construed with the Housing Acts. Yet the 2016 Act is much concerned with the general subject of housing. In that context it is at least noteworthy that in **O'Donnell**[459] the Supreme Court considered S.56(1) of the Housing Act, 1966, which enables a housing authority to "*provide dwellings (including houses, flats, maisonettes and hostels). Such dwellings may be temporary or permanent*". The Court excluded caravans from that definition but considered that "*the power provided therein is to provide permanent accommodation, although the duration of such accommodation may be temporary or permanent*." Two points are notable here: that the word "*accommodation*" is used as descriptive of the meaning of a section which uses the word "*dwelling*", and that the duration of such accommodation may be temporary even though the structure must be permanent. Given that we are concerned with "Student Accommodation" and that student accommodation is typically occupied by students for only part of

456 See reference to DPP v Barnes below as to legal basis of occupation.
457 Clonres CLG v An Bord Pleanàla [2021] IEHC 303 (High Court (Judicial Review), Humphreys J, 7 May 2021).
458 On that basis, presumably, counsel for the Applicants disavowed anything but light reliance on a decision by the Tax Appeals Commission - #09TACD2019 dated 13th December 2018 that student accommodation was residential property in use as a dwelling for purposes of Local Property Tax. I have considered it but do not think I need review it here.
459 O'Donnell v South Dublin County Council [2015] IESC 28.

the year, this provides some support for the proposition that for student accommodation falls within the concept of a "*dwelling*".

293. Likewise, I agree with the Board and Colbeam that recourse to the Residential Tenancies Act 2004[460] as an aid in interpreting the PDA 2000 and the 2016 Act should be cautious.[461] That said, it is notable that "*residential accommodation to students during academic term times*" is considered a "*dwelling*". Though a statutory definition, it is premised on the acceptance that student accommodation is "*residential*" – which categorisation approaches the literal concept of a "dwelling" apart from statutory definition.

294. Murphy J considered the word "*dwelling*" in **Sfar**.[462] It is of interest, first, as a case in which, the word "*dwelling*" was used in the Control of Dogs Act 1986 but, as here, not defined. That suggests that what was at issue was its literal meaning. Second, a wide and general consideration of the word "*dwelling*" is found in the judgment – spanning caselaw, statutes and legal dictionaries. Murphy J considered it clear that the word "*dwelling*" may be used in different senses[463] and in that case he construed it narrowly as excluding a yard or curtilage or outhouse.[464] I will not repeat his analysis in full here, though I have had regard to it.

295. Notable, it seems to me, is the general proposition in **Sfar** that the word dwelling "*implies a building used or capable or being used as a residence*" - that a dwelling has a "*residential*" purpose appears. This seems to me significant, as S.3 of the 2016 Act defines student accommodation in terms which categorise it as "*residential*". S.3 defines student accommodation as a building "*used to accommodate students*" and inter alia "*includes residential accommodation that is used as tourist or visitor accommodation .. outside of academic term times;".* This seems to me to imply that the nature of the accommodation of students is "*residential*" – if the inevitably short-term accommodation of tourists and visitors is residential, a fortiori the impliedly longer-term accommodation of students must be "*residential*". I think I can take judicial notice that, historically, student accommodation was not uncommonly called a "*hall of residence*".[465] All this sits well with the Acts' considering, as it does, student accommodation to be "*housing*". Yet short-term residential accommodation of tourists and visitors does not as convincingly seem to me to be "*dwellings".*

296. **Sfar** records that "the courts have held that to "dwell" and "dwelling" are expressions nearly but not quite, equivalent to reside, residence. To "dwell" connotes, more definitely than "reside", where a person lives and sleeps"[466]. Lord Atkinson is said to have said that "*By a 'dwelling house' I*

460 As amended by the Residential Tenancies Amendment Act 2019.
461 Citing, inter alia, Twomey v Hennessy [2011] 4 IR 395.
462 Sfar v Louth County Council [2007] IEHC 344 - a case as to the seizure of dogs pursuant to the Animals Act 2005.
463 Citing Belfast Corporation v Kelso [1953] N.I. 160.
464 On the basis that "It is a contradiction in terms to say that a place where animals, farm or domestic, are housed can be a dwelling where people live, whether permanently or temporarily."
465 See Cambridge Dictionary – "a college building where students live"; Merriam-Webster - 2a place where students live at a college or university"; similarly Oxford & Macmillan.
466 Citing Pollock CB, AG v McLean 1H&C 761. See also Campbell v O'Sullivan [1947] SASR 195 at 201, 206 cited in Stroud "Judicial Dictionary of Words and Phrases (6th edition), 2000.

understand a house in which people live or which is physically capable of being used for human habitation."[467] Notably also, "*It is established that a person may "dwell" in two or more places*"[468] – in that case both a city and country residence were in issue. So that a student may not reside in student accommodation for the entire year need not mean that accommodation is not a dwelling.

297. The general meaning of "*dwelling*" has a considerable importance given the constitutional guarantee of inviolability of the dwelling. In **CA**[469] the status of "*direct provision*" accommodation centres was considered. CA and her son were accommodated in hotel rooms - sometimes sharing with others. There were no cooking facilities. Visitors were not allowed in the room but could be met in a recreation room. Generally, the centre rules were appreciably restrictive – though there was dispute as to facts in the case. The rooms were subject to unannounced inspections by hotel staff. MacEochaidh J considered that the space CA and her son occupied was their "home" and entitled to the constitutional protection of the dwelling. In **Barnes**,[470] Hardiman J held that the constitutional protection "*embraces the owner or lawful occupier of every sort of premises from a palace to a shack and regardless of whether he is the full owner, a tenant or a licensee or other form of permissive occupant*". He used the term "*householder*", but I don't think that, in context, anything turns on that. What is striking is the range protected – as to both the physical nature of the dwelling and the legal status of its occupation.

298. More generally, in terms of the literal meaning of "dwelling", I would consider that student accommodation is a place where a student resides, "*lives and sleeps"* – and hence dwells - for a large part of the year.

299. On the analysis thus far, it seems to me that there are very considerable reasons to take the view that student accommodation is a dwelling and so falls within the definition of house in S.3 of the 2000 Act such that Part V requirements would apply.

300. However, there are some significant indicia to the contrary. Before I come to those indicia, I note that, while both are concerned with planning law and housing policy in the broad sense and their purposes are complementary and overlapping and they are to be in large measure interpreted together, it should not be assumed that the 2016 Act has the precisely same purpose as Part V of the 2000 Act. I will also repeat my acceptance that the meaning of a word in one statute may differ markedly from its meaning in another.

301. The 2016 Act is concerned with addressing the housing crisis – the general shortage of housing – by (as was thought) simplifying and expediting the planning process for large housing

467 In Lewin v End [1906] A.C. 299 at 304.
468 Butler v Ablewhite, 28 LJCP, 292
469 CA v The Minister for Justice [2014] IEHC 532.
470 DPP v Barnes [2007] 3 IR 130 – cited in Kelly on the Constitution 5th Ed'n §7.5.10.

projects. The Action Plan, the effecting of which is the explicit purpose of the 2016 Act[471], suggests that while, no doubt, student accommodation was included in the SHD process as a beneficial end in itself, its "*primary housing-related benefit*" was indirect or ancillary to the purpose of the 2016 Act. That is, to free up "*significant rental accommodation in the vicinity of third-level institutions that is currently occupied by students*" and "*to avoid additional pressures in the private rental sector*". It seems to me that that there is no intrinsic or policy reason apparent in the 2016 Act suggesting that the Oireachtas did or did not intend the imposition of Part V Conditions on SHD Permissions for Student Accommodation.

302. Part V of the 2000 Act predated the 2016 Act (and its introduction of the concept of student accommodation to the Planning Acts) by over a decade and a half. As originally enacted, Part V related to affordable housing - it was amended later to encompass social housing. The purpose of Part V was identified by the Supreme Court[472] as follows:

> *"It is clear that the purpose of the statutory scheme is to facilitate the purchase of houses by people who would otherwise not be in a position to buy houses and to ensure, so far as possible, that housing developments of this nature are not isolated from the general community."*

303. The second purpose thus described was otherwise put as being to counteract "*undue segregation in housing between persons of different social backgrounds*".[473] Part V's ostensibly primary means of doing so was to ensure that social and affordable housing was integrated "on-site" in private housing developments. However, there is in Part V a variety of "off-site" and monetary alternatives to integrated "on-site" provision. It is for others – policy analysts, social scientists, politicians and, in due course, social historians - to assess whether that purpose of counteracting "*undue segregation"* was realistic or realistically provided for or was in real terms advanced by Part V. It is for me to take that purpose, as identified by the Supreme Court, at face value. In that light it is not at all apparent to me that the purpose of counteracting "*undue segregation"* would be much, if at all, advanced by integrating social and affordable housing in student accommodation developments, nor was any argument to that effect made.

304. Colbeam observe that Part V is concerned with the housing needs of the functional area of the planning/housing authority but, as to student accommodation, the 2016 Act is typically concerned with the accommodation needs of students from outside the functional area. I reject this distinction for two reasons. First, while students may hail from outside the functional area, their accommodation need, no more or less than anyone else and for socially good reason, arises within the functional area and bears on housing supply within the functional area. Second, the 2016 Act addresses student accommodation not primarily as an end in itself as much as, as the Action Plan states, to ease pressure on the private rental market within the functional area. Colbeam also submit that *"whilst citizens within a particular functional area have a need for housing, because of*

471 See above as to its Long Title.
472 In the matter of Article 26 of the Constitution and in the matter of Part V of the Planning and Development Bill, 1999 [2000] 2 IR 321.
473 S94(3) PDA 2000.

their proximity to an educational institution within the same functional area, they do not have a corresponding need for student accommodation, so that they may attend that educational institution." This seems to me far too fine a distinction. Students' availing of student accommodation within a functional area is a direct function of their need for housing near an educational institution. For all that, and for the other reasons I have identified, I consider that Part V and the 2016 Act have appreciably different purposes.

305. I do not consider that legislative amendments postdating the Impugned Decision much illuminate the interpretation of the legislative position at the date of the Impugned Decision. As counsel for the Applicants observed, in **Droog**[474] the Supreme Court noted the view it had taken in **Cronin** that:

> *". . . the court cannot .. construe a statute in the light of amendments that may thereafter have been made to it. An amendment to a statute can, at best, only be neutral – it may have been made for any one of a variety of reasons. It is however for the courts to say what the true construction of a statute is, and that construction cannot be influenced by what the Oireachtas may subsequently have believed it to be."*[475]

306. Nor, of course, can the fact that the Development Plan presumes that Part V applies to student accommodation development proposals affect the interpretation of the relevant statutory provisions. In fairness, that was not suggested.

307. I observed above that there are very considerable reasons to take the view that student accommodation is a dwelling and so falls within the extended definition of "house" in S.3 PDA 2000 but that there are some significant indicia to the contrary. Specifically, it was the 2016 Act which introduced the concept of Student Accommodation to the Planning Acts. The 2016 Act does so in terms which appear to me to indicate an intention to distinguish Student Accommodation from houses:

- S.3 defines "*strategic housing development*" in categorical terms. One category is "*houses*" (clearly intended to encompass the definition of house in the PDA 2000 as including apartments and flats). "*Student accommodation units"* is another category. The definition also refers to "*the cumulative gross floor space of the houses, student accommodation units, shared accommodation units or any combination thereof"* and to "*the number of houses or proposed bed spaces within student accommodation or shared accommodation*".

- S.5(5) and S.5(8)(a) envisage provision of information by prospective applicants in pre-application consultation as to *"the proposed types of houses, student accommodation units or shared accommodation units"* – suggesting a distinction between those three categories.

474 Revenue Commissioners v Hans Droog [2016] IESC 55, 10.14.7.
475 Cronin (Inspector of Taxes) v Cork and County Property Company Limited [1986] I.R. 559 @ 572; See also Cassidy v Commissioner of An Garda Síochána And Others [2014] IEHC 386.

- S.8(1)(a) includes the same phrase as to the content of public notice of a proposed SHD application – requiring inclusion of "*the number of houses, student accommodation units or shared accommodation units of which the proposed development is intended to consist*" and "*in the case of student accommodation units or shared accommodation units*", the combined number of bed spaces.

308. In addition, and in the context of this demonstration in the 2016 Act of a distinction between houses and student accommodation, I may remind myself of the literal interpretation of these phrases, such that they differ in meaning.

309. I am conscious both that the Planning Acts must be construed together and that, in a sense, I am concerned with the interpretation of S.96 PDA 2000 in light of the 2016 Act more than with the interpretation of the 2016 Act itself. As to the view I ultimately take, I confess to no little diffidence and to taking some shelter in the Supreme Court's description of the Planning and Environmental Code as "*almost impossibly complex*"[476] a "*statutory maze*" ,[477] a "*conceptual morass*" and "*an untidy patchwork confusing almost to the point of being impenetrable*".[478] Hogan J recently returned to the theme - as to *"yet another example of the complexities of our planning laws and of how difficult it is often in practice to apply this corpus juris."*[479]

310. That said, I am left with the impression that the 2016 Act, despite the wide definition of houses in the PDA 2000, in introducing to the Planning Code the concept of Student Accommodation – and doing so in terms limited to accommodation of at least 200 bedspaces – did so intentionally and repeatedly in terms which distinguished Student Accommodation from houses. For reasons I have explained, neither can I see a purposive reason to include Student Accommodation of at least 200 bedspaces in the Part V system. Ultimately this leads me to the conclusion, hesitant but conclusion nonetheless, that such Student Accommodation does not fall within Part V and S.96 PDA 2000 and, specifically the concept of "houses" found in S.96. So, the Applicants fail on this ground.

311. I should return briefly to the incongruity of the Board's now asserting that Part V does not apply to Student Accommodation SHDs given it did not say that in its Impugned Decision. I have explained why I consider that the Board was entitled to take the position it now takes. But it may (I only say may) have been arguable that, by not taking that position in the Impugned Decision, it failed in an obligation to comprehensively state its reasons for its decision. An argument to the contrary is that it need not state such a reason as, if its interpretation of the law is correct (as I have found), it simply has no vires to impose a Part V Condition. As that point, no doubt for good reason, was neither pleaded nor argued, I need consider it no further.

476 Waltham Abbey v An Bord Pleanála [2022] IESC 30 (Supreme Court, Hogan J, 4 July 2022).
477 O'Connell v The Environmental Protection Agency and Ors [2003] 1 I.R. 530.
478 An Taisce v McTigue Quarries Ltd [2018] IESC 54 (Supreme Court, MacMenamin J, 7 November 2018).
479 Krikke et al v Barranafaddock Sustainable Electricity Limited [2022] IESC 41 (Supreme Court, Hogan J, 3 November 2022, §1)

GROUND 4 – SPPR3, HEIGHT GUIDELINES 2018 – Urban/Suburban

SPPR3 - Introduction

312. Ground 4 asserts that the Board erred in purporting to justify material contravention of the Development Plan as to building height by reference to S.37(2)(b)(iii) PDA 2000 and SPPR3 of the Height Guidelines 2018.[480]

313. The Proposed Development is of blocks of 3 to 7 storeys high. The Inspector considered[481] that it would materially contravene Development Plan Policy UD6 and the Development Plan Building Height Strategy.[482] §4.8 of that Strategy, as to '*Residual Suburban Area not included within Cumulative Areas of Control*', states that a general recommended height of two storeys shall apply and that in the established commercial cores of these suburban areas 3-4 storey apartment or town house developments may be permitted in appropriate locations. The Inspector considered that the Proposed Development contravenes §4.8 as the Site is in a suburban area but not a commercial core.[483] The Impugned Decision records that permission would be in material contravention of Policy UD6: Building Height Strategy of the Development Plan. But, having regard to s.37(2)(b)(iii) PDA 2000, permission would be justified for the following reasons and considerations:

- Objectives 13, and 35 of the NPF "*which support increased residential densities and building heights at appropriate locations.*"
- SPPR3 of the Height Guidelines 2018 "*which support increased building heights and densities*."

SPPR3 & SPPR4

314. As relevant, SPPR3 in Chapter 3 of the Height Guidelines 2018 (as to "Building Height and the Development Management process") provides as follows:

> *"It is a specific planning policy requirement that where;*
> *(A) 1. an applicant for planning permission sets out how a development proposal complies with the criteria above[484]; and*
> *2. the assessment of the planning authority concurs, taking account of the wider strategic and national policy parameters set out in the National Planning Framework and these guidelines;*
> *then the planning authority may approve such development, even where specific objectives of the relevant development plan or local area plan may indicate otherwise."*

480 Urban Development and Building Heights: Guidelines for Planning Authorities (2018).
481 §10.7.3.
482 Set out in appendix 9 of the Development Plan.
483 §10.7.3.
484 The reference to "the criteria above" is clearly to the "Development Management Criteria" set out in §3.2.

315. §3.1 of the Height Guidelines 2018 states "*Development Management Principles*". It states a "*presumption in favour of buildings of increased height in our town/city cores and in other urban locations with good public transport accessibility*." §3.2, which sets out the "*criteria above*", variously uses the word "urban" but not the word "suburban".

316. SPPR4 – also in Chapter 3 of the Height Guidelines 2018 - commences:

> *"It is a specific planning policy requirement that in planning the future development of greenfield or edge of city/town locations for housing purposes, planning must secure:*
> *1. the minimum densities for such locations set out in …. "Sustainable Residential Development in Urban Areas (2007) or any amending or replacement Guidelines: ……"*

SPPR3 - The Applicants' Pleadings & Submissions

317. The Applicants note that:

- The Inspector identifies the Site as in an established suburban area.[485]
- Colbeam repeatedly identifies the Site as a greenfield site.[486]

So, the Applicants say, the Site is a suburban greenfield site to which SPPR4 of the Height Guidelines 2018, not SPPR3, applies. They say the contravention identified by the Inspector and the Board can't be justified by reference to SPPR3 as it applies only to city cores and other urban areas and not to suburban greenfield sites. Colbeam describe this, correctly, as the nub of the Applicants' contention.

318. So, a significant issue, in this context, is whether the word "*suburban*" denotes a subset of urban lands or whether the terms "suburban" and "urban" are mutually exclusive.

319. The Applicants cite §3.1 of the Height Guidelines 2018, to the effect that building heights "must be generally increased in appropriate urban locations" and so "a presumption in favour of buildings of increased height in our town/city cores and in other urban locations with good public transport accessibility. Planning authorities must apply the following broad principles …. in urban areas …". The Applicants cite **Ballyboden**[487] as authority that §§3.1 and 3.2 of the Height Guidelines 2018 set the framework for the application of SPPR3 – albeit at the differing levels of principle and criteria respectively - such that, by §3.1, SPPR3 applies only in town/city cores and in other urban locations with good public transport. It is SPPR4 which, they say, applies to greenfield or edge of city or town sites, such as the Site.

485 Inspector's Report §§2.1 & 10.7.3.
486 Colbeam's response to the Pre-Application Consultation Opinion §2.1.1 – cited in Inspector's report §5.5. Colbeam's Environmental Report §2.1 and Planning Report §2.1 and Statement of Consistency §3.1 state: "The subject site is predominantly comprised of greenfield lands but also includes the Goatstown Afterschool premises".
487 Ballyboden Tidy Towns Group v An Bord Pleanála [2022] IEHC 7.

320. The Applicants say that:

- Whether a site is urban or greenfield is not a matter of planning judgement - citing §1.11 of the Height Guidelines 2018 which distinguishes "*(a) urban and city-centre locations and (b) suburban and wider town locations".*

- The Board's argument that §3.2, and so SPPR3, generally apply to both urban and suburban areas, treats §3.1 and §3.2 as entirely independent and to be read disjunctively. This is at odds with the principles of interpretation identified in **Ballyboden**[488] and the approach adopted by the Board and the Court in **Ballyboden** to the effect that §3.1 and §3.2 were both relevant to SPPR3, albeit at differing levels of obligation.

- **Spencer Place**[489] and **Cork County Council v Minister for Housing**[490] by analogy imply that an SPPR must be clear in overriding development plans.

SPPR3 - The Board's & Colbeam's Pleading & Submissions – SPPR3

321. The Board and Colbeam cite the principles governing the interpretation of guidelines and SPPRs, and in particular SPPR3, which, they say, are established in **Atlantic Diamond**,[491] **O'Neill**[492] and **Ballyboden**[493] to the effect that such guidelines are to be interpreted in the same manner as development plans: i.e., in accordance with the **XJS**[494] intelligent layperson principle, and not in an overly technical or legalistic manner or as if statutory provisions.

322. The Board and Colbeam plead and submit that:

- The criterion for application of SPPR3 is explicitly compliance with the "*criteria above*" – i.e. those "*Development Management Criteria*" set out in §3.2 of the Height Guidelines 2018. Those criteria do not limit the application of SPPR3 to particular types of urban or suburban areas.

- Nor does SPPR3 limit its scope of application by reference to the content of §3.1 ("*Development Management Principles*") or §3.4 ("*Building height in suburban/edge locations (City and Town)*").

488 §119 recites principles drawn from In re XJS Investments Ltd [1986] IR 750.
489 Spencer Place v Dublin City Council [2020] IECA 268, §§6 & 28.
490 [2021] IEHC 683 & [2022] IEHC 281.
491 Atlantic Diamond Ltd v An Bord Pleanála [2021] IEHC 322 (High Court (Judicial Review), Humphreys J, 14 May 2021).
492 O'Neill v An Bord Pleanála [2020] IEHC 356 McDonald J, 22 June 2020).
493 e.g. §123.
494 Re XJS Investments Limited - [1986] IR 750.

- The phrase in §3.1 "*urban locations with good transport accessibility*" does not exclude the Site - not least as the phrase refers to "*towns/city cores and in other urban locations"*, implying the existence of urban locations other than towns/city cores.

- §3.4 applies only to "suburban edges of towns and cities" as explicitly contrasted with "city and town centres and inner suburbs". The Site is an "inner suburb" – clearly not on the 'suburban edge of Dublin'.

323. They say, in effect, that the Guidelines recognise, exhaustively, two categories of suburb: "*suburban edges of towns and cities"* to which SPPR4 applies; and "*inner suburbs*", to which SPPR4 does not apply. They say that all suburbs are urban – to use a mathematical concept, that suburbs are a subset of the set comprising urban lands.

324. The Board points out[495] that the Inspector repeatedly refers to the Site as in an urban area and with good public transport accessibility. She refers to the area as being "*in transition*" *"from a low density, single and two storey suburban area to a more urban area, with a mix of different types of dwellings, including apartment blocks of varying heights and significantly increased densities."*[496] She suggests that the Proposed Development would make a "*contribution to the consolidation of the urban area*" and "*consolidate the urban setting of the area*".[497] She considers *"that this urban site is highly accessible and suitable of*[498] *accommodating a higher density."*[499] The Board Order refers to "*the location of the site on urban lands accessible to the bus network*".[500]

325. The Board and Colbeam say the Site is not "*greenfield*" within the meaning of §3.4. Acknowledging that Colbeam so categorised it "*at times*", the Board notes that the Inspector described it as part of "*an overall landholding [that] has been substantially redeveloped in the last c. 10-15 years*" [501] and has an area of 2.12 hectares that "*includes part of an afterschool facility"* and also *"includes some grass cover and disturbed ground. The Board's Order refers to the site as "zoned and serviced lands in a built-up area*". SPPR4 applies to "*greenfield or edge of city/town locations*". The Site is in neither and so is not a site to which SPPR4 applies.

495 Citing by way of example the Inspector's report §§10.6.5, 10.7.3, 10.7.5, 10.7.7, 10.7.9 and 10.9.2.
496 §10.6.5, §10.7.7, §10.7.8.
497 §10.7.5, §10.7.9.
498 Sic.
499 §10.9.2.
500 P3.
501 §§2.1-2.3.

SPPR3 - Discussion & Decision

"Urban"/"Suburban"

326. As I have said, it is necessary to ask whether, in the present context, the word "suburban" denotes a subset of urban lands or whether the terms "suburban" and "urban" are mutually exclusive.

327. As to literal or ordinary meaning as understood by the intelligent layperson, I think there is no universal answer. The answer is context-specific. But I think most usually suburbs are distinguished from a town or city centre rather than from the urban area - with both the suburbs and the town or city centre together being regarded as the town or city and the urban area and as distinguished from the rural area.

328. I accept the Applicants' reference to §1.10 of the Height Guidelines as identifying the area within the canal ring as the city centre of Dublin. But to suggest that, in Dublin, everything outside that ring is non-urban is, at least to me, unconvincing. The view that higher density and re-enlivening are desirable within city centres in no way surprising. But neither is it necessarily exclusive of higher density elsewhere or necessarily exhaustive of possible locations for higher density. On the better view, suburbs are part of the town or city and of the urban area.

329. Recently, in **Reid #5**[502], Humphreys J cited the New Shorter Oxford English Dictionary[503], for the primary meaning of "urban" as "[*o]f, pertaining to, or constituting a city or town" and a secondary meaning as "[r]esident in a city or town*". It is useful to contrast the word "urban" with "rural". **Black**[504] defined "*Urban*" as "*Of or relating to a city or town; not rural*". It can hardly be doubted that, if choosing between "urban" and "rural" to identify the category to which suburbia is subordinate and of which it forms part, suburbia is part of an urban and not a rural area.

330. Certainly, no-one would describe Goatstown, save perhaps in the rare aul' times, as a rural area. And, no doubt, the inhabitants of Goatstown regard themselves as living an urban, if suburban, rather than a rural life. More prosaically, it bears observing that the site is in the Dublin 14 postal district[505] and I think I can take judicial notice that the inhabitants of Goatstown regard themselves, broadly speaking, as living in Dublin. In my view the Inspector was entitled to her view that development in Goatstown is not 'sprawl' (a term used by the Applicants in submissions) but consolidation of the urban environment.[506]

502 Reid v An Bord Pleanála & Intel [2022] IEHC 687.
503 Vol. II, p. 3527.
504 Law Dictionary 7th Ed'n 1999.
505 Colbeam's Planning Report §1.1.
506 Inspector's report 10.1.5.

Guidelines & SPPRS

331. Guidelines are to be interpreted not as if statues but rather on **XJS**[507] principles as if by the intelligent informed layperson. They are assumed to allow flexibility as required to apply relatively brief and general guidelines to the highly varied circumstances to which they come to be applied. That flexibility requires the exercise of planning judgement in their application and can be readily accommodated where what is in issue is the usual and relatively undemanding obligation on planning decisionmakers, imposed by S.28 PDA 2000, to "*have regard to*" such guidelines.[508] As noted, *"No kind of compliance is required by a have-regard obligation, merely regard."* [509]

Incidentally, the Board's submission that **Ballyboden**[510] allows decision-makers flexibility in interpreting planning documents is misconceived. Planning documents have only one meaning – and it is discernible as a matter of law and on XJS principles. But, which is a different thing, that meaning may well afford flexibility to the decisionmaker.

332. However, as Simons J says in **Spencer Place**,[511] a single set of Ministerial guidelines may contain two different types of content. The first is policies to which a planning decision-maker is required merely to have regard. The second type is requirements - SPPRs - with which, by S.28(1C) PDA 2000, a planning decision-maker must comply. It is important when reading guidelines to distinguish between these two types and their respective legal effects.

333. Where what is in issue is the obligation to comply, legal certainty requires that SPPRs be expressed, as far as possible, in terms which clearly and precisely identify the circumstances to which they apply. That flows from the necessity of clarity in discerning whether the decision-maker has, as a matter of law, complied. It follows that SPPRs require a more rigorous drafting approach than traditionally applied to planning guidelines. The drafter is in effect drafting a law which must be obeyed – a statutory instrument – rather than a guideline to which mere regard must be had. And particular care is required in that SPPRs are all-but-invariably drafted in terms which cross-refer to elements of the guideline in which it is situate, which elements may have been drafted in the more flexibly expressed manner permissible in such guidelines[512].

334. As the issue may be, as here, whether the decision-maker has properly identified the SPPR with which it must, in law, comply, and in so doing override Development Plan provisions, a more rigorous interpretive approach to SPPRs is required. Whether an SPPR has been correctly identified as applicable to the circumstances in question is a question of law – for the planning decision-maker in the first instance but ultimately for the Court to decide. These observations appear to me broadly

507 Re XJS Investments Limited - [1986] IR 750.
508 As to the "have regard to" obligation see, for example, Spencer Place Development Company Ltd v Dublin City Council [2019] IEHC 384 (High Court, Simons J, 30 May 2019) §53.
509 Cork County Council v Minister for Housing etc [2021] IEHC 683 (High Court (Judicial Review), Humphreys J, 5 November 2021).
510 [2022] IEHC 7 §139.
511 Spencer Place Development Company Ltd v Dublin City Council [2019] IEHC 384 (High Court, Simons J, 30 May 2019) §56.
512 Though clarity should always be the aim.

consistent with the observations of Collins J in **Spencer Place**[513] to the effect that, while they are to be construed on XJS principles and not as if statutes:

> *"Guidelines issued under section 28 PDA, 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."*[514]
>
> *"… section 28 guidelines should be construed in the context of and by reference to the PDA and, in particular, those provisions of the PDA that provide the statutory framework governing the performance of the "functions" to which such guidelines are directed. ……. it does not appear to me to impose an excessive burden on the draftsman to assume that he or she is familiar with the structure and language of the PDA and intends such guidelines to operate in a way consistent with it."*[515]
>
> *"…. the interpretation of SPPR3, and of the Guidelines generally, is ultimately a question of law for the Court and, as a matter of law, the opinion of the Minister as to its appropriate interpretation has no special status or effect."*[516]

335. For "*Minister*" here one may also read "*the Board and any other parties*". All may argue for an interpretation. As the issue is one of law, the arguments of none have special status or effect by reason of the identity of the party making the argument.

336. The Applicants cite Collins J in **Spencer Place**[517] by analogy and to the effect that an SPPR must be clear in overriding development plans. Collins J considered that transfers of competence from planning authorities to the Minister, should be in clear terms and not by a sidewind. It was *"essential that the respective competencies of all of the actors involved – Minister, planning authorities and [An Bord Pleanála] – should be clearly delineated … conferred by clear statutory language."* While Collins J was dealing with a somewhat different, and arguably more compelling, context[518] and with clarity of statute rather than of an SPPR, I agree that SPPRs must be clear because

- they override development plans.

513 Spencer Place Development Company Ltd v Dublin City Council [2020] IECA 268.
514 §77.
515 §78.
516 §89.
517 Spencer Place v Dublin City Council [2020] IECA 268, §§6&28.
518 He held that SPPR3 did not apply to permission applications made under a planning scheme. By Part IX PDA, planning schemes regulate development of areas designated as strategic development zones ("SDZ") – generally in more detail than would a development plan. Generally, consistency with a planning scheme is a necessary and sufficient condition for the granting of planning permission in an SDZ and, as a result, the planning judgment exercised by the planning authority at application assessment stage is significantly attenuated. He considered that the application of SPPR3 to planning schemes would radically alter the function of planning authorities in relation to such applications, to an extent and in a manner very difficult to reconcile with the structure of the PDA 2000.

- they must be complied with rather than merely had regard to, and so, in effect, constitute laws as opposed to guidelines.
- they transfer competence from planning authorities to the Minister.

337. Such a view is echoed by Humphreys J in **Cork County Council v The Minister for Housing #2**[519] to the effect that "*Local self-government is such an important part of our constitution that, to my mind, the courts should be vigilant to see that this power of the central government is not exceeded or misused*" in the particular context of the preparation and content of the "*environmental contract*"[520] and "*representation in solemn form*"[521] that is the development plan. To this one might add the description of the development plan by Collins J in **Spencer Place**[522] as a "*critical element of the planning regime"* as the "*primary reference point for [the] assessment and determination"* of planning applications.

338. As to interpretive principles applicable to interpretation of the Height Guidelines 2018 and SPPR3, I confess to some puzzlement at the Board's reliance on **Atlantic Diamond**. I cannot see that it assists for present purposes. Collins J in **Spencer Place** addresses the interpretation of SPPR3 – but not as to the site location types to which it applies. **O'Neill**[523] addresses the relationship of SPPR3 to the §3.2 criteria of the Height Guidelines 2018 but not the question of the types and locations of sites to which SPPR3 applies. Nor does it address principles of interpretation generally. **Ballyboden**[524] invokes **XJS** principles governing interpretation of planning documents, including guidelines, although the treatment primarily considers development plans. As to guidelines, it cites Collins J in **Spencer Place**. It notes that "*policy documents such as guidelines and development plans are, unsurprisingly given their nature, properly written in broad open-textured terms with flexibility and holistic decision-making in mind: considerable room must properly be left for the judgment of the decision-maker."* Ballyboden also notes that "*avoidance of rigidity comes as a considerable price in lack of precision."* But that content of Ballyboden does not consider the specific interpretive issue thrown up by the fact that compliance with SPPRs is mandatory and whether, in the specific context of SPPRs, the "*considerable price in lack of precision"* can still be paid. While Ballyboden does consider SPPR3 in some detail,[525] it does not seem to me to do so in terms which assist here as to the principles of interpretation of SPPRs generally or SPPR3 in particular.

339. The Board cites in particular Ballyboden[526] and **Cork County Council**[527] correctly, for the lightness of obligations imposed by "*have regard to*" obligations as to guidelines and such as §3.1 of the Height Guidelines 2018. Ballyboden, in essence, holds that §3.1 of the Height Guidelines 2018, in identifying broad principles which decision-makers "*must apply*", cannot "*translate a statutory*

519 Cork County Council v Minister for Housing [2022] IEHC 281 (High Court (Judicial Review), Humphreys J, 27 May 2022).
520 Attorney General (McGarry) v Sligo County Council [1991] 1 I.R. 99.
521 Byrne v Fingal County Council [2001] IEHC 141, [2001] 4 I.R. 565, per McKechnie J. at p. 580.
522 §10.
523 O'Neill v An Bord Pleanála [2020] IEHC 356 McDonald J, 22 June 2020).
524 The Board cites §123. See §119 to §139.
525 §191.
526 §220.
527 Cork County Council v Minister for Housing Local Government and Heritage et al. [2021] IEHC 683 §58.

obligation limited to "having regard" into a legal imperative to apply guidelines." [528] That is undoubtedly so. But it was an observation made in dismissing an argument that it was not open to the Board, in having regard to guidelines, to pick and choose elements of the guidelines which it would and would not apply. It explicitly distinguished the "*shall apply*" obligation as to SPPRs and was not addressing the manner in, and extent to which, §§3.1 and 3.2 informed the interpretation of SPPR3 as to its scope of application to particular types of location. In my view, §§3.1 and 3.2 do inform that scope, interpreting the Guidelines as a whole, as I must. That is not the same thing as saying that, in applying SPPR3 to a location within its scope, the principles stated in §3.1 must be applied. Given the obligation to comply, as to whether an SPPR applies to a particular site, what is required is clarity.

Height Guidelines 2018 & SPPR3

340. Colbeam correctly cite **Pembroke Road**[529] for the proposition that the policies underlying the 2016 Act and the Height Guidelines 2018 include that of combatting urban sprawl outwards by consolidating and strengthening the built-up area, permitting higher buildings in such areas. Colbeam correctly cite **Ballyboden**[530], where SPPR3 was invoked, as to a site 7.5km from Dublin city centre, to the effect that the "*clear thrust of the Height Guidelines 2018 is to advocate increased building height in appropriate urban and suburban locations*".

341. The Height Guidelines 2018 are the "*Urban Development and Building Heights Guidelines*".[531] Accordingly, we expect them broadly to address "urban" rather than non-urban matters - suggesting that subject matter significantly addressed therein is considered "urban". On any view, the Height Guidelines 2018 significantly bear on development in suburban areas. The same can generally be said of the "*Sustainable Residential Development in Urban Areas (Cities, Towns & Villages) 2009"*[532] which notably encompass even villages. §1.12 of the Height Guidelines 2018 describes those 2009 Guidelines as "*Complementary policy advice … for consideration in combination with these guidelines*". All this suggests that, in general, suburbia is considered part of the urban area.

342. §1.11 of the Height Guidelines 2018 describe their task as "*to set out national planning policy guidelines on building heights in relation to urban areas, as defined by the census*". I was not, at trial, referred to any such definition. However, since trial I sought the views of the parties as to whether I could take judicial notice of the Census in that regard and drew their attention to the content I thought relevant. I invited their brief written submissions, which I have considered. The Board and Colbeam thought I could take such judicial notice of the content in question: the Applicants thought not.

528 §220.
529 Pembroke Road Association v An Bord Pleanála [2022] IESC 30 §§77 & 80.
530 §34.
531 Emphasis added.
532 Emphasis added.

343. The law of judicial notice was not much in dispute. Judicial notice may be taken of (i) established or well-known facts or (ii) matters which are capable of accurate demonstration by reference to readily accessible sources of indisputable accuracy. **Greene**[533] is authority that:

> *"Judicial notice refers to facts which a Judge can be called upon to receive, and to act upon, either from his general knowledge of them, or from enquiries to be made by himself for his own information from sources to which it is proper for him to refer ... Judicial notice is therefore a means of establishing rather than providing a fact… The Court is entitled to act upon such facts as if they were given in evidence before the Court by a competent witness in the ordinary way. That does not, of course, mean that the Court is bound to accept that evidence any more than it is bound to accept any other evidence which may be put before it. The doctrine of judicial notice concerns itself with the method of establishing facts rather than the weighing of conflicting evidence."*

344. Colbeam lists examples of judicial notice of facts which, though not within the judge's knowledge, are indisputable and readily ascertainable from reliable sources. The list includes:

- population figures – **Oloo-Omee**.[534]
- historical facts – **Ó Caomhanaigh**.[535]
- geographical facts – **K v RAT**.[536]
- public documents and information gleaned from the Oireachtas website as to the date on which it had passed a statutory resolution – **Mitchell**.[537]

345. The Applicants submit that the meaning of "urban" is not an "*established or well-known fact*" or a matter capable of accurate demonstration by reference to readily accessible sources of indisputable accuracy and that, on XJS principles, intelligent laypersons interpreting guidelines would not consult other documents. I accept the first observation but not the second.

346. And the first observation misses the point. The question is not whether there is an "*established or well known*" meaning of the word "urban". The question is what the word "urban" means "*as defined by the census*". It is not a question of ordinary meaning of the word but of its specific meaning incorporated by reference in the 2018 Guidelines.

533 Greene v Minister for Defence [1998] 4 IR 464 Lavan J.
534 Oloo-Omee v. Refugee Appeals Tribunal [2012] IEHC 455 §22 – "I am prepared to take judicial notice of the fact that the population of Nigeria was approximately 162.47 million people in December 2011."
535 State (O'Connor) v. Ó Caomhanaigh [1963] IR 112 "The Court may, I think, take judicial notice of the historical fact that Whiteboys were mainly Papists ... There can be no doubt that in the political and social attitude of the time the persons whose tumultuous activities were to be restrained and punished would be Papists or reputed Papists and perhaps other "disaffected persons"". "It is unnecessary to go into the history of the organisation known as the "Whiteboys" or its aims and objects beyond noting that it sprang into being from agrarian discontent and that the disturbances or activities associated with that name "Whiteboy" were, strictly speaking, essentially agrarian in character."
536 K v. Refugee Appeals Tribunal [2008] IEHC 294 at §18 - information as to the journey time from Dilla in Ethiopia to Kenya.
537 Mitchell v. Member in Charge of Terenure Garda Station [2013] 1 IR 651 at paragraph 23.

347. The Census of Population is taken periodically by the CSO[538] - a public body established under the Statistics Act, 1993. It is taken pursuant to that Act, European Law[539] and Statutory Instrument.[540] Statistics deriving from the Census are admissible in evidence[541] by production of a document purporting to contain such statistics and to be issued by the CSO. The CSO's Census 2016 Summary Report is readily accessible from the CSO website and well within the easy grasp of an intelligent layperson.[542] It is downloadable in a form which purports to be a document issued by the CSO. While the present issue is not one of proof of statistics within S.45 of the 1993 Act, I am happy that the 2016 Summary Report is a public document within the decision in Mitchell. As with every issue of proof, admissibility and reliability are not abstract concepts but are specific to what is to be proved. No doubt there is content on even the Oireachtas website of which judicial notice of its substantive accuracy may not be taken.[543] However, I am satisfied that the 2016 Summary Report, as to the specific content set out below, is a readily accessible source of indisputable accuracy at very least to the necessary task of proving on the balance of probabilities the fact at issue: the meaning of the word "urban" as understood for purposes of the Census.

348. The applicants argue that in **Redmond**[544] it was considered inappropriate, by reference to the perspective of the reasonable member of the public, to have regard to a previous development plan and the documents which had informed it, in interpreting the current plan. The difference is that, here, the intelligent layperson, enquiring and curious of the meaning of the word "urban", is explicitly referred by the Guidelines themselves to the Census for the answer to his/her question. I see no reason to assume the intelligent layperson would ignore that reference. There is no question of this placing an "unrealistic burden" on the reader - as was understandably the case in **Redmond**. These days, in my view, the intelligent layperson has ready access to the web (though whether what he or she finds there is reliable is a different question.)

349. The applicants argue there is no specific document called "the Census". That may be true. The Guidelines did not say there was such a document. That does not mean there is no such thing as "the Census". It must also be said that a "definition" of "urban" is not found in the 2016 Summary Report. But excessive and legalistic focus on the word "definition" in the 2018 Guidelines, would not accord with XJS principles of interpretation of guidelines and would underestimate the intelligent layperson. Such persons are not unresourceful. Nor are they, ex hypothesi, unintelligent. They would look to see whether the meaning of the word, as used by the CSO in the census, can be reliably discerned from its readily accessible public documents. I consider that it can.

538 Central Statistics Office.
539 Regulation (EC) No 763/2008 of the European Parliament and of The Council of 9 July 2008 on population and housing censuses.
540 S.I. No. 445/2015 - Statistics (Census of Population) Order 2015. S.I. No. 637/2020 - Statistics (Census of Population) Order 2020.
541 Statistics Act, 1993: 45.—Prima facie evidence of any official statistics may be given in all legal proceedings by the production of a document purporting to contain such statistics and to be issued by the Central Statistics Office or to be signed by the Director General.
542 Census2016SummaryPart1.pdf, accessed from https://www.cso.ie/en/csolatestnews/presspages/2017/census2016summaryresults-part1/ or it can be easily accessed from the cso.ie landing page.
543 One can read Dáil debates on the Oireachtas website. It is no disrespect to the denizens of the Dáil to say that I think even they would not suggest that every assertion made in those debates can, as to precise and complete factual accuracy, invariably be taken as holy writ.
544 Redmond v An Bord Pleanála [2020] IEHC 151, Simons J at §19 and 20.

350. The 2016 Summary Report, Chapter 2, Geographical Distribution, Table 2.2 lists "*Population of urban areas, 2011 and 2016*". The first "*urban area*" thus listed is "*Dublin city & suburbs*"[545] and it is clear that the population of Dublin city & suburbs is included in the *"Urban Total".* Figure 2.3, entitled "*Share of population in urban areas*" to the effect that 39% of the State's population live in Dublin City can only be understood as including its suburbs. This view of suburbs as urban is confirmed by the census 2016 Definition of Aggregate Urban Area as referring to towns with a total population of 1,500 or more.[546] Indeed, as contrasted with Aggregate Rural Area, which includes towns of less than 1,500 persons. On any view, the suburbs of Dublin fall within that definition of Aggregate Urban Area. This suggests, again and in general, that suburbia is to be considered part of the urban area and in particular that the suburbs of Dublin are to be considered an urban area. Indeed, one need only suggest that the suburbs of Dublin are urban in nature to appreciate how unsurprising a proposition that is. In the foregoing light and in my view, it is clear that the phrase in the 2018 Guidelines "*urban areas, as defined by the census*" includes suburban areas. However, for reasons which follow, I would take the same view without recourse to the CSO's 2016 Summary Report.

351. It is convenient to say at this point that I canvassed with the parties the question of taking judicial notice of certain of the content of the Greater Dublin Strategic Planning Guidelines 1999 and the Residential Density Guidelines 1999. They have been superseded. On consideration of the parties submissions, I have decided not to have regard to either of these documents. Without formally deciding whether I could take judicial notice of them, I find doing so unnecessary to the conclusions I have reached and I see force in the Applicants' submissions that they would not be readily available to, or likely to be consulted by, the intelligent layperson seeking to understand the 2018 Guidelines.

352. The Applicants cite the Minister's foreword to the Height Guidelines 2018 as reflecting an aim to promote height in city and town as opposed to suburban sprawl outside cities and towns. They cite the foreword, correctly, as decrying "*extensive and constantly expanding low-rise suburban residential areas resulting in ever longer commutes, more and more congestion, empty suburbs by day and empty city and town cores by night. Our cities and our towns must grow upwards, not just outwards, if we are to meet the many challenges ahead. Constant expansion of low-density suburban development around our cities and towns cannot continue."*

353. In my view, the intelligent layperson would read a Ministerial foreword in particular as not intended for minute textual dissection. But even the text cited, in referring to "*expanding low-rise suburban residential areas resulting in ever longer commutes"* refers to the expansion of the suburbs and not to their consolidation. It maps more easily onto the concerns of SPPR4 rather than SPPR3. And its target is explicitly "*low-rise*" and "*low-density" suburban development"* – not higher-rise or higher density suburban development. The same can generally be said of the Applicant's citation of §1.4 as stating that many of our cities and towns continue to grow outwards rather than

545 Cork, Limerick, Galway and Waterford are likewise listed as including their respective suburbs.
546 Census 2016 Summary Report Appendix 3 Definitions.

consolidating and strengthening the existing built-up area. In my view references to "cities and towns" rather than their centres, readily encompass suburbia.

354. §1.9 of the Height Guidelines 2018 envisages "*building up and consolidating the development of our existing urban areas*". Yet again, §1.9 suggests that suburbia is to be considered part of the urban area. It continues:

> *"For example, if much of the future development in and around existing urban areas, where two-storey development is currently the norm, was of four-storey form as the default objective, it would be possible to provide substantially more population growth within existing built-up areas where there is more infrastructure already in place, rather than in greenfield locations which would need services. Therefore, these guidelines require that the scope to consider general building heights of at least three to four storeys, coupled with appropriate density, in locations outside what would be defined as city and town centre areas, and which would include suburban areas, must be supported in principle at development plan and development management levels."* [547]

355. True, there is juxtaposition of the urban and suburban in the Height Guidelines 2018 - §1.11 expands and applies NPF requirements *"in setting out relevant planning criteria for considering increased building height in various locations but principally (a) urban and city-centre locations and (b) suburban and wider town locations*". Nonetheless, even here it is notable that the same general policy of increased building height is to apply to both.

356. Chapter 3 of the Height Guidelines 2018 is entitled "Building Height and the Development Management process". §§3.1 and 3.2 repeatedly use the word "urban" in such phrases as "*urban locations", "urban centres", "urban areas", "urban regeneration", "urban design"* and "*urban redevelopment*". More specifically, §3.2 refers to "*Larger urban redevelopment sites*" and to enhancing the "*urban design context*" and requires that the "*proposal makes a positive contribution to the improvement of legibility through the site or wider urban area within which the development is situated…*". It is said that objectives of a planning application "*might include securing comprehensive urban regeneration and or an effective urban design and streetscape solution*". Required assessments may include "*an urban design statement* .." Neither of §§3.1 and 3.2 uses the words "suburban" or "greenfield".

357. §3.1 identifies "Development Management Principles" and states as to planning applications that "*it is Government policy that building heights must be generally increased in appropriate urban locations. There is therefore a presumption in favour of buildings of increased height in our town/city cores and in other urban locations with good public transport accessibility*." Thus, it is clear that §3.1

547 Emphases added.

contemplates urban locations other than town/city cores – the obvious implication is that suburbs are such other urban locations.

358. §3.1 continues:

> *"Planning authorities must apply the following broad principles in considering development proposals for buildings taller than prevailing building heights in urban areas in pursuit of these guidelines:*
> - *Does the proposal positively assist in securing National Planning Framework objectives of focusing development in key urban centres and in particular, fulfilling targets related to brownfield, infill development and in particular, effectively supporting the National Strategic Objective to deliver compact growth in our urban centres? ……"*

Rhetorically, can it be disputed that greater Dublin is a "*key urban centre*"?

359. Overall, I consider §3.1 to be a general introduction of principles relevant to the remainder of Chapter 3. It generally informs the interpretation of the remainder the Chapter, including its SPPRs. In its repeated use of the word "*urban*", I see no intent to contradistinguish "suburban". For reasons which I hope I have demonstrated, that is not the ordinary relationship of these two words, nor is it the scheme of the Height Guidelines 2018.

360. §3.2 requires planning applicants to "*demonstrate*" satisfaction of listed "*Development Management Criteria*", and "*Where the [Board] .. considers that such criteria are appropriately incorporated into development proposals, the relevant authority shall apply*" SPPR3. I have set out SPPR3A, as relevant, above.

361. SPPR3(B) is not directly relevant to the present case but cites "*Government policy that building heights be generally increased in appropriate urban locations*". Again, I see no intent to contradistinguish "suburban" locations.

<u>SPPR4</u>

362. SPPR4 ensues from §§3.4 – 3.8 which are headed "*Building height in suburban/edge locations (City and Town)*" and refer to "*developments outside city and town centres and inner suburbs, i.e. the suburban edges of towns and cities ..".* So "inner suburbs" are contrasted with "suburban edges". Inter alia:

> *"3.6 Development should include an effective mix of 2, 3 and 4-storey development …… 4 storeys or more can be accommodated alongside existing larger buildings, trees and parkland, river/sea frontage or along wider streets.*

3.7 Such development patterns are generally appropriate outside city centres and inner suburbs, i.e. the suburban edges of towns and cities, for both infill and greenfield development and should not be subject to specific height restrictions. Linked to the connective street pattern required under the Design Manual for Urban Roads and Streets (DMURS), planning policies and consideration of development proposals must move away from a 2-storey, cul-de-sac dominated approach, returning to traditional compact urban forms which created our finest town and city environments.

3.8 Where the [Board] considers that such criteria are appropriately incorporated into development proposals, [it] shall apply …"

363. As relevant, SPPR4 requires that

".. in planning the future development of greenfield or edge of city/town locations for housing purposes, planning authorities must secure:
1. the minimum densities for such locations set out in the Guidelines … titled "Sustainable Residential Development in Urban Areas (2009[548]) …
2. a greater mix of building heights and typologies in planning for the future development of suburban locations; and
3. avoid mono-type building typologies …. particularly, but not exclusively so in any one development of 100 units or more.

Note that SPPR4 relates to two distinct types of location – *"edge of city/town"* and *"greenfield".*

SPPR4 - Greenfield & Infill

364. The Board say – for reasons I have set out above - that the Site is not a "*greenfield*" site within the meaning of §3.4. "Greenfield" is not defined in the Height Guidelines 2018. It is, perhaps unfortunately, assumed that the intelligent layperson would not merely understand the word but understand it in context. As a layperson, I would understand "greenfield" as having the ordinary meaning of simply a site which has not before been built on or perhaps one from which any buildings have long-since been removed leaving little trace and a green field. But, as will appear, I would not be correct.

365. My first reaction was that the fact that the Board's Order refers to the site as *"zoned and serviced lands in a built-up area*" is irrelevant to whether it is a greenfield site. "*Zoned and serviced lands"* may be greenfield, and it seems arguable as a matter of ordinary meaning that greenfield sites, such as sports pitches and houses with large grounds, may be surrounded by built-up lands. Nor, I think, is it relevant that the Site is part of "*an overall landholding [that] has been substantially*

548 The SPPR says 2007 but clearly means 2009.

redeveloped in the last c. 10-15 years".[549] The focus for this purpose must be on the Site itself. The inspector correctly describes the 2.12-hectare Site as including "*part of an afterschool".* But one look at Figure 1 above demonstrates that to suggest that the presence of the afterschool in the northeast corner of the Site determines the character of the Site as not greenfield is untenable. It is a small building on the edge of a large site.

366. The Inspector is cited as saying that the Site "*also includes some grass cover and disturbed ground".* First, and lest the word "*some*" – a word inserted in submissions and not used by the Inspector - be misinterpreted as diminutive, it is undeniably clear from Figure 1 that the *"grass cover and disturbed ground"* constitutes by far the greater part of the Site. Nor would I see the former and temporary use of some of the Site as a construction compound[550] as altering its character if otherwise greenfield. Moreover, Colbeam repeatedly and prominently in its planning application (not just "*at times*" as the Board submitted) itself categorised the Site as "greenfield" - a term with immediately apparent resonance, not least as to the Height Guidelines. It is striking that neither the factors identified retrospectively by the Board in its submissions, nor any other factors, prompted the Inspector or the Board in its Impugned Permission, to say that the site was not greenfield in the teeth of Colbeam having so categorised it.

367. However, §1.9 of the Height Guidelines 2018 prefers development *"within existing built-up areas where there is more infrastructure already in place, rather than in greenfield locations which would need services."* At least generally, services tend to be relatively readily available to sites surrounded by built-up lands. SPPR4 applies the same policies as to density, height and building typology to "*greenfield or edge of city/town locations*" – which suggests that the two categories have common characteristics such that the same policies fit both. Green fields are most typically found on city/town edges.

368. I have already noted that §1.12 of the Height Guidelines 2018 describes "*Complementary policy advice … for consideration in combination with these guidelines*" as including the Urban Residential Guidelines 2009. Given this express reference, the intelligent layperson could be expected to consult those 2009 Guidelines. They categorised "*Appropriate locations for Increased Densities*" by reference to the following categories: (a) City and Town Centres; (b) 'Brownfield' Sites (within city or town centres); (c) Public transport corridors; (d) Inner suburban/infill; (e) Institutional Lands; (f) Outer Suburban/'Greenfield' Sites.[551] So both the 2009 Guidelines:

- distinguish each of the above categories from each other, inter alia distinguishing "*Inner Suburban/Infill*" from "*Outer Suburban/'Greenfield' Sites*", and distinguishing both from "*Institutional Lands"*.
- associate "*Infill"* sites with the "*Inner Suburban*" – observing that the provision of dwellings in inner suburbia can be provided by infill.

549 Inspector's report §2.1.
550 Inspector's report §10.3.3.
551 Sustainable Residential Development in Urban Areas (Cities, Towns & Villages) 2009 §5.4 et seq.

- associate "*Greenfield*" Sites with "*Outer Suburban*" and explicitly define "*Outer Suburban/ 'Greenfield' Sites*" as "*open lands on the periphery of cities or towns whose development will require the provision of new infrastructure, roads, sewers and ancillary social and commercial facilities, schools, shops, employment and community facilities*".
- observe of "*Institutional Lands*", that "*A considerable amount of developable land in suburban locations is in institutional use. Such lands are often characterised by large buildings set in substantial open lands which in some cases, may offer a necessary recreational or amenity open space opportunity required by the wider community*." This description seems to me consistent with location in either outer or inner suburbia.

369. Consistently with these definitions, the 2016 Action Plan[552] referred to the *"… tendency for the development sector to prefer housing provision in peripheral or greenfield sites on the edges of urban areas over brownfield or re-development opportunities to a disproportionate and undesirable level. This creates demands for additional transport and other infrastructure and can lead to isolation from communities and services. … An excessive reliance on greenfield development and underdevelopment of existing but under-utilised urban or brownfield land is not sustainable".*

370. The NPF[553] observes that

> *"…….. the fastest growing areas are at the edges of and outside our cities and towns, meaning:*
> *A constant process of infrastructure and services catch-up …*
> *A gradual process of run-down of city and town centre and established suburban areas ……*
> *That most development takes the form of greenfield sprawl that extends the physical footprint of our urban areas, …*
> *A preferred approach would be compact development that focuses on reusing previously developed, 'brownfield' land, building up infill sites, which may not have been built on before and either reusing or redeveloping existing sites and buildings."*

371. This NPF text is instructive not merely for putting greenfield sprawl at the edges of and outside cities and towns but for contrasting greenfield with *"infill sites, which may not have been built on before"*. It is also instructive given the explicit purpose of the Height Guidelines 2018 to apply NPF objectives.[554] And though neither the Inspector nor the Board explicitly categorises the Site as "Infill", it is noteworthy that the Inspector, cites[555] relevant NPF policy objectives as including NPO 35[556] to "*Increase residential density in settlements, through a range of measures including reductions in vacancy, re-use of existing buildings, infill development schemes, area or site-based regeneration and increased building heights*" in justification of the material contravention as to height and density and in her Recommended Order[557] as adopted by the Board.

552 P24.
553 Project Ireland 2040 National Planning Framework 2018 §2.6.
554 Forward & Chapter 1 generally.
555 §§6.3 & 10.6.6, 10.14.6, 11.6, 16.
556 National Policy Objective.
557 P107.

SPPR3 & Height - Conclusion

372. I confess to jibbing at the Board's idea that a site in Goatstown, about 5km south of Dublin city centre, is in the "*inner suburbs"* of Dublin. Equally, I accept that it is far from on the "*suburban edge"* of Dublin and perhaps I am subliminally confusing "inner city" with "inner suburbs". Given the meaning of "infill" as unbuilt land, my initial reaction - that the ordinary meaning of "greenfield" is simply a site which has not before been built on or perhaps one from which any buildings have long-since been removed leaving little trace - must be wrong.

373. Ultimately, and having regard to the long-standing association, in guidelines and policy documents, of the term "*greenfield*" with edge of city/town locations and infrastructural deficits, I have concluded that the Site is not a greenfield site within the meaning of the relevant Guidelines. The Site is on Institutional Lands – which is consistent with location in both inner and outer suburbia. Ultimately, I accept the Board's view that that the various guidelines imply a bipartite, as opposed to a tripartite, categorisation of suburbia, such that what is not outer suburbia at the edge of a city/town is inner suburbia. On that view, and as it is clearly not an edge of city site, the Board correctly categorises this Site as in inner suburbia. It follows that I reject the Applicants' argument that SPPR4, not SPPR3 applies to the Site. §3.4 makes clear that SPPR4 applies only to areas "*outside city and town centres and inner suburbs*".

374. But of itself, that does not necessarily imply that SPPR3 applies to the Site – perhaps no SPPR does. I agree that §§3.1 and 3.2 both introduce and illuminate SPPR3, repeatedly use the word "Urban" and never use the word "Suburban", much less "Inner Suburban". However as stated above, §3.1 states a ".. *presumption in favour of buildings of increased height in our town/city cores and in other urban locations with good public transport accessibility*". That implies that there are "urban" locations other than "*town/city cores"* – and as I have said, the obvious candidate for such other urban locations is the suburbs.

375. It does not seem likely that the policies as to building height of the NPF and the Height Guidelines themselves are intended to govern building height in core urban areas (by SPPR3) and Outer Suburban areas (by SPPR4) but not the areas between them – in the Inner Suburban areas. I suppose such a view could reflect a policy decision that increased height is suitable to town and city centres and to what one might term "new" development areas on outskirts where perceived effect on existing low-height neighbourhoods would be limited. But I do not think I can infer such a policy or such a meaning in the Guidelines.

376. It is difficult to avoid the impression that the drafters of the Height Guidelines failed to fully appreciate the importance of taking a clearer approach to the meaning of important concepts used to describe the scope of application of SPPRs. A certain vagueness and flexibility is permissible - perhaps even desirable - in guidelines to which the decision-maker need merely have regard. However, it is necessary, in drafting guidelines which include SPPRs with which decisionmakers must

comply as a matter of legal obligation, to adopt, in furtherance of legal certainty, language that more distinctly outlines the scope of application of that obligation of compliance. It would have made the guidelines and SPPRs clearer and the task of lawyers easier, and this section of this (admittedly overlong) judgment shorter, had they made it express that, for purposes of the Height Guidelines 2018 the word "urban" generally included suburbia. The Applicants understandably emphasise **Spencer Place**[558] and **Killegland**[559] as to the necessity of clarity as opposed to ambiguity in SPPRs which, of their nature, override Development Plans. However, in the end, on an overview and not without some hesitation, I take the view that the position is, to use the word deployed by Humphreys J in **Killegland**, "*tolerably"* clear.

377. For reasons I have set out above, it is my view that §§3.1 and 3.2 of the Height Guidelines both illuminate the meaning of SPPR3 and in their reference to matters "*urban*" incorporate reference to the "*suburban*", such that SPPR3 does apply to suburban sites and to the Site. The Board was right to find that the Proposed Development is to be located on "*urban lands*" and to apply SPPR3 as it did. Accordingly, Ground 4 is dismissed.

GROUND 5 – SPPR3 & DAYLIGHT

Daylight - Introduction

378. This ground asserts invalidity of the Impugned Permission, insofar as SPPR3 of the Height Guidelines 2018 applies to the lands, as contravening:

- the sunlight/daylight requirements/criteria of §3.2 of the Height Guidelines 2018 as applicable to SPPR3.
- the Apartment Design Guidelines 2020[560] with which the Board, the Applicant pleads, must comply under S.9(3) of the 2016 Act.[561]

The Applicant pleads also that the Proposed Development does not "comply with"

- BS8206-2:2008 - Lighting for Buildings - Part 2: Code of Practice for Daylight[562] (Daylighting Code).
- BRE Site Layout for Planning for Daylight and Sunlight: A Guide to Good Practice (BRE Guide)[563]

and/or contains material errors of fact.[564]

379. Though the terms of Ground 5 do suffice to plead the point, they do not make it obvious that at issue here is that §3.2 of the Height Guidelines 2018 sets the criteria for the application of

558 Spencer Place v Dublin City Council [2020] IECA 268.
559 Killegland v Meath County Council [2022] IEHC 393.
560 Sustainable Urban Housing: Design Guidelines for New Apartments (2020).
561 Obligation to apply relevant SPPRs.
562 British Standard: Lighting for Buildings - Part 2: Code of Practice for Daylight - as revoked and replaced by BS EN 17037:2018
563 The BRE is the British Research Establishment, 2011 – described by Humphreys J in Atlantic Diamond as "A private group of British planning consultants."
564 Sic.

SPPR3 in terms which require the Board to take "*appropriate and reasonable regard*" of "*quantitative*[565] *performance approaches to daylight provision*" outlined in guides like the BRE Guide and the Daylighting Code. In this case what is at issue is daylight provision to the "*living spaces*" - the 99 clusters are described by Colbeam as "*each with* a *communal Living/Kitchen/Dining room" ("*LKD*")*.[566] Note the description of the LKD as in combined and single terms. Such daylight provision is measured as an "Average Daylight Factor" ("ADF"). An average indoor illuminance of 1% APF equates to $\frac{1}{100}$ of the outdoor unobstructed illuminance.

Daylight - Grounds

380. The Applicants plead that the BRE Guide requires that LKD spaces be assessed by reference to an ADF standard of 2% (being the higher of 2% applicable to kitchens and 1.5% applicable to living rooms[567]), whereas Colbeam's Daylight/Sunlight report incorrectly,

- excluded the kitchens from the combined LKD spaces.
- assessed the living/dining rooms only - and those by reference to an ADF standard of 1.5%, instead of 2% which would have applied but for the exclusion of the kitchens.
- failed to quantitively assess the kitchens at all.

The Applicants plead that the Inspector did not advert directly to these errors and simply accepted Colbeam's analysis[568]. The Applicants plead that all this vitiates the Impugned Decision.

381. The Applicants plead that §3.2 of the Height Guidelines 2018 and the Apartment Design Guidelines 2020 set out daylight criteria and also requirements applicable where a proposal will not be able to fully meet those criteria. I set these out below. They plead that, as the daylight provision was not properly assessed, it was not possible to consider whether those requirements were met.

382. As a separate matter, the Applicants plead[569] that Colbeam's Daylight/Sunlight Report does not take into account the permitted and ongoing development of Roebuck House.[570] It failed to consider windows on the "South Bay" of the House and included a demolished rear extension. Nor did it assess a building for which there is planning permission to the rear of Roebuck House. Thus, the Report contained material errors of fact such that it was impossible for the Board to assess the potential impact of the proposed development on the residential amenity of future occupiers of Roebuck House.

565 Emphasis added.
566 SHD Application form – description of proposed development. Inspector's report §§3.1, 10.1.1, 10.6.2, 10.8 12, 16.
567 The Code of Practice provides that in rooms used for combined purposes, the ADF standard is the highest for any of the uses. See Atlantic Diamond Ltd v An Bord Pleanála [2021] IEHC 322 (High Court (Judicial Review), Humphreys J, 14 May 2021).
568 Cited in the Inspector's report §10.8.4.
569 As identified in the submission of Ms Jennings to the Board.
570 Pursuant to permission D11A/0595.

Daylight - Opposition & Some Comment

383. The Board accepts that that the ADF standard of 2% applies to LKD spaces as the higher of 2% applicable to kitchens and 1.5% applicable to living rooms but says this was "reflected" in Colbeam's Daylight/Sunlight Report. It pleads, "*However, it is not the case that all kitchens and living rooms in the proposed development were combined into a single room such that this applied. Where kitchens will be separated from the living room with a partial separating wall, it is legitimate to assess the living room as a living room only applying the 1.5% standard*."

384. I pause to observe that in this plea the Board failed to recognise, even at this late point, the factual position discernible - though not expressly set out - in Colbeam's Daylight/Sunlight Report. The plea clearly assumes that 2% was applied to LKD spaces save for limited instances in which the kitchens and living rooms were not combined into a single room. In fact, no kitchens and living rooms were combined into a single room for purposes of analysis in Colbeam's Daylight/Sunlight Report. This was not even clear at trial until a late stage and resulted in some misconceived discussions.[571]

385. The Board pleads that Colbeam's Daylight/Sunlight Report[572] demonstrates that the ADFs of the living spaces, separate from but linked to kitchens (and where the dining areas are to be located in the well-lit living spaces), exceed the relevant standard. Furthermore, the Proposed Development comprises student accommodation units rather than conventional dwelling units, with different kitchen requirements for food preparation therefore applying.

386. I pause, again, to observe that even accepting the premise that kitchens may be separated from living/dining spaces for daylight assessment purposes, the Board does not address in its pleading the fact that the result of that approach was to not quantitively assess the kitchens at all. Nor was any evidence that I have seen before the Board or the Court that, as to their need for light in kitchens, students' requirements are any less than those of the general population.

387. Colbeam pleads that it was reasonable to consider the living/dining spaces and kitchens separately, given that they are to be separated by a wall and so are separate spaces. Colbeam pleads also that even if each living room, dining room and kitchen is assessed together, as a combined space, with a target value of 2.0%, a similar (albeit lesser) level of compliance is achieved. This is mere assertion – unquantified and retrofitted by Colbeam in these proceedings to the Impugned Decision. It was not asserted to the Board.

388. Like the Board, Colbeam does not explain why that wall resulted in not quantitively assessing the kitchens - as could easily have been done in the Daylight/Sunlight Report, the very method of

571 Day 3 p221 et seq & p241 & p242.
572 §6.6.

which is quantification. Nor was any evidence or explanation before the Board that the justification for exclusion of the kitchens from assessment was due to walls separating them from the living/dining spaces. These, again, are explanations retrofitted in these proceedings.

Daylight - Height Guidelines 2018 & SPPR3 – "have regard to" or "comply"?

389. SPPR3, as relevant, is set out above in my consideration of Ground 4. As to the "*criteria above*" cited in SPPR3, §3.2 of the Height Guidelines 2018, under the heading "*Development Management Criteria*", provides that

> *"In the event of making a planning application, the applicant shall demonstrate to the satisfaction of the Planning Authority/ An Bord Pleanála, that the proposed development satisfies the following criteria:"*

Amongst those "following criteria" are the following:

> *"At the scale of the site/building*
> - *The form, massing and height of proposed developments should be carefully modulated so as to maximise access to natural daylight, ventilation and views and minimise overshadowing and loss of light.*
> - *Appropriate and reasonable regard should be taken of quantitative performance approaches to daylight provision outlined in guides like the (BRE Guide and the Daylighting Code of Practice).*
> - *Where a proposal may not be able to fully meet all the requirements of the daylight provisions above, this must be clearly identified and a rationale for any alternative, compensatory design solutions must be set out, in respect of which the planning authority or An Bord Pleanála should apply their discretion, having regard to local factors including specific site constraints and the balancing of that assessment against the desirability of achieving wider planning objectives. Such objectives might include securing comprehensive urban regeneration and or an effective urban design and streetscape solution."*

As will be apparent from the first excerpt above, the maximisation of access to natural daylight is a function which form – i.e. design - is expected carefully to follow.

390. In **Killegland Estates**[573], Humphreys J, citing SPPR3, described "*Appropriate and reasonable*" as an *"intensifier*" of the more common "have regard to" obligation. That intensifier "*generally connotes an additional degree of weight to be given to the matter to which regard is to be had, with a general enhancement of the level of reasons that have to be given for not affording such weight*".

573 Killegland Estates v Meath County Council & Giltinane [2022] IEHC 393.

In this he echoed his view, expressed in **Atlantic Diamond**[574], of an argument that the BRE Guide is not mandatory:

> *" …. the reference to guidelines like the two identified certainly includes having regard to both of the two guides identified …"*[575]
>
> *"The mandatory s.28 guidelines require appropriate and reasonable regard to be had to the BRE guidelines. That takes them well out of the "not mandatory" simpliciter category."*[576]
>
> *"The obligation is to have "appropriate and reasonable regard" to guides of this nature, and regard would not be appropriate or reasonable unless one considered all of the material and acted in conformity with it or, if not, explained why."* [577]
>
> *"If, having regard to the relevant guidelines, the developer is not able to fully meet all the requirements regarding daylight provisions, then there are three very specific consequences.*
> *(i). this must be clearly identified;*
> *(ii). a rationale for any alternative compensatory design solutions must be set out; and*
> *(iii). a discretion and balancing exercise is to be applied."*[578]

391. Here again we see the complexity which may arise from the language of S.28 guidelines in the context of SPPRs. By S.28 PDA 2000, the Board is obliged merely to have regard to guidelines. SPPRs apart, the terms of those guidelines cannot, by their expression in mandatory terms, amplify that obligation to have regard to guidelines into an obligation to comply with guidelines or carry such Ministerial guidelines into effect.[579] That would be ultra vires the Minister. However, by S.28(1C) PDA 2000, the Board must comply with SPPRs – not merely have regard to them. In the present case, SPPR3 identifies, by explicit cross-reference to text of the Height Guidelines 2018 outside the SPPR itself (i.e. in §3.2), "criteria" for the application of SPPR3. Absent SPPR3 such text would be covered merely by the "have regard to obligation".[580] But "criteria", of their nature, are requirements. So I respectfully agree with Humphreys J that the net effect of the cross-reference of SPPR3 to those criteria is that satisfaction of those criteria is mandatory if SPPR3 is to be applied - as opposed to the Board being obliged merely to have regard to those criteria in deciding whether to apply SPPR3. In any event, I am bound by his view. This rather complex effect - by which SPPRs can transmute narrative content of guidelines from "have regard to" obligations to obligations to comply (at least if the relevant SPPR is to be invoked) - amply justifies the concern Collins J in **Spencer Place** that clarity be expected of the drafters of S.28 guidelines and SPPRs in particular.

574 Atlantic Diamond Ltd v An Bord Pleanála [2021] IEHC 322 (High Court (Judicial Review), Humphreys J, 14 May 2021).
575 Atlantic Diamond §29.
576 Atlantic Diamond §33.
577 Atlantic Diamond §40 – See also §42.
578 Atlantic Diamond §27.
579 Cork County Council v Minister for Local Government [2021] IEHC 683 (Humphreys J, 5 November 2021) §45.
580 Leaving aside the fact that its content makes no sense other than by reference to SPPR3.

Daylight - Apartment Design Guidelines 2020

392. It is, at least, puzzling that Ground 5 asserts that s.9(3) of the 2016 Act requires the Board to "comply" with the Apartment Design Guidelines 2020.[581] It quite obviously does not, at least as here relevant. S.9(3) of the 2016 Act requires the Board to "comply" with SPPRs. The Apartment Design Guidelines 2020 contain SPPRs, but none are relevant to Daylight/Sunlight issues. Hence, the Boards' obligation as to the Daylight/Sunlight provisions of the Apartment Design Guidelines 2020 arises under S.9(2), not S.9(3), of the 2016 Act and is to "have regard" to them. That is a far lesser obligation than that pleaded - of compliance.

393. Nonetheless, the Apartment Design Guidelines 2020 do cover some of the same Daylight/Sunlight ground as, and in terms consistent with, the Height Guidelines 2018 and SPPR3, and so bear some review here. In explaining the desirability of dual aspect apartments, the Apartment Design Guidelines 2020 make the important, general and indisputable observation that

> *"The amount of sunlight reaching an apartment significantly affects the amenity of the occupants."*[582]

So it comes as no surprise that the BRE Guide says

> *"People expect good natural lighting in their homes .."*[583]

394. As to content of planning applications, the Apartment Design Guidelines 2020, state:

> *"6.5 The provision of acceptable levels of natural light in new apartment developments is an important planning consideration as it contributes to the liveability and amenity enjoyed by apartment residents. In assessing development proposals, planning authorities must however weigh up the overall quality of the design and layout of the scheme and the measures proposed to maximise daylight provision with the location of the site and the need to ensure an appropriate scale of urban residential development.*
>
> *6.6 Planning authorities should have regard to quantitative performance approaches to daylight provision outlined in guides like the (BRE Guide and the Daylighting Code of Practice) when undertaken by development proposers which offer the capability to satisfy minimum standards of daylight provision.*
>
> *6.7 Where an applicant cannot fully meet all of the requirements of the daylight provisions above, this must be clearly identified and a rationale for any alternative, compensatory design solutions must be set out, which planning authorities should apply their*

581 Sustainable Urban Housing: Design Standards for New Apartments. Guidelines for Planning Authorities issued under Section 28 of the Planning and Development Act, 2000 (as amended) December 2020.
582 §3.16.
583 §1.1.

discretion in accepting taking account of its assessment of specific.[584] *This may arise due to a design constraints associated with the site or location and the balancing of that assessment against the desirability of achieving wider planning objectives. Such objectives might include securing comprehensive urban regeneration and or an effective urban design and streetscape solution."*

395. The foregoing is consistent with the Height Guidelines 2018 and SPPR3. I underline "*minimum standards*" not to suggest that the Apartment Design Guidelines 2020 render such standards strictly legally binding. I do so to draw attention to the planning judgement stated in the Guidelines as to the importance of the issue of natural light as it contributes to the liveability and amenity enjoyed by apartment residents and the view that achievement of these minima will normally be the result of reconciliation of natural lighting issues with countervailing considerations – not the starting point to the diminution of which the effect of countervailing considerations will be applied. Nor are any of these observations intended to suggest an obligation on the Board higher than that to have regard to the Apartment Design Guidelines 2020. But, in substance, such a higher obligation can arise via the Height Guidelines 2018 §3.2 and SPPR3 - as established in **Killegland**, and **Atlantic Diamond**.

Daylighting Code & BRE Guide

396. The BRE Guide is explicitly intended to be read with, and is for use in applying, the Daylighting Code.[585] The BRE Guide sets sunlight/daylight standards/targets & assessment methodologies – though neither rigidly[586] – as "*In special circumstances the developer or planning authority may wish to use different target values*".[587] That inevitably prompts the question: are the circumstances special and what is special about them? The examples of special circumstances given as justifying lesser targets[588] do not apply in the present case - either in terms or by analogy – nor has it been suggested that they do. Nor were any special circumstances identified by Colbeam to the Board or to the Court.

397. The BRE Guide records that "*It is purely advisory and the numerical target values within it may be varied to meet the needs of the development and its location. Appendix F explains how this can be done in a logical way, while retaining consistency with the British Standard recommendations*

584 Sic.
585 BS 8206-2: 2008.
586 The BRE Guide §1.6 reads "The advice given here is not mandatory and the guide should not be seen as an instrument of planning policy; its aim is to help rather than constrain the designer. Although it gives numerical guidelines, these should be interpreted flexibly since natural lighting is only one of many factors in site layout design."
587 While Mr Dalton's affidavit cited verbatim the passage set out in the next-preceding footnote, he omitted the criterion of "special circumstances".
588 For example, in a historic city centre, or in an area with modern high-rise buildings, a higher degree of obstruction may be unavoidable if new developments are to match the height and proportions of existing buildings. The Site is not in a city centre, is not in an historic area, and is surrounded by low-rise.

on interior daylighting."[589] So, the BRE Guide envisages that departures from its numerical target values be done:

- in accordance with Appendix F.
- in a logical way.
- while retaining consistency with the Daylighting Code (which sets the targets).

The foregoing requirements are consistent with the BRE Guide's envisaging use of different target values "*in special circumstances".*

398. The Daylighting Code and the BRE Guide adopt the concept of ADF as a tool to assess adequacy of natural lighting of rooms. The Daylighting Code is not before me but the BRE Guide[590] states that "*ADF is a measure of the overall amount of daylight in a space*" and cites the Daylighting Code to the effect that it recommends *"an ADF of 5% for a well daylit space and 2% for a partly daylit space*". It says that "*Below 2% the room will look dull and electric lighting is likely to be turned on*." The BRE Guide cites the Daylighting Code as giving *"minimum values of ADF of 2% for kitchens, 1.5% for living rooms and 1% for bedrooms".* Similarly, Colbeam's Daylight/Sunlight report[591] cites the Daylighting Code as recommending an ADF of 5% for a well daylit space where no additional electric lighting is available, and 2% for a partly daylit space with supplementary electric lighting. So, well daylit requires 5% ADF and 2% is partly daylit.

399. Consistent with this understanding of the Daylighting Code, the BRE Guide says:

> *"The amount of daylight a room needs depends on what it is being used for."*[592]
>
> *"Living rooms and kitchens need more daylight than bedrooms."*[593]
>
> *"If a predominantly daylit appearance is required, then the ADF should be 5% or more if there is no supplementary electric lighting, or 2% or more if supplementary electric lighting is provided. There are additional recommendations for dwellings of 2% for kitchens, 1.5% for living rooms and 1% for bedrooms. These additional recommendations are minimum values of ADF which should be attained even if a predominantly daylit appearance is not achievable."* [594]

So, the recommendations of 2% for kitchens, 1.5% for living rooms and 1% for bedrooms are minima which do not achieve "*a predominantly daylit appearance*" but at 2% "*a predominantly daylit appearance*" can be achieved by use of supplementary electric lighting. The BRE Guide unsurprisingly comments that, while the minima can be used as targets for obstructed situations, better is desirable.[595]

589 See Summary.
590 §2.1.8 citing BS 8206-2.
591 Colbeam's Daylight/Sunlight report §4.6.
592 §2.1.6.
593 §2.1.13.
594 See Appendix C.
595 §2.1.9.

400. Of particular note is the BRE Guide[596] to the effect that:

> *"Non-daylit internal kitchens should be avoided wherever possible, especially if the kitchen is used as a dining area too. If the layout means that a small internal galley-type kitchen is inevitable, it should be directly linked to a well daylit living room."*

I take "non-daylit" here to imply no windows. The phrase "well daylit" appears, as has been seen above, to require an ADF of 5%. This appears to mean that the BRE Guide is to the effect that to provide adequate daylight to a small non-daylit internal galley-type kitchen requires a direct link to a living room daylit to the 5% ADF standard.

401. Colbeam's Daylight/Sunlight Report[597] repeatedly records, that "*For LKD spaces, a target value of 2% ADF is applied*." This is misleading as the Report also takes the view that there are in fact no such spaces. This target does not appear in the BRE Guide. However, in **Atlantic Diamond** Humphreys J noted that the Daylighting Code:

> *"……. expressly provides that where rooms are used for combined purposes, the appropriate standard is the ADF that is highest for any of the uses. Thus, insofar as kitchens are combined with living rooms in the proposed development, the appropriate ADF would be the higher of the 1.5% standard for living rooms and the 2% standard for kitchens...."*[598]

402. Accordingly, it is clear that (though not explicitly stated in the Daylight/Sunlight Report) the 2% target for LKD spaces was adopted not just as a matter of professional judgement by the author of the Daylight/Sunlight Report, but in compliance with the obligation imposed by SPPR3 and §3.2 of the Height Guidelines 2018 that appropriate and reasonable regard be had to the Daylighting Code.

403. I bear in mind that guidelines are not to be interpreted as if statutes. On the other hand, that is not a warrant to deprive them of real meaning. Of the foregoing from the Daylighting Code and the BRE Guide I note:

- "*People expect good natural lighting in their homes ..*"[599]
- Natural light is not the only design criterion and flexibility may be required to accommodate design criteria other than daylighting. (That said, the 2018 Guidelines requires that design be "*carefully modulated so as to maximise access to natural daylight".*[600]*)*
- The standards are explicitly minima, which do not achieve a "*predominantly daylit appearance"* and which may be departed from (in the sense of these minima not being achieved) "*in special circumstances".*

596 §2.1.14.
597 E.g. p52.
598 §34.
599 BRE Guide §1.1.
600 §3.2 of the Height Guidelines 2018.

- Such departures are to proceed and be justified in a logical way, in accordance with Appendix F of the BRE Guide and while retaining consistency with the Daylighting Code.
- The Daylighting Code standard for ADF in LKD spaces is 2%.
- Kitchens require greater – not less - natural lighting than other living areas. The Daylighting Code standard for ADF in kitchens is 2% - as opposed to 1.5% for sitting and dining areas.
- Non-daylit internal kitchens are to be "*avoided wherever possible*".
- A small internal galley-type kitchen is contemplated only where,
  - "*inevitable",*
  - *"directly linked to a well daylit living room*". Well-daylit means 5% ADF.

It is important to remember that in Irish planning law at least, the Daylighting Code and the BRE Guide are guidelines, not, as it were, black letter law. However as will be seen, they are guidelines to which the law requires an enhanced level of regard by planning decision-makers.

Daylight - Atlantic Diamond & Walsh

404. Consideration of Colbeam's Daylight and Sunlight Report in this case, as it bore on the issues identified §3.2 of the Height Guidelines 2018, was not just a matter of having regard to S.28 Guidelines. It was a question of discerning whether the mandatory criteria set in §3.2 of the Height Guidelines had been satisfied in order to discern, as the Board did, that the Board was both entitled and compelled by S.28(1C) PDA 2000 to apply SPPR3. And it bears recollection that SPPR3 may be applied only where the "*applicant for planning permission sets out how a development proposal complies with the criteria*" stipulated in §3.2 of the Height Guidelines 2018.

405. **Atlantic Diamond**[601] was a challenge to an SHD Permission. I have addressed it in some degree above. Humphreys J started his consideration of the issue as to daylight and sunlight analysis by rejecting a challenge to the applicant's standing which had been based on the fact that the applicant had not raised the point before the Board and on an assertion that the applicant was not personally affected by the issue. The first argument was rejected on the basis that there is no obligation on an objector in a planning application to correct the developer's homework[602] - an objector need not point out omissions and defects in the paperwork of an applicant to the Board. The objector is entitled to rely on the Board to see to all of that, and if it isn't done, the objector can raise the issue for the first time in judicial review. The second argument was rejected on the basis that there is no rule that you can only make points in a planning context that you are personally affected by – anyone can make a planning objection on any legally cognisable ground.

601 Atlantic Diamond Ltd v An Bord Pleanála [2021] IEHC 322 (High Court (Judicial Review), Humphreys J, 14 May 2021).
602 Citing Reid v An Bord Pleanála [2021] IEHC 230 (Unreported, High Court, 12th April 2021).

406. Humphreys J identified the relevant documents as (i). The Building Height Guidelines; (ii). The Apartment Guidelines; (iii). The BRE Guide; (iv). the Daylighting Code (v). The Board's decision; (vi). The Inspector's report; and (vii). The developer's daylight study. He considered each in turn.

407. As to SPPR3 and the §3.2 criteria "At the scale of the site/building" of the Building Height Guidelines 2018[603] Humphreys J held that "If, having regard to the relevant guidelines, the developer is not able to fully meet all the requirements regarding daylight provisions, then there are three very specific consequences". I have set these out above.[604]

408. As to the BRE Guide, Humphreys J noted that the developer's Daylight/Sunlight Study[605] stated that the BRE Guide is not mandatory. He commented: *"That is something of a downplaying of the situation. The mandatory s.28 guidelines require appropriate and reasonable regard to be had to the BRE guidelines. That takes them well out of the "not mandatory"* simpliciter *category."* In referring to the "*mandatory s. 28 guidelines"* and the phrase *"appropriate and reasonable regard",* Humphreys J was clearly referring to the §3.2 criteria of the Height Guidelines 2018 to which the Board would merely have been obliged to have regard but for the terms of SPPR3 which requires compliance. I have elaborated on this position above.

409. Humphreys J noted that the developer's Daylight/Sunlight Study, as to ADF, identified the appropriate guidelines for kitchens at 2% and living rooms at 1.5% and, as recorded above, noted the 2% ADF standard applicable to LKD spaces.[606] He observed: *"Unfortunately, the developer applied a 1.5% standard to these combined rooms ..."*.[607] He observed of the Daylight/Sunlight Study:

> *"Crucially, however, that document does not articulate (and neither does the Board) that we are dealing here with combined kitchens and living rooms. They are simply treated as living rooms with no acknowledgment of the problem. That methodological gap in the reasoning would in my view be fatal in itself."*

He continues:

> *"The second fatal aspect arises when combined with the fact that the British Standard*[608] *requires that the highest standard of a combined room be applied. That has a direct read-across to the BRE guidelines with which the developer claimed compliance, wrongly on this analysis. The board acted erroneously in endorsing that without properly stress-testing it against the guidelines. If they had done so, the incompatibility would have come to light. Thus the case*

603 Set out above.

604 (i). this must be clearly identified; (by the developer)

(ii). a rationale for any alternative compensatory design solutions must be set out; (by the developer) and

(iii). a discretion and balancing exercise is to be applied." (by the Board).

605 Properly, the Daylight Sunlight and Overshadowing Study.

606 BS 8206-2: 2008 - the Daylighting Code of Practice.

607 §34.

608 BS 8206-2: 2008.

> *illustrates a certain laxity in scrutiny, involving in effect the cutting-and-pasting of the developer's materials by the board without adequate critical interrogation."*

410. I pause to observe the necessity of active and critical interrogation by the Board of submissions by applicants for planning permission – indeed, of submissions by all participants in the process. That is a general obligation and is essential to fulfil the Board's public function as an independent and impartial quasi-judicial decision-maker and to public trust in its fulfilment of that function. It is also essential in order to justify the deference the Court accords it as an expert tribunal. Unless the Board applies its expertise in active and critical interrogation, deference to it is not justified. Charleton J in **Weston** adverted to similar considerations in when referring to the legislative intent enshrined in the PDA 2000, that any development be subject to proper scrutiny. In endorsing the inspector's interrogation of information proffered by the planning applicant in that case, he said *"Any planning application must be processed with scrupulous rigour."* Charleton J said:

> *"Planning applications seek to change the character of a neighbourhood and landscape. The granting of permission can be the fulfilment of a modest domestic ambition or the opening up of what is perceived to be the path to riches. Human nature, with its inescapable tendency to exaggeration, evasion and deception, is an integral part of this process. The role of an inspector under the planning code is to bring objectivity to bear in circumstances where assertions may be made that are unsupported; where what appears on the ground may be different to the maps and plans supplied; and where wishful thinking may be seen in the cold light of reality. An inspector is entitled to make his own observations not only in the context of the arguments advanced in favour of a planning permission, but as to how facts may be assessed. It may be fair to observe, in the context of planning applications especially, that those who seek permission rarely make errors against their own interest."*

411. The foregoing, against the facts of that case, refers to the entitlement of a planning inspector to make observations. However the tenor of the judgment, as to scrupulously rigorous scrutiny, speaks clearly not merely to the entitlements but to the obligations of the Inspector and the Board. They are perfectly entitled to accept information tendered by a planning applicant - but only after rigorous scrutiny. And, as to significant issues, both scrutiny and its rigour must be apparent: that is a primary function of an Inspector's report. It is to contain not merely summary but analysis. Indeed, the very function of expertise, and the reason it is accorded deference, is to exercise judgment in analysis.

412. Further, the typical imbalance in resources as between developers of large projects on the one hand and objectors, drawn often from the community, on the other, justifies an emphasis on active and critical interrogation by the Board of submissions by applicants for planning permission and the active deployment of its own expertise in so doing. As Charleton J said: *"those who seek permission rarely make errors against their own interest."* O'Donnell J in **Balz**[609] observed that

609 Balz v An Bord Pleanála [2019] IESC 90 (Supreme Court, O'Donnell J, 12 December 2019) §45.

> *"It is of the utmost importance that planning authorities and the Board, on appeal (or, as is increasingly the case, the Board in those circumstances in which direct application can be made to it for permission), should carry out their functions as professionally and competently as possible. The system of appeal (or first instance application) to an independent expert body was a great advance when introduced in 1976. The imbalance of resources and potential outcomes between developers on the one hand, and objectors on the other, means that an independent expert body carrying out a detailed scrutiny of an application in the public interest, and at no significant cost to the individual, is an important public function."*

Accordingly, it is unsurprising that recently Humphreys J in **Treascon**[610] emphasised *"the need for thoroughly independent and detailed expert scrutiny by the statutory decision-maker".*

413. It is hardly necessary to add that to preserve public faith in the process, not merely must that "*detailed scrutiny*" have been done – it must be seen to have been done. As O'Donnell J said in Balz in the specific context of consideration of objections:

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

414. In that context it bears observing that, though the Board's obligations of expert *"detailed scrutiny of an application in the public interest"* and active and critical interrogation arise in any event, such submissions and those of planning authorities, for which statute provides, have a clear role in drawing the Board's attention to matters which may require particularly active and critical interrogation.

415. Returning to **Atlantic Diamond**, Humphreys J took the view that:

> *"The inspector impliedly accepted the developer's documentation and in particular the developer's statement of consistency, which is in some respects reiterated word for word by the inspector. Paragraph 12.4.9 of the report states that an average daylight factor analysis indicated that of 135 rooms tested, 125 exceeded the BRE guidelines. That is a positive assertion of fact. That assertion is impliedly based on the developer's interpretation of the guidelines. Thus, we are well outside the realm of planning judgement or O'Keeffe …. unreasonableness. This is a question of interpretation of a document with some legal relevance. That is ultimately a*

610 Concerned Residents of Treascon and Clondoolusk v An Bord Pleanála [2022] IEHC 700 (High Court (Judicial Review), Humphreys J, 16 December 2022).

matter for the courts. Deference to the decision-maker's interpretation does not arise any more than it arises in the interpretation of any other legally relevant instrument."

The inspector accepted again pretty much word for word the developer's analysis as to why the departure from the BRE guidelines (in the sense of the ten rooms tested that in the developer's view did not meet the standard) was reasonable. The inspector stated that a balance must be struck between overall regeneration of the site and a minor reduction in VSC (Vertical Sky Component) of some of the proposed units at ground floor."[611]

416. I note, at the cost of repetition, that Humphreys J observed in this context:

"The board's defence is essentially that the 2018 guidelines are permissive and that there is some sort of absolute choice between the BRE guidelines and the British Standard or indeed some other document. I don't accept that argument. The obligation is to have "appropriate and reasonable regard" to guides of this nature, and regard would not be appropriate or reasonable unless one considered all of the material and acted in conformity with it or, if not, explained why.

The board predictably says that there is an element of discretion and planning judgement and endeavours to characterise this as an unreasonableness challenge. As noted above, that misses the point that the 2018 ministerial documents are binding mandatory statutory guidelines which require as a matter of legal obligation that the decision-maker have appropriate and reasonable regard to identified standards.

……. What is required is appropriate and reasonable regard, and if the standards identified are not being complied with, it must be clear why.

The developer argues that the applicant's consequential argument that if the standards are not met there needs to be "a rationale for any alternative" is a new separate and unpleaded argument. But it is not. It is just a consequence of the breach of the requirement to have due and adequate regard to the standards." [612]

417. Of some present interest given the affidavit of Mr Dalton[613], Humphreys J noted that

"An interesting alternative argument was raised by the developer that a departure from 2% to 1.5% would have been appropriate to give effect to the design standards in the apartment guidelines of 2018 which favour balconies as private amenities basis to be accessed from living rooms (para. 3.35 to 3.36)[614]. That may well be an argument that the notice party could have

611 §§36 & 37.
612 §40 et seq.
613 See below.
614 Sic.

made; but we are reviewing a decision here, not writing a new one, and no such analysis was spelled out by the decision-maker."[615]

I have above identified a "retrofitted" explanation given in this case.

418. Humphreys J concluded[616]

"For these reasons, I would uphold in full the point pleaded under this heading at ground 35 that "the report fails to identify the fact that, in this application, the living room in every apartment within the proposed development has a shared use with a kitchen, and the assessment fails to apply the British Standard recommendation that "the higher minimum ADF value should apply". The correct minimum value against which to assess ADF for the sample locations should have been 2.0%, not 1.5%."

419. In **Walsh**[617] Humphreys J applied Atlantic Diamond. He observed that:

- Other than as to obligatory content of a planning application, *"……. 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*".

- *"Insofar as it was suggested that it is impermissible in principle not to apply an Average Daylight Factor (ADF) of 2%, that is clearly incorrect. The development criteria do allow for a departure from that in certain circumstances provided certain procedures and criteria are complied with".*[618]

- *"… departure from the criteria, which includes a departure from the daylight standards, must be clearly identified*". (The reference here is to the criteria imposed by §3.2 of the Height Guidelines 2018 for the application of SPPR3).

- Though the inspector understood in general terms that the development did not comply with the 2% ADF value, the obligation is to identify departures "*clearly*" and that "*has to mean identifying the extent of the non-compliance*" …. *"… the impact and assessment of a design depends on the extent of non-compliance with design standards in precise terms. The mere fact that it can be said that some unquantified or not fully quantified part of a scheme does not comply with standards is totally inadequate information for the purposes of a proper and rational evaluation in planning terms or a logically watertight environmental assessment."*

615 §44.
616 §45.
617 Walsh v An Bord Pleanála & St Clare's GP3 Ltd [2022] IEHC 172 §47 et seq.
618 Emphasis added.

420. As to kitchens, the necessity of identifying, not merely non-compliance, but the "*extent of the non-compliance*" was not recognised or met by Colbeam in this case.

421. The facts of Walsh are not entirely clear to me, but a useful sense of the standards required of inspectors and of the failure in that case to meet those requirements is apparent in the following[619]:

> *"… she finds 97.3% of the development as "complying with standards". That is, superficially, an answer to the problem, but unfortunately it ceases to be so when one realises that her analysis is based on a false premise. Insofar as she assesses non-compliance, it is by reference to the debased standard proposed by the developer of 1.5% ADF …*
> *That is not what the Building Height Guidelines require. She should have started with the applicable standard, which is 2%, then "clearly identified" the extent of the non-compliance, and only at that point interrogated the rationale for such non-compliance by reference to the objective planning considerations referred to in the guidelines. Instead … she accepted a basis for "defaulting to a 1.5% value" as a "target" …, and thus found the 97.3% "complying with standards". But 1.5% is not the standard, the standard is 2%. Essentially, she asked the wrong question and fell into an error of law in doing so.*
>
> *That error occurred at the outset of the analysis – we never even got to whether a departure from standards was really justifiable having regard to the sort of objective planning features envisaged by the guidelines, as opposed to being driven by an economic desire to maximise profit by building as many apartments as possible on the site."*

422. Clearly, Humphreys J expected, and I agree, that the inspector would first clearly identify the standards and then any departure from the standards and only thereafter, but necessarily, interrogate "*whether a departure from standards was <u>really justifiable</u> having regard to the sort of <u>objective</u> planning features envisaged by the guidelines*".

Humphreys J concluded on this issue:

> *"55. The need to identify in <u>precise and clear terms the extent</u> of any failure to meet standards <u>is critical</u> to the evaluation of the acceptability of a project. The extent to which an application falls short of building design standards, and why, is critical to whether a sub-standard design such as this one should be accepted. <u>It can't be lawfully accepted without first clearly identifying the extent of non-compliance</u>, which wasn't done. The board's figures of 97.3% compliance are a sleight of hand that erases the actual standard in favour of the developer's standard. The clear language of the ministerial guidelines sends the message that the reasonable exercise of planning judgement requires that an enthusiasm for quantity of housing has to be qualified by an integrity as to the quality of housing. Among other obvious*

619 Walsh §§53.

reasons, and speaking about developments generally rather than this one particularly, such an approach reduces the prospect of any sub-standard, cramped, low-daylight apartments of today becoming the sink estates and tenements of tomorrow."

423. While I might not have expressed it in quite those terms - and the phrase "*sleight of hand*" is clearly applicable to the view taken by Humphreys J of the Board's approach to the particular facts of that case - I entirely agree with his general sentiment that the reasonable and lawful exercise of planning judgement requires that enthusiasm for quantity of housing must be reconciled with integrity as to the quality of housing. Reconciliation of quantity of development with quality of development is a fundamental purpose of the planning system.

Colbeam's Daylight/Sunlight Report & Analysis Thereof

424. Colbeam's Daylight/Sunlight Report, as to ADF of internal proposed development, claims that of 177 rooms assessed "*100%"* meet the guidelines.[620] It comments:

"It should be noted, that considering the scale and massing of the proposed development, its design has yielded good results in terms of sunlight and daylight. Its design has minimized effects on surrounding environment and itself and achieved high levels of compliance for daylighting within the units. A 100% compliance rate on ADF should be accepted as a high level of compliance with regard to the BRE Guidelines."

425. It also states[621]

"This study has assessed the Average Daylight Factor (ADF) received in all private rooms across the lowest habitable floors of the proposed development.
The ADF value in 177 No. of the assessed spaces was above the values as set out in the BRE Guidelines.
The compliance rate is 100%, for a scheme of this size, this should be considered an excellent level of compliance."

426. Apart altogether from a more detailed analysis, this bold claim of 100% "*compliance*" with the guidelines must be read as appreciably diluted by the following Introduction in the Daylight/ Sunlight Report.[622] It lays the basis for an appreciably less clearly definitive achievement than the claim of 100% compliance suggests. The Report states that the standards and assessment methodologies "suggested" in the BRE Guide and the Daylighting Code have been "referenced" in

620 §1.0 Executive Summary; also §7.5.
621 §7.5.
622 §2.0.

the report.[623] I am quite unsure what "referenced", in reality, means but it does not claim rigour in the context of a claim to "100% compliance". The report continues, to the effect that:

> *"Neither the British Standard nor the BRE Guide set out rigid standards or limits. The BRE Guide is preceded by the following very clear warning as to how the design advice contained therein should be used: "The advice given here is not mandatory and the guide should not be seen as an instrument of planning policy; its aim is to help rather than constrain the designer. Although it gives numerical guidelines, these should be interpreted flexibly since natural lighting is only one of many factors in site layout design."*
>
> *The authors comment:*
>
> *"That the recommendations of the BRE Guide are not suitable for rigid application to all developments in all contexts, is of particular importance in the context of national and local policies for the consolidation and densification of urban areas or when assessing applications for highly constrained sites (e.g. lands in close proximity or immediately to the south of residential lands)."*

427. While this may be correct as to the status of the BRE Guide and the Daylighting Code in their own terms,

- it renders a claim of "*100% compliance*" difficult to clearly understand or to verify.
- the report displays no appreciation, or even awareness, of the Height Guidelines 2018, SPPR3 of those Guidelines or the status of the BRE Guide and the Daylighting Code[624] as a result of their being cited in §3.2 of the Height Guidelines 2018, which sets the mandatory criteria for application of SPPR3.

428. The Daylight/Sunlight Report records that the student bedspaces are provided in 99 clusters of from 5 to 8 bedspaces "*each with a communal Living/ Kitchen/Dining room*".[625] This phrase is taken directly from Colbeam's description of the Proposed Development in its SHD Planning Application Form and is repeatedly used in many of its planning application documents - such as Colbeam's Planning Report,[626] Material Contravention Statement,[627] and Ecological Impact Assessment.[628] On occasion the word "*area*" replaces "*room*", but in either case the word used is always singular. This phrase is, equally unsurprisingly, found in the Inspector's Report[629] and in the Board Order.

623 §2.0.
624 BS 8206-2: 2008.
625 §2.0.
626 P3 – 7, 44 – 47, 63.
627 P2 – 6.
628 P2.
629 §§3.1, 10.1.1, 10.6.2, 16.0.

429. In my view, this phrase "*each with a communal Living/ Kitchen/Dining room*" is no accident. And on a common-sense[630] interpretation on **XJS**[631] principles as by an informed intelligent layperson, it refers to an essentially single "LKD" space combining the living, kitchen and dining functions. In addition, looking at the phrase as a matter of impression on such a layperson – an approach appropriate to the application of XJS principles – I would take the same view.

430. Were a more grammatical interpretation required, the singular "*a communal …. Room/Area"* confirms that view. So too does the fact that, if a living/dining room separate from the kitchen was intended, one would expect a phrase such as "*Kitchen and Living/Dining room".* Clearly, in the phraseology actually used, the word "living" relates, as does "dining", to the singular words "Room" and "area" and the interposition of "Kitchen" between "Living" and "Dining" implies that it also relates to the singular words "room" and "area". I am conscious that the foregoing is an exercise, perhaps tedious, on which the informed intelligent layperson is unlikely to embark. I do so only in deference to the arguments made against what I consider to be the correct and more-or-less obvious interpretation of the phrase on XJS principles.

431. Nor do I see that this view is upset by a consideration of the floor layout drawing which was before the Board and the Court.[632] As I understand, this is the LKD floor layout generally applied in the development. This view is amplified by a drawing[633] which was not before the Board but was prepared for the proceedings and exhibited by Colbeam with the intention of illustrating the opposite. In my view it is quite consistent with a generally open plan area comprising all three of the Living, Kitchen and Dining functions, with no door separating them and having a single common route and door to the rest of the building.

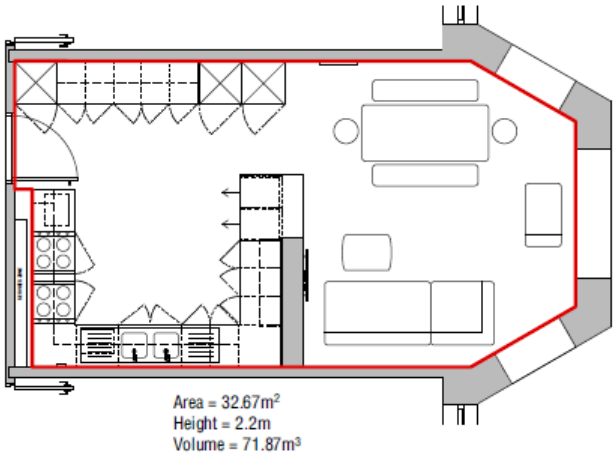

Figure 6A – Floor Plan - communal Living/ Kitchen/ Dining room.[634]

630 Camiveo Ltd v Dunnes Stores [2019] IECA 138 (Court of Appeal, Costello J, 9 May 2019).
631 In re XJS Investments Ltd [1986] IR 750; See generally Ballyboden Tidy Towns Group v An Bord Pleanála [2022] IEHC 7.
632 Figure 6A below.
633 Figure 6B below.
634 Note: this Figure is from a drawing prepared for the proceedings and exhibited by Colbeam – but on the basis that it depicted the floor plan in the Planning Application Drawings.

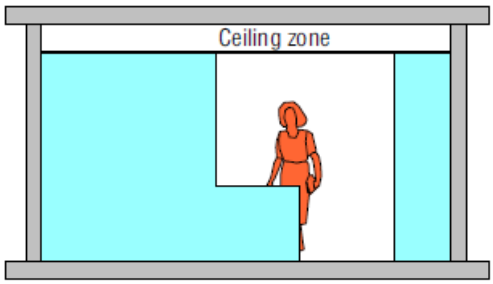

Figure 6B – elevation - communal Living/ Kitchen/Dining room.

- Note: it is apparent from the floor plan that the blue column to the right and the small "square" below the standing figure are not solid wall but kitchen units. In another plan submitted by Colbeam, the small "square" below the standing figure is denoted as an "Island Unit" over a bin storage area.
- To exit the living/dining area to the remainder of the cluster, one walks through the kitchen.
- This drawing was not before the Board.

432. Nowhere in in the Planning Application documents, insofar as drawn to my attention or as I have been able to find, is it suggested that each cluster is to have a communal Living/Dining room and separate Kitchen. That nowhere incudes the Daylight/Sunlight Report in which, on the contrary and under the heading "Defining Areas", the following appears:

> *"Many of the living spaces in the proposed development are open plan and connected to a kitchen and dining room (LKD)."* [635]

That the communal Living/Kitchen/Dining Rooms are properly viewed as a single space is confirmed by the Daylight/Sunlight Report in its following sentence:

> *"In such instances where the kitchens have a window on the external wall, the LKD will be analysed as one space with a target value of 2%."*[636]

Note that this approach – that the LKD spaces are open plan - is taken despite the author of the Daylight/Sunlight Report being aware of the floor layout and, I must presume, the elevation set out above, upon which Colbeam rely for the view, expressed on affidavit by that very author, that the kitchens are to be regarded as separate from the dining/living areas.

433. However the Daylight/Sunlight Report next states:[637]

635 §5.2.4.
636 §5.2.4.
637 §5.2.4.

> *"In units where the kitchens are completely internal and not serviced by window[638] on the external facade, the kitchen area will be omitted from the analysis area and a target value of 1.5% will be applied. These internal kitchens may require supplementary electric lighting for longer parts of the day as the ADF is likely to be lower than the target value of 2%."*

Note in the foregoing that what distinguishes an internal kitchen is, and is only, that it is not serviced by a window.

The words "*In units where*" clearly give the impression that such units are the exception, or at least that not all units have such windowless kitchens. That is not so. All kitchens are windowless.

434. Of this text, the Board submits that "*This approach is fully consistent with §2.1.14 of the BRE Guidelines*." I cannot agree unless, as is impermissible, one ignores in §2.1.14 the words "*avoided wherever possible*" and "*inevitable*". As far as I can see, those words were, indeed, ignored. Nor are the kitchens small galley-type within the meaning of §2.1.14. Nor does §2.1.14 suggest that even small galley-type kitchens can be excluded from daylight analysis. Indeed, the requirement that such a kitchen be directly linked to (and hence illuminated by light from) a well daylit living room implies the contrary.

435. Neither can I see how the admission that the ADF in kitchens – every kitchen - is likely to be lower than the target value of 2% in a degree unquantified and for periods of the day unquantified (all day for all we know) - and this in a windowless area (on Colbeam's case largely separated by a wall from the living/dining area from which its only daylight is to come) - can be reconciled with the claim of 100% compliance to which I have referred above.

436. The Daylight/Sunlight Report gives no explanation for why the absence of a kitchen window:

- Is, by reference to the terminology of the BRE Guide, "*inevitable*" or its avoidance not "*possible*" or is due to "*special circumstances*" justifying adoption of reduced daylight targets.

- Occurs despite "*careful modulation*" of form to *"maximise access to natural daylight".*

- Transforms the single "LKD" space, as Mr Dalton's affidavit would have it,[639] into two spaces comprising, as it were, separate "LD" and "K" spaces.

- Justifies the omission of the kitchen from the quantification analysis – not least when according to the BRE Guide it is that very space which requires more, not less, light than the living and dining areas. So there is no separate daylight analysis at all of the now-separated kitchen – despite the BRE Guide's statement that a small non-daylit internal galley-type kitchen, if unavoidable/inevitable - requires a direct link to a well-daylit living room and the admission that the kitchens in this Proposed Development will not meet targets.

638 Sic.
639 Infra.

- Quantifies, as Walsh requires, "*the extent of the non-compliance."*

- Justifies the benign assumption, not evidence-based, that such kitchens "*may require supplementary electric lighting for longer parts of the day as the ADF is likely to be lower than the target value of 2%*." We are not told how much lower - nor how long are the "longer parts" of the day during which supplementary lighting "may" be required. Nor are we told the degree of likelihood intimated by the word "may", or indeed the word "likely". This vagueness is especially notable in a report clearly premised, by reference to standards clearly premised, on the production of objective, evidence-based, mathematically computed, quantified data.

- Explains how ignoring these kitchens for purposes of ADF calculation is consistent with a claim of "*100% compliance*". Nor is there any explanation of how a vague and unquantified assumption (as opposed to a calculation) that "*ADF is likely to be lower than the target value of 2%"* – acknowledging that 2% is the target value – is consistent with a claim of "*100% compliance*". In short, "*100% compliance*" is claimed by the simple expedient of ignoring the non-compliance of the kitchens.

437. As has been seen, the Daylight/Sunlight Report asserts that it will assess the Average Daylight Factor (ADF) received in <u>all private rooms</u> across the lowest habitable floor of the proposed development.[640] That turns out to be an incorrect statement. As I have stated, the kitchens were omitted altogether from the ADF figures.

438. The Daylight/Sunlight Report does not directly state how many of the kitchens on the ground floor have no internal windows and hence have been omitted from the ADF calculations. However, it is possible to work it out from the tabulated ADF results.[641] That is because the tables tell us that for LKD spaces – i.e. including a kitchen with a window – a 2% target is applied, whereas *"Where the kitchen of an LKD is completely internal and is not serviced by a window, the kitchen area has been omitted from the assessment. In such instances, a target value of 1.5% has been applied to the living space".* That these two assertions are repeated in every tabulation of the ADF results clearly invites the reader to imagine that one may expect to find at least some examples of each. Yet, on my perusal, of the 18 ground floor "*living spaces*" listed, all were assessed to a 1.5% standard, thereby confirming that all kitchens had no windows and all kitchens were omitted from the ADF analysis. The only assessments at 2% were of studios.

439. I not been able to determine how many kitchens in the entire Proposed Development have no internal windows as the analysis is confined to the lowest floor. I make this observation as the Daylight/Sunlight Report asserts[642] that *"In an instance where a room does not achieve the recommended level of ADF, and is repeated on subsequent floors, calculations will be run on the*

640 §4.6.
641 §6.6.
642 §5.2.4.

upper floors to determine at what level that room type meets the guidelines." As to kitchens that was not done even for the ground floor.

440. Further, the Daylight/Sunlight Report does not at all address the question whether as contemplated in the BRE Guide[643], these are "*small internal galley-type kitchens*". That they were "galley" kitchens was first urged in these proceedings. "Galley" and "Galley kitchen" are not, as far as I am aware, terms of art. They are nowhere defined and so their ordinary meaning applies. "Galley kitchen" is an ordinary phrase with an ordinary meaning, interpreted on XJS principles and readily discernible to the intelligent informed layperson. Such kitchens are typically, though not invariably, small. But as the BRE guide envisages only small galley kitchens that aspect need detain us no further. What most distinguishes galley kitchens, in their ordinary meaning, is their shape. They are significantly longer than they are wide, with services, apparatus and storage on one or both sides of a walkway/standing area. The drawings in this case are not of galley kitchens nor of small kitchens, as contemplated by the BRE Guide. The shape is square and almost as big as the living space which is big enough to serve the 5 to 8 students residing in each cluster. Indeed, the Inspector even saw the size of the kitchens as providing amenity compensating for the narrowness of the bedrooms.[644] So she clearly saw them as large. Each kitchen has no less than two fridges, two sinks, two hobs and four runs of kitchen units. These are not galley-type kitchens – much less small galley-type kitchens. This is not a matter of planning judgement but one of the ordinary meaning of words. As was observed by the UK Supreme Court in Tesco v Dundee[645] as to an analogous issue of interpretation - "*planning authorities do not live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like it to mean*."

441. But in the end my view in hindsight, evidence on affidavit in this judicial review or urgings at trial that these are not small galley-type kitchens are not the point. Despite its "*referencing*" the BRE Guide, the Daylight/Sunlight Report does not call them "galley" kitchens or small kitchens. Nor does it excuse their lack of natural light on the basis that they are small galley-type kitchens. The word "galley" does not appear in the Daylight/Sunlight Report or in the Inspector's Report. Given the enormous body of papers to hand, I cannot claim to have done an absolutely exhaustive search, but I have failed to find in the papers any description of them as galley kitchens. More to the point, I was not pointed to anywhere in the papers in which they had been described as galley kitchens. The argument that these are galley kitchens is an artifact purely of the proceedings and an attempt to retrofit to the Impugned Decision a justification for the fact that no kitchens have windows and their exclusion from the daylight analysis.

442. Perhaps more significantly, the Daylight/Sunlight Report does not at all address the question whether, in the sense required by the BRE Guide[646], these kitchens without windows were "inevitable" or that it was not "possible" to avoid them. In fairness to the authors, that circumstance

643 §2.1.14
644 §10.8.12
645 Tesco Stores Limited v. Dundee City Council [2012] UKSC 13 – cited in Ballyboden Tidy Towns Group v An Bord Pleanála [2022] IEHC 7 §115.
646 §2.1.14.

could have arisen on foot of considerations outside their expertise and so may be for others to explain. But it is surprising that the Daylight/Sunlight Report ignored that aspect of the BRE Guide[647] altogether – if only to refer the reader to the justification elsewhere in the planning application papers of that inevitability or impossibility. Again, given the enormous body of papers to hand, I cannot claim to an absolutely exhaustive search, but I have failed to find in any description of these windowless kitchens as "inevitable" or their avoidance as not possible or any similar description. And, again more to the point, I was not pointed to anywhere in the papers in which they had been so described - much less that inevitability and impossibility explained or justified. As far as I have been able to discern, the issues of inevitability and impossibility were simply ignored. In short, there is no evidence that I can see before me, and there was none before the Board as far as I can see, that it was inevitable in putting student accommodation on this Site that all ground floor kitchens would be windowless despite the fact that the relevant standard required a higher, not a lesser, daylighting standard for kitchens as compared to other living spaces. Nor is there any evidence that the avoidance of such kitchens was impossible. Nor is the position as to upper floors apparent. Nor is there any evidence that the Inspector considered these issues in discharge of the Board's obligations of detailed scrutiny and scrupulous rigour.

443. Incidentally, and while the issue may require consideration in any other case in which it arises, I would not incline to the view that the inevitability and impossibility contemplated by the BRE Guide is of an absolute kind. No doubt, these are relative concepts of which a sensible view is to be taken in context - not least, many legitimate countervailing considerations may arise. However, that does not allow that these requirements of inevitability and impossibility can simply be ignored and their resolution with countervailing considerations remain unarticulated. As Humphreys J said in **Atlantic Diamond,** "*appropriate and reasonable regard*" must be had to these requirements.

444. In the foregoing light, and despite the baldly stated "*100% compliance"* claim made elsewhere in the Daylight/Sunlight Report, it is unsurprising to read therein that *"A combination of the calculated results and reasonable inference made from these results will be used give an approximated percentage compliance rate for the ADF for the proposed development as a whole."* All in all, based as it is on ignoring all kitchens for purposes of calculation, and not least as it is kitchens to which the highest standard is ordinarily applied, it is difficult to see the "*100% compliance"* claim as credible. Or at least there is no explanation in the Daylight/Sunlight Report of why it is credible despite the omission of the kitchens from the calculations.

445. The exclusion of the kitchens had another, pleaded, detrimental effect: it deprived the sitting and dining areas of the benefit of the 2% ADR standard, which was reduced to 1.5%. That said, all those areas comfortably exceeded 2%, so nothing turns on the issue.

647 §2.1.14.

Daylight - Dalton Affidavit sworn 13 January 2022

446. Mr Dalton is a director of the 3D Design Bureau, which prepared Colbeam's Daylight /Sunlight Report.[648] He cites the BRE Guide to the effect that:

> *"The advice given here is not mandatory and the guide should not be seen as an instrument of planning policy; its aim is to help rather than constrain the designer. Although it gives numerical guidelines, these should be interpreted flexibly since natural lighting is only one of many factors in site layout design."*[649]

He omits the immediately following sentence, which reads:

> *"In special circumstances*[650] *the developer or planning authority may wish to use different target values".*

The omission is regrettable given the light which the reference to "*special circumstances*" sheds on what precedes it. While one may argue what that light implies as to meaning, it should not have been obscured by an expert witness.

447. Mr Dalton justifies considering the kitchens separately from the living spaces on the basis that a wall separates them.[651] That wall and that rationale were not mentioned in the Daylight and Sunlight Report – only the absence of a kitchen window was cited. Nor were that wall and that rationale relied on by the decision-maker. As Humphreys J observed in **Atlantic Diamond**: *"That may well be an argument that the notice party could have made; but we are reviewing a decision here, not writing a new one, and no such analysis was spelled out by the decision-maker."*

448. Mr Dalton confirms that no kitchens had external windows – a fact discernible only on interrogation of the Daylight/Sunlight Report and not explicitly stated in it. On the contrary, the Daylight and Sunlight Report states that the 99 clusters come "*each with a communal Living/ Kitchen/Dining room*".[652] And the passage cited above and which I here repeat[653] appears to me designed to convey both that at least some *"kitchens have a window on the external wall"* such that *"the LKD will be analysed as one space with a target value of 2%"* and that the rationale for omitting other kitchens from analysis was the absence of a kitchen window – not that the kitchen was separated from the *Living/Dining* area by a wall:

> *"Many of the living spaces in the proposed development are open plan and connected to a kitchen and dining room (LKD). In such instances where the kitchens have a window on the external wall, the LKD will be analysed as one space with a target value of 2%. In units where the*

648 Daylight and Sunlight Assessment Report
649 BRE Guidelines §1.6
650 Emphasis added.
651 He considers Ground 5 at §18 et seq of his affidavit.
652 §2.0.
653 §5.2.4

> *kitchens are completely internal and not serviced by window on the external facade, the kitchen area will be omitted from the analysis area and a target value of 1.5% will be applied. These internal kitchen[654] may require supplementary electric lighting for longer parts of the day as the ADF is likely to be lower than the target value of 2%."*

449. Mr Dalton does not explain why, having separated the kitchens from the living/dining areas, the kitchens were then omitted from the mathematical analysis. Nor does he explain, by reference to the BRE Guide, whether these were "*galley*" kitchens or "small" kitchens or, more to the point, why it was "*inevitable*" that every kitchen on the ground floor had no window and whether and in what degree those kitchens were connected to "well-daylit" living areas as the concept of "well-daylit" is to be understood from the BRE Guide.

450. While stating that the BRE Guide and the Daylighting Code do not set out a "*rigid standard for limits*", he does not repeat the Report's claim of 100% compliance with those non-rigid standards or explain what that claim amounted to. Nor does he explain, in the context of that claim of 100% compliance, what is meant by the sentence, "*A combination of the calculated results and reasonable inference made from these results will be used to give an approximated percentage compliance rate for the ADF for the proposed development as a whole."* Nor does Mr Dalton mention SPPR3 or §3.2 of the Height Guidelines or his understanding of their implications, in terms of *"appropriate and reasonable regard"* for his consideration and application of the BRE Guide and the Daylighting Code.

451. Leaving aside the retrospectivity of his explanation of the treatment of kitchens in the Daylight and Sunlight Report – an explanation in terms not before the Board - his affidavit fails to explain the significant difficulties with that report as I have identified them above. Nor does Mr Dalton address the requirement, identified in **Walsh**, to identify, not merely non-compliance but the "*extent of the non-compliance*". It should be said that his affidavit was sworn before Walsh was decided, but it represents a significant lacuna.

<u>Daylight - Dalton Affidavit - Conclusion</u>

452. In my view it is clear, in terms of §3.2 of the Height Guidelines and by reference to the standard identified in **Atlantic Diamond**, that the "*the developer is not able to fully meet all the requirements regarding daylight provisions*". It is also clear that the developer has not *"clearly identified"* and has not quantified the respects in which that is so.

654 Sic.

Daylight - Inspector's report & Planning Authority Report

453. It remains to be considered whether, despite the failings identified above and paraphrasing **Walsh**, the shortcomings in Colbeam's material become a problem as having flowed into the Board's analysis. Also, the third "*very specific consequence*", identified by Humphreys J in **Atlantic Diamond** as arising "*If, having regard to the relevant guidelines, the developer is not able to fully meet all the requirements regarding daylight provisions*", is that "*a discretion and balancing exercise*" is to be applied. Humphreys J cites §3.2 of the Height Guidelines 2018 – "*An Bord Pleanála should apply their discretion, having regard to local factors including specific site constraints and the balancing of that assessment against the desirability of achieving wider planning objectives."*

454. Of course, in order to discern whether the application of discretion is required, and in order to exercise that discretion, the Board must first discern – even if the developer has failed to identify it – any failure to "*fully meet all the requirements of the daylight provisions above"* – i.e. the BRE Guide and the Daylighting Code.

455. The Inspector records that Colbeam had submitted a Daylight/Sunlight Report. She states[655] that the planning authority "noted" that the orientation of the site layout maximises sunlight and daylight to the interior of the scheme, thus increasing the residential amenity of the students. As this observation does not make clear whether the "interior" relates to the external and communal areas internal to the Site (as to which the Inspector addresses various issues regarding daylight/sunlight) or the question of sunlight/daylight to the habitable areas inside buildings, it is necessary to turn to the Chief Executive's report – from which it appears[656] that the planning authority noted "*that the Applicant also states*" that the orientation of the site layout maximises sunlight and daylight to the interior of the scheme, thus, increasing the residential amenity of the students. The passage does not shed further light on what is meant by "interior". Nor does it endorse Colbeam's view in this regard. This is merely the noting by the Inspector of the noting by the planning authority of a claim by Colbeam.

456. The Chief Executive's report[657] considers Colbeam's "Daylight Analysis". As to ADF to internal habitable spaces, the treatment consists of two sentences:

- "*The applicant has undertaken daylight analysis which assesses the level of daylight that would be achieved within a sample of bedrooms, kitchens and living areas*."
    - This is clearly incorrect – save perhaps as to studios – in that kitchens were excluded from the sample.

- "*The applicant notes that all the rooms assessed at the lower floors will meet or exceed the BRE recommended values, which is welcomed*."

655 P41.
656 P41.
657 P22.

- This attributes to Colbeam a result that is clearly incorrect as shown above. In welcoming it, the Planning Authority could, at a stretch, be considered to have endorsed it. But by no stretch is there anything like the scrutiny, much less critical interrogation, required by Atlantic Diamond and the other cases cited above.

These observations are not a criticism of the Planning Authority, which was not the decision-maker. I make them rather to demonstrate that the Board cannot call in aid the Inspector's reference to the Planning Authority Report in seeking to demonstrate compliance with obligations to scrutinise and interrogate Colbeam's Daylight/Sunlight Report.

457. The Inspector notes[658] the criteria set out in §3.2 of the Height Guidelines to the effect, as here relevant, that *"Additional specific assessment may also be required for issues including daylight and sunlight".* She next simply states: *"Having regard to the information outlined above it is my view, that the proposed development would be in compliance with SPPR3, having specific regard to the high-quality design and layout of the scheme and its contribution to the consolidation of the urban area."* It is not clear on what basis she considered that specific assessment as to daylight and sunlight was optional. Certainly, to this point of her report, beyond noting the presence of Colbeam's Daylight/Sunlight Report, it is clear that she does not record any interrogation of its content for the purpose of the exercise of the "*appropriate and reasonable regard", "scrutiny", "critical interrogation"* and "*discretion and balancing exercise*" identified by Humphreys J in **Atlantic Diamond** as necessary. The following passage from **Atlantic Diamond** seems applicable:

> *"That has a direct read-across to the BRE guidelines with which the developer claimed compliance, wrongly on this analysis. The board acted erroneously in endorsing that without properly stress-testing it against the guidelines. If they had done so, the incompatibility would have come to light. Thus the case illustrates a certain laxity in scrutiny, involving in effect the cutting-and-pasting of the developer's materials by the board without adequate critical interrogation."*

458. Here, and to the inspector's conclusion that SPPR3 applies, Colbeam's materials were not even cut and pasted and there is no evidence of any scrutiny, much less critical interrogation. I do not rule out the possibility that the Inspector and the Board could properly have taken a view different to those I have identified above on those issues arising on foot of the Daylight and Sunlight Report. But none of the issues identified above as arising on foot of the Daylight and Sunlight Report were identified by the Inspector and the Board or interrogated by the Inspector and the Board. And even if I am incorrect as to the identification of such issues, it can be said more generally that the Daylight and Sunlight Report was not scrutinised or critically interrogated. The very purpose of the expertise in the Board, to which the Court defers, and the premise of such deference, is scrutiny and critical interrogation.

658 Inspector's Report §10.7.5.

459. Of course, the Inspector's report must be read as a whole, and she later considers the Daylight and Sunlight Report as to "*potential daylight provision within the proposed scheme and overshadowing within the scheme*".[659] Of this, the Inspector says only that "*This assessment notes the use* (of) *the BS 8206-2: 2008 Code of Practice for Daylighting and the BRE guidance document: - site layout planning for daylight and sunlight (2011).*" She next finds that an updated version of the BS is inapplicable. She says nothing more at this point of the content of the Daylight and Sunlight Report on the issue of daylight provision in the Proposed Development.[660]

460. In short, there is no evidence in the Inspector's report of any consideration of the issues of, or the content of the Daylight and Sunlight Report as relating to, daylighting of the Kitchen Living and Dining areas (whether collectively or separately) of the clusters - much less analysis, scrutiny or critical interrogation.

Different Daylight Standards for Students

461. The Board pleads that "*the proposed development comprises student accommodation units rather than conventional dwelling units, with different kitchen requirements for food preparation therefore applying*." The Board's submits that "*the development in this case is a student accommodation complex, in which a galley type kitchen is for obvious reasons particularly appropriate*". My attention has not been drawn to any evidence:

- Supporting these assertions or justifying the plea and submission.
- Identifying the substance, nature or significance any such "*different kitchen requirements".*
- That Colbeam justified its application to the Board, as to daylight standards in kitchens, on foot of any such assertions or supporting material.
- That the Board relied on any such assertions in making its decision.

This is what I have termed impermissible "retrofitting" of reasons to the Impugned Decision – and of mere assertions at that.

Roebuck House & Permitted Building to its Rear

462. The Applicants plead that the Sunlight and Daylight Report as to shadowing effects on Roebuck House contained material errors of fact, such that it was impossible to assess the impact of the proposed development on the residential amenity of future occupiers of Roebuck House, in that the Report

- does not take into account the permitted and ongoing development of the house[661].

659 §10.8.3.
660 The inspector moves on at §10.8.4 to the Daylight and Sunlight Report as to impact on surrounding properties and at 11.5 she considered the report as it relates to Daylight and Sunlight of open spaces.
661 Pursuant to permission D11A/0595.

- failed to consider windows on the "South Bay" of the house.
- assessed the house on the basis that it has a rear extension - which extension is demolished.

The Applicants also plead that the Sunlight and Daylight Report failed to assess the impact of the proposed development on the residential of future occupiers of a building to the rear of Roebuck House for which planning permission has been obtained. The plea specifically invoked the submission of Ms Jennings to the Board, which is exhibited, as having made these complaints. Inter alia, that submission shows "before and after" images of the demolition of the rear extension.

463. The Board's Opposition is no more than a traverse asserting that the Daylight and Sunlight Report considered in full the impact of the development on surrounding properties including Roebuck Grove House. The same is true of Colbeam's Opposition, save for a plea that:

> *"The proposed development does not subtend an angle of more than 25° in a perpendicular section from Roebuck House and in accordance with the BRE Guidelines, it was not necessary to carry out any impact assessment on the windows of that property."*

464. Mr Dalton's affidavit confirms this plea. However, despite this plea, the Sunlight and Daylight Report does assess the effect on Roebuck House – sub nom "Our Lady's Grove, Goatstown Road". Indeed, it assesses two separate buildings by this name: The Grove Afterschool[662] and Robuck House.[663] For reasons unexplained, Roebuck House was assessed – and assessed as to Effect on Vertical Sky Component but not as to Effect on Annual Probable Sunlight Hours. The Sunlight and Daylight Report does not suggest that the assessment was unnecessary or precautionary only. Neither does it refer to the pleaded 25° standard identified by Mr Dalton. That said, the exhibited BRE Guide does appear to articulate such a standard.[664]

465. Mr Dalton also says that the analysis of the Sunlight and Daylight Report as to effect on Roebuck House "*is accurate, within a reasonable tolerance. It is highly unlikely that the impact to Roebuck House would have been any different, even if the reconfigurations that the applicants have mentioned were made*". He does not address the issue of the permitted building to the rear of Robuck House. In any event, I do not see that this invitation, which I consider merits-based on opinion not before the Board, and retrofitted, assists.

466. Though I am not clear I have fully understood the BRE Guide in this respect and though the point was not made to the Board, I am not prepared to find against the Impugned Decision on this point as it seems unnecessary to do so given other findings I make in this judgment. Nor, for this reason, does it seem necessary to consider the significance or otherwise of the demolition of the extension to Robuck House. Nor am I clear that I have sufficient information to decide the question

662 §6.1 Effect on Vertical Sky Component - §6.1.1 Our Lady's Grove, Goatstown Road; §6.2 Effect on Annual Probable Sunlight Hours - §6.2.1 Our Lady's Grove, Goatstown Road.
663 §6.1 Effect on Vertical Sky Component - §6.1.4 Our Lady's Grove, Goatstown Road.
664 §2.25, Figure 14, Figure 20, §§2.2.21, 3.1.15, 3.2.2, 3.2.7, 3.2.11.

of effect on permitted building to the rear of Robuck House. In particular, I heard no argument on the status, for this purpose, of a building permitted but not built at any material date. In the circumstances, I will refrain from deciding Ground 5 as it relates to Robuck House or permitted building to the rear. It will be a matter for the Board to re-consider this issue on any remittal of the decision.

Daylight - Conclusion

467. I note the view taken by Humphreys J in **Atlantic Diamond**, by which I am bound,

- of the status of the BRE Guide, and the Daylighting Code[665] in the application of the criteria entitling the Board to apply SPPR3 of the Building Height Guidelines 2018,

- of the enhanced obligation to have not merely regard, but *"appropriate and reasonable regard",* to the BRE Guide, and the Daylighting Code and

- that
  "If, having regard to the relevant guidelines, the developer is not able to fully meet all the requirements regarding daylight provisions, then there are three very specific consequences.
  (i). this must be clearly identified; (by the developer[666])
  (ii). a rationale for any alternative compensatory design solutions must be set out; (by the developer[667])
  (iii) a discretion and balancing exercise is to be applied."

468. On that basis it appears clear to me that Colbeam:
- is not able to fully meet all the requirements regarding daylight provisions.
- has not clearly identified that fact – on the contrary, it has denied that fact – claiming 100% compliance.
- has not identified the "*extent of the non-compliance*" – much less clearly done so.[668]
- in consequence has failed to set out any alternative compensatory design solutions or a rationale for such solutions.
- has not fulfilled its enhanced obligation to have, not merely regard, but *"appropriate and reasonable regard",* to the BRE Guide and the Daylighting Code.
- has therefore not complied with the criteria set by §3.2 of the Building Height Guidelines for the application of SPPR3.

469. Adopting the rationale of **Atlantic Diamond**, it appears to me that here, the Board

665 BS 8206-2: 2008.
666 My words but clearly the sense of the decision of Humphreys J.
667 My words but clearly the sense of the decision of Humphreys J.
668 See Walsh supra.

- "*Acted erroneously in endorsing that without properly stress-testing it against the guidelines. If they had done so, the incompatibility would have come to light. Thus the case illustrates a certain laxity in scrutiny, …….. … without adequate critical interrogation*."
- Has not fulfilled its obligation, imposed by §3.2 of the Height Guidelines by way of criteria for application of SPPR3, to have *"appropriate and reasonable regard"* to the BRE Guide and the Daylighting Code.

So the Impugned Permission is legally in error in that:

- it contravenes the criteria set in §3.2 of the Height Guidelines for application of SPPR3.
- the application to the Living/Dining area of a 1.5% ADR standard was not justified in the Planning Application.
- the omission of the kitchens – all kitchens - from any quantified Daylight Assessment was not justified in the Planning Application.

470. Adopting the rationale of **Atlantic Diamond**, the foregoing constitute *"fatal methodological gaps in reasoning"* and the Impugned Decision will be quashed on this account.

GROUND 6 – PUBLIC TRANSPORT CAPACITY

471. Here, the case made is that:

- if SPPR3 of the Height Guidelines 2018 applies, the Impugned Decision is invalid as contravening the obligation imposed by SPPR3 that the planning applicant set out how its development proposal complies with the criteria listed in §3.2 of the Height Guidelines 2018.
- §3.2 requires at the scale of the city/town that the site be well-served by public transport with high capacity, frequent service and good links to other modes of public transport.
- Colbeam failed to demonstrate, and the Board failed to address, the adequacy of transport capacity before granting permission in material contravention of the Development Plan. Counsel for the Applicants described this as the "key point".

472. In **Ballyboden**,[669] I pointed out that frequency and capacity of public transport are related but different concepts and that "as to a particular planning application, public transport capacity is an intensely practical – as opposed to a theoretical - issue" and that "the criterion is that the site itself be "well served" – by which I understand well served actually as opposed to theoretically …". It was implicit in that judgment, but I add explicitly, that what is to be well-served is the Site as it would be developed pursuant to the Impugned Permission and so the concept of being well-served is relative to the public transport requirements of the Proposed Development. I do not think that it is incumbent on the Developer or the Board or any other participant in the process to state the very obvious: that where public transport is frequent and broadly high-capacity, the adequacy of that

669 Ballyboden Tidy Towns Group v An Bord Pleanála [2022] IEHC 7 §82 et seq.

capacity is likely to be issue only in the morning and evening rush-hour unless particular circumstances indicate otherwise.

473. In **Ballyboden** what was at issue was what might be called an ordinary SHD of dwellings to be occupied by a population likely, in considerable degree, to be commuters reliant on public transport. That was also in a context in which the planning authority considered that "*the level of access to frequent public transport is very low at this location*" such that a density 140 dph[670] was not, in its view, *"sustainable on the strength of a single high frequency bus route".*

474. The context here is very different and on the evidence the position is obvious. That conditions the analysis required. The Proposed Development, consisting of specifically student accommodation, is intended and expected to primarily serve students attending UCD's nearby Belfield campus. In these proceedings no doubt has been cast on that essential proposition – though, no doubt, some students of other institutions may avail of the Proposed Development. A "Transportation Statement" formed part of the Planning Application. It points out that the Site is within walking distance of UCD, Bellfield (approx. 850m – a 10-minute walk or a 2-3-minute bike ride to the rear/Clonskeagh entrance). In some detail it describes the derivation of a predicted modal split of morning rush hour means of travelling to UCD at walking (64.5%), cycling (30%), public transport (5%) and private car (0.5%). On its assumption of 175 students (25% of student residents) attending 9:00 a.m. lectures that equates to 9 students availing of public transport at rush hour[671]. The accuracy of those predictions has not been impugned. I do not see that the Inspector can be criticised for accepting them.[672] And there was no contrary evidence before the Board. But if one doubled the figure to 18 it would make no practical difference. The public transport capacity requirements of the Proposed Development bear no comparison to those at issue in the Ballyboden case.

475. The Transportation Statement asserts that retail and leisure amenities in Clonskeagh, Dundrum and the City Centre are easily accessible via public transport options including existing Dublin Bus / Go Ahead bus services and LUAS Green Line services. The Inspector noted[673] the objections that,

- there was a lack of public transport and inadequate links from the Site to public transport.
- only the #11 bus serves this part of Goatstown, and the bus stop is between 350 and 450m from the site. It runs at 15- to 30-minute intervals between Sandyford Business Park and Glasnevin on what is not a high-quality bus corridor and lacks dedicated bus lanes. A reduction in frequency is planned.

670 Dwelling per hectare.
671 Transportation Study: Table 5.2: Proposed Development AM Peak Hour Person Trips.
672 Inspector's Report §10.9.7.
673 p34.

476. The Inspector addressed[674] those objections in the context of the intended function of the proposed development: "*The site is connected to UCD by a cycle track and high quality footpaths on both sides of the roads. Goatstown Road is also served by the no. 11 bus route. In addition, the site is located c. 750m from the no. 17 route on Roebuck Road. The site is also located within 1.3km of the Dundrum Luas stop. It is, therefore, my view that this urban site is highly accessible…"*

477. Counsel for the Board submits that the Inspector's conclusions must be viewed in the context of the profile of the intended occupants of the Proposed Development and the profile of their transport needs. I see no reason to criticise this analysis. I reject this ground of challenge.

GROUND 7 – STRATEGIC OR NATIONAL IMPORTANCE

Importance - Introduction

478. The Impugned Decision invokes S.9(6)(b) of the 2016 Act and S.37(2)(b)(i) PDA 2000 – thereby basing the grant of the Impugned Permission in material contravention of the Development Plan on the assertion that the proposed development is of strategic or national importance.

479. The Applicants plead that the Impugned Permission is invalid as the Board failed to *"identify any or any adequate basis for its conclusion that the proposed development was of national and strategic importance."* The word "reasons" is not pleaded but the allegation is in substance an allegation of want of reasons.

480. The Inspector dealt with this issue as follows:

> *"The proposed development falls within the definition of strategic housing as set out in the [2016 Act] and by the government's policy to provide more housing set out in [the Action Plan[675]] … the proposed material contravention is justified by reference to section 37(2)(b)(i) of the Act."* [676]

481. The Board in the Impugned Permission invoked *S*.37(2)(b)(i) PDA 2000 on, in substance, the exact same basis,

- that the Proposed Development falls within the definition of strategic housing in the 2016 Act.
- of Government policy to provide more housing as set out in the Action Plan.

674 Inspector's Report §10.9.2.
675 Rebuilding Ireland – Action Plan for Housing and Homelessness issued in July 2016.
676 §10.14.5.

482. To invoke S.37(2)(b)(i) PDA 2000, the Board did not need to hold that the Proposed Development was of national importance as well as strategic importance. Either would suffice. I need not here consider how the two concepts may differ.

483. The Action Plan lists "*Measures to support greater provision of student accommodation*" amongst its "*Key Action Areas*"[677] – albeit in the context of "*Financing/Viability*" initiatives – and a "*Key Action*"[678] with a view to contributing to addressing the obstacles to greater private rented sector delivery, to improve the supply of units at affordable rents. It acknowledges that the rental sector must cater for students.[679] The primary housing-related benefit of Student Accommodation is identified as in the consequential freeing up of significant rental accommodation in the vicinity of third-level institutions that is currently occupied by students.[680] The Action Plan also devotes considerable narrative content to the issue of student accommodation. I have set out some of that content earlier. The rest is too long to set out here verbatim. It notably:

- estimates existing (i.e. at 2016) unmet demand of about 25,000 student bed spaces nationally and predicts third-level student population growth of 15% by 2024.
- says that both those statistics a highlight the importance of increased funding/ investment in and provision of well-designed and located student accommodation to avoid additional pressures in the private rental sector - including short-term increase of supply in the areas of greatest pressure.
- identifies actions designed to enhance the manner in which such projects are prioritised and assessed within a streamlined planning process - the new fast-track application process directly to An Bord Pleanála[681]. It is said that "*This will have major potential to cut processing time and enhance certainty.*"
- cites wider initiatives in this Action Plan in relation to land supply and management as relevant to provision of student accommodation.

484. The foregoing must be understood also in terms of what the Action Plan is: "*a central component of the Programme for a Partnership Government and its preparation has been informed, in particular, by the Report of the Oireachtas Committee on Housing and Homelessness (June 2016).*"[682] The long title to the 2016 Act describes it as "*An Act to facilitate the implementation of* [the Action Plan]". There can be no doubt that, as indeed reflected in its inclusion in the very concept of SHD in furtherance of the Action Plan, the provision of student accommodation is, in a general sense, of national and strategic importance. But the general sense is not the issue here. What is at issue here is the particular importance of the Proposed Development.

677 Table 1: Key Action Areas.
678 Table 2: Key actions to be delivered under the Action Plan; Pillar 4: Improve the Rental Sector Key Objectives at p71.
679 P27.
680 P63 - This observation relates to National Treasury Management Agency (NTMA)/Ireland Strategic Investment Fund (ISIF) investment in student accommodation but is clearly a generally applicable description of its benefits.
681 This is a reference to what became the 2016 Act.
682 P9.

Importance - Clonres/Conway #2 & "Strategic"

485. The Applicants argue, correctly, that what is required to properly invoke S.37(2)(b)(i) PDA 2000, as the Board does, is not that the Proposed Development is of a type the provision of which is, in a general sense, of national or strategic importance. What is required is that the Proposed Development itself *be* of particular national or strategic importance. They cite **Clonres/Conway #2**[683] in which the Applicant, albeit not specifically as to student accommodation, complained that the Board failed to give any or any adequate reason as to why s.37(2)(b)(i) applied as a basis for material contravention.

486. In that case, Humphreys J considered that the word "*strategic*" meant different things as between the 2016 Act definition of "*strategic housing*" on the one hand and, on the other, the use of the word strategic in S.37(2)(b)(i) PDA 2000. Humphreys J contrasted those usages as follows: "*In the sense in which the word "strategic" is used in the SHD legislation[684], all it really means is large housing developments, rather than ones that are individually pivotally crucial to, or even individually significantly impactful on, the national interest*." It was in this latter sense of being "*individually pivotally crucial to, or even individually significantly impactful on, the national interest*" that Humphreys J construed the use of the word strategic in the S.37(2)(b)(i) PDA 2000. Though one may suggest conflation here of the concepts of national importance and strategic importance (and I do not rule out that they encompass a single concept), nothing turns on that now.

487. The use of the word "strategic" in the 2016 Act was, Humphreys J considered "simply a technique or manoeuvre by the drafter (unquestionably on instructions from the Department). Words can be defined to mean anything." "In this Chapter ... 'strategic housing development' means ...." doesn't confer any particular status on the words "strategic housing development" or on the word "strategic" in particular. The words "development to which this Chapter applies" could have been used instead and the meaning wouldn't change."

488. I respectfully and enthusiastically agree that in statutory drafting "*words should ideally be defined in a way that bears a very close relationship to what they normally mean*" - though often the very purpose of a statutory definition is precisely to give a word or phrase a meaning other than its literal meaning. But I confess I am unclear of the intended significance of the words "*unquestionably on instructions from the Department*". A court must assume that any such instructions were given for deliberate, and presumptively good, reason. And the word "strategic" was validated by the Oireachtas in an Act passed by it as part of a statutory response to a national housing crisis. In that context the use specifically of the word "*strategic*" seems to me hardly surprising and, it seems to me, is significant. It is for the Oireachtas, not the courts, to decide what it is strategic. I respectfully do not see the usage of the word "*strategic*" in the 2016 Act or in its definition of SHD as "artificial" given that it is within the legislative and policy discretion of the Oireachtas to take the view, as it has

683 Clonres CLG v An Bord Pleanála & ors incl Crekav Trading GP and Conway v An Bord Pleanála & ors incl Crekav Trading GP [2021] IEHC 303 (High Court (Judicial Review), Humphreys J, 7 May 2021) §101 et seq.
684 i.e. the 2016 Act.

clearly done, that specifically large-scale development projects are an important - "strategic" - part of the remedy for a housing crisis. The definition of SHD generally, and not just as to student accommodation, is in terms explicitly quantified as relating to large-scale development projects. That large housing developments would be temporarily[685] deemed generally strategic (in the sense in which that word is used in the 2016 Act) in a housing crisis does not seem to me surprising.

489. I respectfully share the view of Humphreys J of the importance of democratically-adopted development plans and that they should be overridden only for good, clear and properly-stated reason. I have taken that view elsewhere in this judgment as to the necessity of care and clarity in drafting SPPRs and as to the exceptionality of material contravention permissions. However, I respectfully observe that grant of planning permissions in material contravention of developments plans is, and has always been, though legally exceptional, a not-uncommon feature of planning law and practice, for which statute has made explicitly restrictive provision. Indeed, S.37(2) PDA 2000 primarily addresses decisions on ordinary planning applications to local planning authorities.

490. I respectfully share the view of Humphreys J that the fact that something proceeds from strategy doesn't make it strategic. I am also troubled by the idea that if one approximates the word "strategic" as used in the definition of SHD, with its use in S.37(2)(b)(i) PDA 2000, one would provide an all-but-automatic basis on which SHD permissions could be granted in material contravention of the Development Plan. The Board's proposition, taken to its conclusion, is that as it falls within the definition of SHD (which every proposed SHD development necessarily does) every SHD is strategic and so is, ipso facto, strategic within the meaning of S.37(2)(b)(i) PDA 2000 such that the Board may grant material contravention permission for any and every SHD. I would be most reluctant to draw such a conclusion.

491. Or, to put it another, and rhetorical, way: on that view of matters, for what SHD could the Board not grant a material contravention permission in reliance on its strategic nature? Put in that way, it becomes apparent that such an all-but-automatic basis on which SHD permissions could be granted in material contravention would clearly be inconsistent with the scheme of S.9(6)(c) of the 2016 Act. That is a scheme clearly designed to restrict the Board – "…… *the Board may only grant permission ……..*" – in granting SHD permissions in "*even*" if in material contravention. It would also render otiose all other statutory bases for granting SHD permissions in material contravention, in breach of the presumptions in statutory interpretation against futile legislation[686] and surplusage.[687] It would also make a cipher of the requirement of S.10(3) of the 2016 Act that the Board, in granting a permission in accordance with S.37(2)(b) PDA 2000 shall indicate in its decision the main reasons and considerations for materially contravening the development plan, if it sufficed, as to a proposed SHD, for the Board merely to observe that it is an SHD.

685 The currency of the 2016 Act is time limited.
686 Dodd on Statutory Interpretation §7.52 & 5.55 et seq.
687 (Superfluous words) - Grange v The Information Commissioner [2022] IECA 153 §127 & 135.

492. The Oireachtas would not have bothered with S.9(6)(c) of the 2016 Act if its intention had been that all SHDs would, merely because they were SHDs, (and ceteris paribus) have been entitled to material contravention permission if the Board thought fit. That implies that S.9(6)(c) of the 2016 Act and S.37(2)(b)(i) PDA 2000, in requiring that a proposed SHD be strategic to merit material contravention permission, must require something more than merely that it be an SHD – something specific to the proposed SHD in question. In this, I agree with Humphreys J.

493. Nor does it seem to me that mere invocation of the Action Plan can constitute such main reasons and considerations. As the Long Title to the 2016 Act makes clear, the Action Plan is itself the policy basis underlying the 2016 Act and from which the 2016 Act proceeds. To say of a proposed development that it advances Government policy to provide more housing as set out in the Action Plan is to say no more than that such proposed development comes within the definition of SHD in the 2016 Act which, it is clear, was enacted as the very means to advance that policy.

494. I have come to this view with some hesitation. Not least, as to a particular SHD, it is difficult to envisage what factors, beyond those which render it an SHD, would set it apart from other SHDs as being of "*national or strategic importance*". Rare indeed must be the individual residential development project which could be described as being, by itself, of national or strategic importance in a degree which sets it apart from other SHDs. However the alternative, that SHDs all-but-automatically merit material contravention permission, is even more difficult to envisage - both generally and in light of the relevant statutory provisions.

495. It seemed to Humphreys J in **Clonres** that "there wasn't anything on the basis of which the Board could have held this to be a development of strategic or national importance. It was simply one of many high-density housing developments." I do not know if that could be said in the present case. What can be said is that if there was here anything on the basis of which the Board could have held this to be a proposed development of strategic importance it should have, by virtue of S.10(3)(b) of the 2016 Act been stated in the Impugned Decision and it was not.

496. While my reasoning is not quite on all fours with that of Humphreys J in Clonres, I share much of his view and have reached the same conclusion. If I had not, I would in any event be bound by his conclusion. I do not think I could distinguish his decision on the basis that in Clonres the Board had disagreed with its inspector. In this case and on this issue the Board and the Inspector are equally laconic. All that was given by way of reasons were two ways of saying the same, inadequate, thing – that the proposed development is an SHD.

497. However, I should address the Board's submission that **Clonres/Conway#2** can be distinguished on the basis that, in addressing material contravention in the present case, the Inspector referred to Colbeam's Material Contravention Statement which, the Board submits,

provides further information on the basis for the finding that the Proposed Development comes within s.37(2)(b)(i).

498. Oddly, the Board's submission does not specifically identify that further information. In fact, the relevant content[688] consists of a submission in the Material Contravention Statement that the Board can grant permission by reference to S.37(2)(b)(i) – that '*The proposed development is of strategic or national importance*' – on the basis that *"The proposed development student accommodation development[689] is defined as a 'Strategic Housing Development' in accordance with the"* 2016 Act. In other words, Colbeam submitted that if a Proposed Development meets the definition of SHD it is ipso facto strategic for purposes of S.37(2)(b)(i) or, at least, that fact alone can justify a finding that it is strategic for purposes of S.37(2)(b)(i). For reasons already stated, that is incorrect.

499. Colbeam's submissions are in similar vein. They cite the housing crisis. But that is a premise of the 2016 Act and qualification of a proposed development as an SHD. It is necessary but not sufficient to a finding that a proposed SHD is strategic for purposes of S.37(2)(b)(i). Subject to that exception, neither Colbeam's Material Contravention Statement nor its Submissions adds to the reasons given by the Inspector and the Board, and all constitute precisely the reasoning rejected by Humphreys J as inadequate in **Clonres/Conway#2** and rejected by me above.

500. I also reject Colbeam's submission that **Clonres/Conway#2** can be distinguished on the basis that it was a decision on irrationality whereas here the challenge is based on inadequacy of reasons. It is clear that the challenge in **Clonres/Conway#2** was based on inadequacy of reasons.[690] As Colbeam submits, Humphreys J considered that *"there wasn't anything on the basis of which the board could have held this to be a development of strategic or national importance. It was simply one of many high-density housing developments. Admittedly, such developments are governed by government policy, but then again, many things in the world of public administration or otherwise could be said to be governed by policy in one shape or form. That doesn't make them strategic."*[691] I don't see that as transmuting a pleaded reasons ground into certiorari granted on an unpleaded irrationality ground. Humphreys J was merely expanding on his observation that:

> *"The fact that something proceeds from strategy doesn't make it strategic. In public administration, everything should proceed from a strategy of some kind. To construe sub-para. (i) in that way would make all SHD applications strategic would render any restrictions involved meaningless. Nor is there any basis to focus purely on the strategic housing development category as proceeding from a strategy. There are also strategies for one-off rural housing, architectural protection and many other kinds of developments or aspects of development. An application governed by any of these strategies would also become strategic if one were to*

688 Material Contravention Statement p15.
689 Sic.
690 Clonres/Conway#2 §101
691 §105

> *adopt the flawed logic that sub-s. (i) is satisfied merely because the development proceeds from a strategy."*[692]

Importance - Pembroke Road, Killegland, Foley & Redmond

501. Colbeam's submissions go beyond their own material contravention statement in their assertion that the reasons why the Board considered the development to be of national and strategic importance are similar to those successfully relied on in **Pembroke Road**.[693] The Board's reason in that case was, indeed, that,

> *"The proposed development is considered to be of strategic or national importance by reason of its potential to contribute to the achievement of the Government's policy to increase delivery of housing set out in Rebuilding Ireland – Action Plan for Housing and Homelessness issued in July 2016, and to facilitate the achievement of greater density and height in residential development in an urban centre close to public transport and centres of employment."*

502. However, that reason was not challenged in Pembroke Road on the basis on which the reason in **Clonres/Conway#2** was challenged and on which the reason in the present case is challenged. The challenge in Pembroke Road was on the quite different basis of an alleged failure by the Board to identify malalignment between the height requirements and objectives of the Development Plan on the one hand and, on the other, the Height Guidelines 2018 (and, by extension, the NPF). The challenge failed as the malalignment was obvious.[694]

503. Pembroke Road is by no means the only authority that reasons need not state the obvious – i.e. "*If the rationale is clear from the circumstances*" – see **Killegland**[695] and authorities cited therein, and **Foley**.[696] The Board does not use the word "*obvious*" but, in substance to that effect, submits that its reasons *"must be read in the context of the nature of the proposed development, which the intelligent layperson would know, namely provision of much needed student accommodation close to a national university at a time when there is, as part of a general housing crisis, a student accommodation crisis."* The difficulty in meeting the Applicant's case with that observation is that, while it articulates the obvious as to the rationale underlying the Proposed Development being an SHD, it is not obvious that it takes the matter any further such as to put this Proposed Development in the subset of SHDs which are not merely strategic such as to merit designation as SHDs but are of strategic importance for purposes of S.37(2)(b)(i). It may be that the Board could have taken that view - but it is not obvious.

692 §102
693 Pembroke Road Residents Association v An Bord Pleanála & Waltham Abbey v An Bord Pleanála [2022] IESC 30.
694 §84.
695 Killegland Estates Limited v Meath County Council [2022] IEHC 393 - §83, 86 & 99(xi).
696 Foley v Environmental Protection Agency [2022] IEHC 470 (High Court (General), Twomey J, 26 July 2022) §252 & 253.

504. Also, this is a case in which the Planning Authority recommended refusal on grounds of material contravention. Necessarily implicit in that recommendation is the view that the circumstances did not merit permission despite material contravention. Despite that recommendation and despite material contravention, the Board decided to grant permission. So it is clear that the Board rejected the Planning Authority's recommendation as to what ought to be the consequences of material contravention in this case. What the Board now, in effect, says is obvious was not obvious to the Planning Authority for the functional area in question.

505. The significance of the role of the Planning Authority, its chief executive's report and its recommendation in the SHD process, having regard, inter alia to Article 28A of the Constitution, were described by Simons J in **Redmond**.[697] He held that the Board's obligation to engage with that recommendation is more obvious than the obligation to engage with an internal report such as that prepared by a board inspector. So, Simons J held, it must be clear to a person reading the Board's decision, in conjunction with its inspector's report, why the planning authority's recommendation to refuse planning permission was not accepted. While that of itself does not require a statement of the obvious, the fact of disagreement between the Planning Authority and the Board on such an important issue is of itself a considerable indication that the reasons favouring grant despite material contravention are not obvious.

Importance - Conclusion as to Validity of Reasons

506. For the foregoing reasons, I uphold Ground 7 to the effect that the Board failed to identify any or any adequate basis for its conclusion that the proposed development was of strategic importance. However, that conclusion does not necessarily determine the outcome on this ground.

Importance - Excision of the Invalid Reason

507. The Board and Colbeam, prudently, suggest that the invalidity of this reason does not require certiorari – the invalid reason can be excised leaving the remaining reasons to adequately justify the Impugned Permission.

508. The Board cites **Clonres/Conway #2**[698] to the effect that the question whether the invalid reason can be excised from the Board's decision, leaving only the valid reasons, is decided by answering the question whether the reasons are too intermingled to excise the invalid from the valid. If not, the invalid reason should be excised and the impugned decision saved despite the invalid reason. That submission overstates the significance of the question posed and answered in

697 Redmond v An Bord Pleanála [2020] IEHC 151 (High Court (Judicial Review), Simons J, 10 March 2020) §115 et seq.
698 Clonres CLG v An Bord Pleanála & ors incl Crekav Trading GP and Conway v An Bord Pleanála & ors incl Crekav Trading GP [2021] IEHC. 303 (High Court (Judicial Review), Humphreys J, 7 May 2021) §108.

Clonres/Conway #2. The answer as to intermingling of reasons prevented excision in that case and the impugned decision was quashed. Humphreys J had no need to consider the matter any further and so, did not. That answer in that case does not imply that if the question was answered in the opposite sense excision would, or even could, follow. That such an answer is necessary to excision does not imply it is sufficient to excision.

509. Though it is not set out in **Clonres/Conway #2**, I have been provided with a copy of the Board's order quashed in that case for incorrect application of the concept of strategic development for purposes of S.37(2)(b)(i) PDFA 2000. Its terms illuminate the view taken by Humphreys J, in refusing to excise the relevant reason, as to intermingling of reasons. As relevant, it reads as follows:

> *"The Board considered that a grant of permission that could materially contravene the maximum building height as set out in Section 16.7.2 of the Dublin City Development Plan 2016-2022 would be justified in accordance with sections 37(2)(b)(i) and (iii) of the Planning and Development Act 2000, as amended, having regard to -*
> *• objective 13 of the National Planning Framework 2018-2040*
> *•Specific Planning Policy Requirement 1, Specific Planning Policy Requirement 3*
> *and section 3.2 of the Guidelines for Planning Authorities on Urban Development and Building Height 2018 published under Section 28 of the Planning and Development Act 2000,*
> *which state policy in favour of greater density and height at central accessible locations such as the current application site, subject to performance and development management criteria with which the proposed development would comply."*

510. It is easy to see why Humphreys J took the view he took. The reasons for material contravention by reference to "*sections 37(2)(b)(i) and (iii)*" were in effect combined in a single composite reason.

511. As to intermingling of reasons, in this case, the Board says, excision is easy.[699] Textually that is so – the reason to be excised is not textually intermingled with other reasons.

512. The Board disputes the Applicants' reliance on **Ballyboden** as to excision of reasons, on the basis that **Clonres/Conway #2** was not cited by the Court in **Ballyboden** and that, whereas the latter related to an invalid reason given under s.37(2)(b)(iii) PDA 2000, here the issue arises under s.37(2)(b)(i) PDA 2000, as did the issue in **Clonres/Conway #2** such that the latter is directly on point. For reasons I have stated, it seems to me that the Board overstates the significance of the question posed and answered in **Clonres/Conway #2**. It is readily clear that, as a general proposition, where invalid reasons are too intermingled with the valid to allow excision of the invalid, the decision will

699 Simply a matter of excising the final paragraph on p.5 and the first two bullet points on p.6 of the Board Order. They read as follows:
"The Board considers that, having regard to the provisions of section 37(2)(b)(i) [PDA 2000], ... the grant of permission in material contravention of the ...Development Plan .. would be justified for the following reasons and considerations:
The proposed development falls within the definition of strategic housing as set out in [the 2016 Act].
The Government's policy to provide more housing as set out in [the Action Plan].

be quashed. As a general proposition, that does not turn on whether the reason was invalid by reference to s.37(2)(b)(i) PDA 2000 as opposed to s.37(2)(b)(iii) PDA 2000. Ballyboden is not to be distinguished and Clonres applied on that account.

513. In **Ballyboden**[700] the impugned decision justified material contravention of the development plan as to height, inter alia pursuant to S.37(2)(b)(iii) PDA 2000[701] on foot of the Height Guidelines 2018. That reason was quashed by reason of a misapplication of §3.2 of those Guidelines, one criterion of which is that the site be well served by high-capacity public transport. The Board urged that, despite its error, its reasons pursuant to s.37(2)(b)(i)(ii) & (iv) PDA 2000 survived and sufficed such that certiorari should be refused. The Board unsuccessfully analogised severance of invalid planning conditions, citing **Aherne**.[702] The following appears in the judgment in Ballyboden:

> *"Aherne is authority that a "peripheral and insignificant" planning condition is severable if invalid and it is demonstrated that the Board would have granted the relevant permission subject only to the other conditions. While material contravention permissions by the Board are by no means unusual in practice, nonetheless as disapplications of democratically-adopted development plans, they are no small thing, are legally exceptional and should arise only for substantial reason – a consideration reflected in the obligations imposed on the Board by s.37(2) PDA 2000. As a matter of law I should not lightly conclude that any reason given pursuant to s.37(2)(b) PDA 2000 is "peripheral and insignificant" or in any degree analogous to "peripheral and insignificant. The Board has not stated that any individually of its reasons pursuant to s.37(2)(b) sufficed to justify its decision or whether the cumulative weight of some or all sufficed for that purpose and I do not consider that I can make an inference to that effect. Accordingly the Board's argument in this regard fails."*

514. In my view there is no conflict between Clonres and Ballyboden in this respect. The first question is whether, textually and conceptually, the invalid reason can be severed from the valid reasons. That was answered against the Board in Clonres. But even had it been answered in its favour, the second question would have remained - whether, on viewing the valid reasons which remained after severance, bearing in mind the significance of material contravention, it can be said that, shorn of the invalid reason, the Board would have regarded the remaining valid reasons as sufficient to justify the material contravention in question. That second question was answered against the Board in Ballyboden.

515. I should add that the answers to these questions are to be objectively discernible from the Impugned Decision (including the documents properly to be read with it). That is so as reasons are to be discernible from the Impugned Decision rather than retrospectively given by the decision-maker

700 §§281-283.

701 (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, (Footnote not part of Board Decision).

702 Aherne v An Bord Pleanála [2015] IEHC 606.

in judicial review – see **Deerland Construction**[703], **Damer**[704]**, Owens**[705]**, D'Amico**[706], **S v The Minister for Justice**[707] and **Simons**.[708] Further, it must be borne in mind that more than one material contravention may be in issue – that, after severance of an invalid reason for one material contravention, there may remain good reason for another is unlikely to save an impugned decision.

516. In the present case, the Board recorded that the Proposed Development was "*broadly compliant*" with the Development Plan but would materially contravene it with regard to

- building Height as set out in Policy UD6: Building Height Strategy,
- density as set out in Policy RES 5: the Institutional Lands Objective and Section 2.1.3.5 and
- Part V and Affordable Housing as set out in Section 7.6 of Appendix 2.[709]

The invalid reason – that the Proposed Development was of strategic importance for purposes of S.37(2)(b)(i) – applied to, and so informed the Board's decision as to, all three material contraventions.

517. I set out below, for comparison with the reason in the quashed Clonres/Conway#2 decision as set out above, an edited version of the three surviving material contravention reasons in the present case:

> *"…… having regard to … S.37(2)(b)(iii) PDA 2000, … permission in material contravention of Policy UD6: Building Height Strategy of the … Development Plan .. would be justified for the following reasons and considerations:*
> *• Objectives 13, and 35 of …. the NPF …. which support increased residential densities and building heights at appropriate locations.*
> *• SPPR3 of the …Building Heights Guidelines 2018 … which support increased building heights and densities.*
>
> *…. having regard to S.37(2)(b)(iii) PDA 2000, … permission in material contravention of Policy RES5, Institutional Lands Objective and Section 2.1.3.5 in relation to density of … Development Plan .. would be justified for the following reasons and considerations:*
> *• Objective 35 of …. the NPF …. which supports increased residential densities at appropriate locations.*
> *• Regional Policy Objective 5.4 and Regional Policy Objective 5.5 of the … Regional Spatial and Economic Strategy*[710] *which encourage the provision of higher densities and the consolidation of Dublin and suburbs.*

703 Deerland Construction Limited v The Aquaculture Licences Appeals Board et al - [2009] 1 IR 673.
704 Damer v An Bord Pleanála [2019] IEHC 505 (High Court, Ireland - High Court, Simons J, 11 July 2019).
705 Owens v An Bord Pleanála [2021] IEHC 532 (High Court (Judicial Review), Barrett J, 27 July 2021).
706 Marine Survey Office v D'Amico Societá Di Navigazione [2018] IEHC 674 (High Court, McDonald J, 30 November 2018).
707 S v The Minister for Justice [2022] IEHC 578.
708 Planning Law, 3rd Ed'n, Browne §13-492 et seq.
709 The decision also recorded material contravention as to open space. But all agree that this was in error and is to be ignored. The Board's position, accepted by all as its position, is that there was no material contravention as to open space.
710 Eastern and Midland Regional Assembly Regional Spatial and Economic Strategy 2019-2031.

> *……. having regard to S. 37(2)(b)(iv) PDA 2000, .. permission in material contravention of the Part V and Affordable housing as set out in Section 7.6 of Appendix 2 of … Development Plan … would be justified for the following reasons and considerations:*
> *• Since the making of the … Development Plan … the Board did not apply Part V requirements for off campus student accommodation developments at Vector Motors site*[711]*; … at the Avid Technology International site*[712]*, … and at the Blakes and Esmonde Motors Site*[713]*.*

518. It will be seen that each of the three surviving reasons is discrete to one only of the three material contraventions at issue and each, as to the material contravention to which it relates, states that permission in material contravention includes the phrase "*would be justified for the following reasons and considerations*". In other words, each of these reasons asserts its sufficiency to justify permission despite the material contravention to which it relates. In my view therefore, it is apparent from the Board's decision that, even if it had not given as a reason for permission in material contravention that the Proposed Development was of strategic importance, the Board would in any event have granted permission in material contravention for the three surviving reasons.

519. I have reviewed the material contravention reasons given in Ballyboden. There, the essential structure was similar more to the "composite" reason given in Clonres/Conway #2 than to the present case. In Ballyboden, the Board found only one material contravention and the Board's decision said that *"the grant of permission in material contravention … would be justified for the following reasons and consideration."* And there followed four reasons, all relating to the same material contravention, one of which reasons was invalid. Also, the Board's argument, as the except set out above reveals, was different in Ballyboden to its argument here. Accordingly, while I uphold the principles stated in Ballyboden, their application to the present case has a different result.

Importance - Conclusion – Ground 7

520. As recorded earlier. I uphold Ground 7 to the effect that the Board failed to identify any or any adequate basis for its conclusion that permission despite material contravention of the Development Plan was justified as the Proposed Development was of strategic importance.
521. However, I also hold that that conclusion can be excised such that the remainder of the justification of the grant of permission despite material contravention survives and such that I should refuse certiorari in this regard.

711 Formerly known as Vector Motors, Goatstown Road (An Bord Pleanála Reference Number ABP- 308353-20.
712 Carmanhall Road, Sandford Industrial Estate, (An Bord Pleanála Reference Number ABP 303467-19).
713 Lower Kilmacud Road, Stillorgan (An Bord Pleanála Reference Number ABP-300520-18.

GROUND 8 – TREE REMOVALS

522. This ground pleads that the Impugned Decision is invalid as it fails to recognise the Proposed Development as in material contravention of the Development Plan as to trees. It pleads that the Impugned Permission is contrary to zoning contrary to s.9(6)(b) of the 2016 Act and/or a grant in material contravention of the Development Plan that was not made pursuant to S.37(2)(b) PDA 2000. It is common case that the Board identified no material contravention in this regard.

Trees – The Development Plan

523. Figure 5 above is an extract from the relevant zoning map. It makes clear that the objective "*To protect and preserve Trees and Woodlands*" ("the Tree Preservation Objective") applies to the Site. The map does not show what trees were on site when the Development Plan was made, and I can only assume they were more or less as shown in Figures 2A and 2B above. The narrative of that objective, as relevant, is as follows:

> *"8.2.8.6 Trees and Hedgerows*
> *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. Arboricultural assessments …. shall be submitted as part of planning applications for sites that contain trees …. The assessment will inform the proposed layout in relation to the retention of the maximum number of significant and good quality trees and hedgerows. ….*
> *The retention of existing planted site boundaries will be encouraged within new developments, particularly where it is considered that the existing boundary adds positively to the character/visual amenity of the area. New developments should have regard to the location of new buildings/extensions relative to planted boundaries. ……*
> *Where it proves necessary to remove trees to facilitate development, the Council will require the commensurate planting or replacement trees and other plant material. ……"*

524. I confess that the more often I read the last line of this text, the more I think it clear that it contains a typo. The word "*the*" after "*require*" is incongruous. And the words "*commensurate planting*" invite the question – planting of what? It seems to me clear that this passage makes a lot more sense read as and is in fact intended as *"the commensurate planting of replacement trees and other plant material."* I so interpret it.

525. The Applicants also cite in this regard the Development Plan as it relates to trees on Institutional Lands as follows:

- §2.1.3.5 Policy RES5: Institutional Lands, sets out a general policy to retain the open character and/or recreational amenity of such lands wherever possible. Inter alia open space provision

"*must be sufficient to maintain the open character of the site with development proposals structured around existing features and layout, particularly by reference to retention of trees, boundary walls and other features …"*

- §8.2.3.4(xi) Institutional Lands states that "*The principal aims of any eventual redevelopment of these lands will be to achieve a sustainable amount of development while ensuring the essential setting of the lands and the integrity of the main buildings are retained*." It also and essentially repeats the text of §2.1.3.5 to the effect that open space provision "*must be sufficient ….. etc*", including the phrase "*particularly by reference to retention of trees*, …"

526. Development Plan Policy OSR7: Trees and Woodland[714] includes the following text:

"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. They make a valuable contribution to the landscape and biodiversity of the County and significant groups of trees worthy of retention have been identified in the Development Plan Maps."

Policy OSR7 cites the County Tree Strategy which states:

'Certain trees, groups of trees and woodlands have been identified on the Development Plan Maps. It is intended that these trees be protected and maintained. Robust and appropriate levels of protection should be provided for trees and tree groups identified, …"[715]

527. It appears to follow, from Policy OSR7 and the designation on the Development Plan Map,[716] that the trees on this Site have been identified by the Development Plan as "*significant*" and "*worthy of retention*". While others may legitimately disagree, the Development Plan binds them on this issue and by acting on their disagreement they risk material contravention of the Development Plan. That said, there is clearly room for nuance as to materiality and as to whether individual trees within the protected groups are worthy of retention.

Trees - Applicants' Pleadings & Submissions

528. The Applicants make 3 points as to trees. They say that the Proposed Development:

714 Development Plan §4.2.2.6 – Cited in the Affidavit of Nicholas Fettes sworn 2/11/22, in the Chief Executive's Report p53 & 57, in Colbeam's Planning Report §7.3.7, Colbeam's Arboricultural Report p7, Colbeam's Ecological Impact Assessment Report p5, Colbeam's Statement of Consistency p57.
715 See Colbeam's Planning Report §7.3.7.
716 Figure 5 above.

a. materially contravenes the standalone site-specific objective on the Zoning Map, to "*Preserve Trees and Woodlands*" with which a "*wholesale loss"*[717] of trees cannot be reconciled on the principles of identification of material contravention set out in **Ballyboden.** There is, they say, no caveat to that site-specific objective and no basis to read it in conjunction with the general policy of §8.2.8.6[718] of the Development Plan. §8.2.8.6 has two separate requirements:

- *"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"*

The first part is caveated, the second is not. The ordinary and natural meaning of "*preserve*" is that, by definition, existing trees and woodland cannot be removed even if it is proposed to replace them.

b. materially contravenes §8.2.8.6[719] as "*'necessary' means exactly that"* and the Developer has made no attempt to demonstrate why the retention of the oaks is not practicable or why their removal is necessary as required by the Development Plan. The Board did not advert to this issue nor interrogate the potential of the Site to accommodate alternative building arrangements that would preserve the oak trees as required by the Development Plan nor did it give adequate reasons or consider relevant considerations.

c. materially contravenes the requirement of §8.2.8.6 that trees be replaced with commensurate planting. The Board failed to give adequate reasons to explain how removal of 9 "*highly prized*"[720] early mature oak trees could be met with commensurate planting or replacement trees. The Applicants say "commensurate" means "equivalent".

529. Also, the Applicants say that Condition 12 in the Board's Order does not subject the landscaping plan to the consent of the Local Authority. It requires Local Authority agreement only if the Developer proposes to change its landscape plan. So the permission does not require "*commensurate planting"* for the removal of the oaks and so the requirements of the Development Plan and the concerns of the Local Authority, recognised by the Inspector as to be met by a planning condition, will not be met by this Condition.

717 As found by the Planning Authority.
718 The Grounds say §8.6.2.2. But there is no such § and the typographical error is clear.
719 See note above as to typo.
720 In the view of the Planning Authority.

Trees - The Board's & Colbeam's Pleading & Submissions

Moot

530. The Board and Colbeam say Ground 8 is moot in that, on foot of the judgment partially lifting the stay on the operation of the Impugned Permission, the trees for removal pursuant thereto have been removed.

The Meaning of the Objective

531. As to the Applicants' first point, the meaning of the objective "*To protect and preserve trees and woodlands*", must be interpreted in light of Development Plan §8.2.8.6 which, the Board says, creates one objective not two and in which the Board emphasises the phrases "*as far as practicable, and have regard to"*. As to the meaning of the latter phrase, the Board and Colbeam cite ***Cork County Council***[721] and **McEvoy**[722] to the effect that it imposes a light requirement, simply to take account of the matter in question. They say that was done here and cite the Inspector's specific consideration of §8.2.8.6.[723]

532. They cite **Redmond**[724] and say that, in breach of the O.84 R.20(3), the Applicants' assertion that the objective is a zoning objective is bare – they plead no basis and there is none.

533. Colbeam point out that §8.2.8.6 of the Development Plan envisages tree removal. I agree.

Failure to demonstrate/interrogate necessity of tree removal

534. The Board disputes that that the developer and/or the Inspector failed to consider whether tree removal was necessary – citing as an example §10.4.5 of the Inspector's Report and her conclusion, in accordance with §8.2.8.6 of the Development Plan, that removal was necessary to facilitate development but would be addressed by replacement trees. The Board says there was no failure to consider relevant matters and no failure to provide adequate reasons.

535. Colbeam[725] cites the Planning Report as to necessity of tree removal. That report states, as cited:

721 Cork County Council v Minister for Housing [2021] IEHC 683.
722 McEvoy v Meath County Council [2003] 1 IR 208 at 224.
723 Inspector's Report §10.4.
724 [2020] IEHC 151.
725 On day 3 (p235) Colbeam suggested that necessity was demonstrated in a "Design and Access Statement" submitted with the Planning Application. But while such a Statement is cited in the Planning Application form as enclosed, it was not exhibited and was not before me.

3.1.4

- That the design re-orientates the block layout of the scheme previously permitted[726] to retain a larger number of existing trees, particularly along the western and southern Site boundaries.
- That the Design Team sought to maximise tree retention.
- 34 trees must be removed - retaining an additional 4 trees and 110 metres of tree line compared to scheme previously permitted.
- Proposes planting 56 replacement trees, yielding a net gain of 22 compared to the existing Site.
- The retention of "*as many existing trees as possible*" will,
  - reduce impact on surrounding properties.
  - support biodiversity.
  - provide an attractive space for residents of the Proposed Development and the public.
  - aid in maintaining the open space and character of the lands.

7.1.4

- In the context of the Height Guidelines 2018 espousing higher heights and densities, 698 bedspaces of student accommodation and ancillary facilities at the Site represents proper planning and sustainable development and can be successfully assimilated into its context.
- The removal of a select number of trees is necessary to allow the site to be developed and to ensure adherence to current standards (i.e., the width of the fire tender access).
- The Proposed Development retains a substantial number of trees, particularly on the more sensitive parts of the Site, adjacent to boundaries with residential properties. A tree replacement strategy to reinforce these boundaries is also proposed.

7.3.7 Objective to Protect and Preserve Trees and Woodland

- This section cites in extenso the Development Plan as to tree protection, including the text reading "*Where it proves necessary to remove trees to facilitate development …".* It also cites the Arboricultural report. It is repetitive of content set out above.
- Notably, it asserts that "*The Design Team has sought to maximise opportunities for tree retention as part of the subject scheme to aid in the assimilation of the scheme into its context."*
- It also states, "*In our opinion this proposal is in line with the Development Plan objectives which clearly note that 'where it proves necessary to remove trees to facilitate development, the Council will require the commensurate planting'*".

<u>Tree Replacement</u>

536. The Board says the Development Plan does not require that replacement trees be of equivalent ecological value as the trees removed. The Board says that §8.2.8.6 provides options – <u>either</u> "*the commensurate planting <u>or</u> replacement trees"* and that the word 'the' before

726 i.e. That quashed in Redmond.

commensurate highlights that the adjective 'commensurate' does not apply to 'replacement trees'. The Board cites the Oxford dictionary[727] definition of "*Commensurate*" as "*corresponding in size or degree: in proportion*". As such, "*commensurate planting*" to the intelligent layperson means planting of an equivalent *number* of trees. There is nothing in the meaning of "*commensurate*" to suggest equivalent ecological value: it implies only equivalent numbers of trees.

537. The Board says that what matters is the Court's view whether, as a matter of law, there is a material contravention. It says that the Planning Authority's view as to tree loss is of "*no relevance*". The Board says the Applicants incorrectly assume that if the Planning Authority's concerns in relation to ecological value of trees lost are not resolved, there is a material contravention. I would observe in passing that, on this view of matters, the same is true of the Board's view of material contravention as is true of the Planning Authority's view. Either both are irrelevant, or neither is. Yet the Board's submissions emphasise that it did not share the Planning Authority's concerns: the Inspector stating[728] "*[i]t is in my view that the proposed tree loss would be adequately compensated by the planting of an additional 22 no. trees and the significant landscaping proposed within the areas of open space.*"

Trees - Zoning – Decision

538. It is convenient here to dismiss Applicants' case that the Tree Preservation Objective is a zoning objective such that, by s.9(6)(b) of the 2016 Act, the Board had no power to grant permission in material contravention of that objective. Simons J in **Redmond** rejected a submission that the Institutional designation of the site was a zoning objective. I need not repeat his analysis in any detail. In my view it applies here. He found that the zoning objective applicable to the Site is "*Objective A To protect and/or improve residential amenity*" and that the Institutional designation did not override but rather sought to regulate the implementation of that residential zoning. The same is true of the Tree Preservation Objective.

539. My view is reinforced by the view of McDonald J in **Highlands**:[729]

> *" ….. zoning relates to the use for which lands are designated. This seems to me to follow from the terms of s.10(2)(a) of the 2000 Act which expressly refers to the zoning of land "for the use solely or primarily of particular areas for particular purposes…" (emphasis added). That language is also reflected in para. 20 of the Fourth Schedule to the 2000 Act. It seems to me that the language of s.10(2) very clearly establishes that zoning of land means the designation of that land for a particular use."*

727 Oxford Concise English Dictionary 11th ed.
728 §10.4.5
729 Highlands Residents Association v An Bord Pleanála [2020] IEHC 622 (High Court (Judicial Review), McDonald J, 2 December 2020).

540. The zoning objective applicable to the Site, "*Objective A To protect and/or improve residential amenity*", is not merely apparent on the Development Plan Map.[730] It is described in §8.3 of the Development Plan, entitled "*Land Use Zoning Objectives*" (which cross-references to the Development Plan Map), the Tables to which list "*land use activities*". Table 8.3.2 describes uses "*Permitted in Principle*" and others "*Open for Consideration*". Many uses are listed. It suffices to list those Permitted in Principle: "*Assisted Living Accommodation, Open Space, Public Services, Residential, Residential Institution, Travellers Accommodation*". Not merely is "Residential" listed but the generality of the uses listed demonstrates that Tree Preservation is not one. While I would not rule out the possibility that in an appropriate case a Tree Preservation objective could be a zoning objective, I am satisfied that it is not a zoning objective in this case.

Trees – Moot?

Arguments

541. The Board and Colbeam argue that the fact that the trees for removal have been removed since the start of the proceedings – perfectly properly given the vacation of the stay on such removal[731] - renders this ground moot, such that I should not decide it. They cite the Applicants' earlier arguments,[732] in defending the stay, that its vacation and consequent removal of the trees would render grounds 8 and 10 moot and they cite the court's agreement to that effect.[733] Nonetheless, that was a judgment on an interlocutory issue and so the Applicants are entitled to have me revisit the issue of mootness. Colbeam cite, inter alia, **Lofinmakin**,[734] as to the test for mootness and point out that further development of the Site in accordance with the Impugned Permission will not result in the removal of trees.

542. **Lofinmakin**, as to the test for mootness, has recently been considered in **Shields**.[735] I will not repeat its summary but will attempt to identify elements here relevant. First, it is necessary to record the two-stage test: is the issue moot; if so, should the court, in its discretion, decide that moot?

543. McKechnie J in **Lofinmakin** emphasises the weight of the rule:

> *"The rule by which a court will decline to hear and determine an issue on the grounds of mootness is firmly based on the deep rooted policy of not giving advisory opinions, or opinions which are purely abstract or hypothetical. This policy stems from and is directly related to the*

730 See Figure 5 above.
731 See above.
732 Recited in earlier judgments in this case. The Board cites Jennings v An Bord Pleanála [2022] IECA 100 §§4, 40(1); [2022] IEHC 11 §6, [2022] IEHC 61 §38.
733 The Board cites Jennings v An Bord Pleanàla [2022] IEHC 11 §113; [2022] IEHC 61 §67.
734 Lofinmakin v Minister for Justice [2013] 4 IR 274.
735 Shields v The Central Bank of Ireland [2022] IECA 241 (Court of Appeal (civil), Faherty J, 26 October 2022).

system of law within which our courts discharge their essential function of administering justice. Apart from any special jurisdiction conferred by statute, by the Constitution, or resulting from our membership of the European Union, the system in question is fully adversarial. Consequently, there must exist some issue … embedded within a factual or evidential framework, the determination of which is … necessary so as to resolve the conflict or dispute which necessitated the proceedings in the first instance. It has therefore always been recognised that, without such a concrete foundation, the courts typically will decline to intervene."

544. As to whether an issue is moot, the following questions arise:

- Will resolution of the issue have a practical impact or effect on the resolution of some live controversy between the parties as to a tangible and concrete dispute.
- Has the issue materially lost its character as a *lis*, or has its essential foundation disappeared*?*

545. The Applicants dispute that the issues as to tree-removal are moot. They say that if I were to quash the Impugned Permission on this, or any other ground, the removal of the trees would prove to have been unauthorised development, as to which enforcement proceeding could ensue. They cite **Doorly**,[736] in which the Court of Appeal decided that tree-felling was unauthorised development and granted a planning injunction[737] requiring full remediation – restoration of the lands to their condition before the trees were felled. Inter alia, felled trees were to be replaced with the same species of tree of the same age – including semi-mature or mature age. They also point to the judgment in these proceedings lifting the stay[738] and thereby, in effect, allowing Colbeam to remove the trees. It includes the following:

"97. Of course, if the stay is removed and the Applicants succeed at trial the Impugned Permission will be quashed, the development frustrated and, ceteris paribus, the prospect of replanting will recede. However Counsel for Colbeam fairly and sensibly conceded that in that instance his client would be unable to resist injunction proceedings to compel replanting. Of course replanting under enforcement in an undeveloped site might not be the same as that contemplated in the Impugned Permission and any resultant deficit would not be counterbalanced by what the Board sees as the virtues of the proposed development. But such replanting would at least aim at remediation and it seems to be at least the case that appreciable mitigation by replanting would be possible and as a matter of probability could be forced on Colbeam if needs be. I accept that that prospect could be in practice complicated by a subsequent planning application on the site and I do not suggest that this prospect of mitigation is a complete answer to the Applicants' concerns. But the prospect of mitigation does deserve appreciable weight in balancing the risks of injustice. So, overall, while the loss of the trees would indeed be irreversible in the strict sense, and I do not accept the Colbeam submission that the intended tree removal is de minimis, its environmental consequences in terms of the intrinsic value of the trees are not so absolute given the prospect of mitigation – not least by the

736 Doorly v Corrigan [2022] IECA 6 (Court of Appeal (civil), Humphreys J, Ní Raifeartaigh J, 21 January 2022).
737 Under S.160 PDA 2000.
738 Jennings & O'Connor v An Bord Pleanála & Colbeam [2022] IEHC 249.

prospect of replacement of at least some of the existing "early mature" oaks by "semi mature" oaks."

Decision – Ground 8 as to Trees Not Moot

546. In my view, and by reference to those questions, Ground 8 as to tree removal is not moot. The argument on this issue seems to me to proceed on a misconception of what is the issue raised by Ground 8. Perhaps that is a misconception understandably informed by the focus in private law on practicality of remedy in such as tort and other forms of lites inter partes. However as a matter of public law it seems to me that the issue as to that Ground, and the issue the mootness or non-mootness of which is to be decided, is not whether the trees should be removed or have been removed. The issue is whether the Impugned Permission is unlawful for the reason asserted in Ground 8. That issue subsists independently of the subsequent removal of the trees. Put simply, the removal of the trees did not render the Impugned Permission lawful if it was unlawful before their removal.

547. The point can be illustrated by the Applicants' reliance on **Doorly**. One may imagine that the Impugned Permission was lawful in all respects but by reference to the issues raised in Ground 8. In that circumstance and if the Board and Colbeam are correct, and Ground 8 is moot, the Impugned Permission would survive even though (as we assume for purposes of the argument) the Impugned Permission was unlawful when made. Why should that be? And why should it be merely because the trees have been removed?

548. Arguably it should be because, on any remittal of the decision to the Board having been quashed on this account, the Board would have to decide the Application on the footing that the trees no longer exist, such that the unlawfulness for which the Impugned Permission was quashed could not arise. I do not consider that I have to decide that point. It would involve an assumption that the Board would be obliged, in making the remitted decision, to ignore what had transpired to be the unlawfulness of the removal of the trees and the Tree Protection Objective of the Development Plan as to such removed trees. This issue was not argued.

549. However, the Applicants say that immediately on the quashing of the Impugned Permission for whatever reason, they would be entitled to set planning enforcement processes in motion, whether via the Council or an application under S.160 PDA 2000 for a planning injunction. And as recorded above, in the application to lift the stay, Colbeam conceded that in that instance it would be unable to resist injunction proceedings to compel replanting. Doorly holds that the Court can order replanting of a substance very close to that of the trees removed. Again, I do not see that I can assume that the Board could, in deciding the present SHD Planning application on any remittal in these proceedings, ignore the prospect that the protected trees might be, or were to be, reinstated. And if they were to be reinstated, that reinstatement would be directed without reference to

competing requirements of reconciliation with the Proposed Development, permission for which would, ex hypothesi, have been quashed. So an order for reinstatement could well, in substance, be quite different, in both its nature and location, from the substance of the commensurate planting or replacement trees to be provided pursuant to Condition 12 of the Impugned Permission. In that sense, the prospect of protection of trees on the Site, as required by the Development Plan, subsists.

550. If I am wrong, and the issue is moot, the question arises whether I should decide the issue nonetheless. I must apply the principles set out in **Lofinmakin.** The first consideration is that to decide a moot is to disapply a general rule against deciding moots – the Court will *"only do so reluctantly, even where there is an important point of law involved" - guided by both the rationale for the rule and by the overriding requirements of justice;* I bear in mind that the rationale of the rule has the consequence the Court will not offer opinions based on factual hypotheses. I bear in mind the "*matters of a more particular nature which will influence this decision"* listed in **Lofinmakin,** including, in particular, the potential benefit and utility of a decision of this moot. This would be a decision whether a particular planning decision was in material contravention of the Development Plan. I do not consider that the issue of court resources weighs against deciding the issue – they are already spent.

551. It seems to me that a substantial consideration here is that of minimising any injustice which may have arisen by the lifting of a stay – the "*overriding requirements of justice"* cited in **Lofinmakin**. The imperative of minimising injustice applies as much after as before making an interlocutory order granting, refusing or setting aside or refusing to set aside a stay on the operation of an impugned permission. The assumption for the sake of analysis, in deciding that issue, must be that, when granted, the Impugned Permission was unlawful for the reasons stated in Ground 8. To refuse to decide the moot would be to carry into effect the injustice the risk of which was recognised, but which was outweighed, in the determination to lift the stay. On the assumption I have just identified, I do not see that principle or any practical consideration requires that I should carry that injustice into effect to the undeserved advantage of Colbeam.

552. Accordingly I will decide Ground 8. It is not a moot. And if I am wrong and it is a moot, I will decide it anyway as to decline to do so would carry an injustice into effect to the undeserved advantage of Colbeam.

<u>Decision - Commensurate Planting of Replacement Trees and Other Plant Material - Not Moot</u>

553. The Board emphasises the Inspector's view[739] "… that the proposed tree loss would be adequately compensated by the planting of an additional 22 no. trees and the significant

739 §10.4.5.

landscaping proposed within the areas of open space". Condition 12 of the Impugned Permission requires that:

> *"The site shall be landscaped, and earthworks carried out in accordance with the detailed comprehensive scheme of landscaping, which accompanied the application submitted, unless otherwise agreed in writing with, the planning authority prior to commencement of development."*

554. On any view, the question of the landscaping condition, as it bears on "*commensurate planting of replacement trees and other plant material"* is clearly not moot and must be decided.

Trees - Colbeam's Response to the Board's Pre-Application Consultation Opinion, Material Contravention Statement, Landscape Report & Arboricultural Report

555. Colbeam's Response to the Board's Pre-Application Consultation Opinion was submitted as part of the Planning Application. Inter alia, it,

- addresses a request for further consideration and/or justification addressing the Development Plan objective to protect and preserve trees and woodlands.
- emphasises the words "as far as practicable" in §8.2.8.6[740] and the words "Where it proves necessary to remove trees to facilitate development, the Council will require the commensurate planting …".
- asserts that "*The Design Team has sought to maximise opportunities for tree retention*". But it does not describe or substantiate those efforts or how tree retention has been maximised. It merely moves directly to the observation "*However, 34 trees are required to be removed* .." and proposes planting 56 replacement trees, resulting in a net gain of 22 trees.
- asserts that this scheme proposes to retain an additional 4 trees and 110 metres of tree line compared to scheme quashed in Redmond. It asserts that the "*retention of as many existing trees as possible*" will reduce impact on surrounding properties, support biodiversity of the subject site and provide an attractive space for residents of the scheme and the general public. It says that "*Importantly, the increased tree retention will aid in maintaining the open space and character of the lands."*
- asserts that there is no material contravention as to trees but states that the issue is considered in the Material Contravention Statement in case the Board disagrees.

556. The Material Contravention Statement asserts that:

- the Proposed Development allows for the retention of a substantial number of trees, particularly on the more sensitive parts of the site, adjacent to boundaries with residential properties. A tree replacement strategy to reinforce these boundaries is also proposed.

740 See above.

- the removal of a select number of trees is necessary to allow the site to be developed and to ensure adherence to current standards (i.e., the width of the fire tender access).
- the proposed density, principally achieved through verticality/building upwards, is ultimately designed to maximise the provision of open space and maintain the character of the lands (in accordance with the 'INST' objective) and ensure significant tree retention through reduced building footprints (in accordance with the Tree Protection Objective).

557. I have set out above Colbeam's citation of its Planning Report as to the necessity of tree removal. Colbeam also filed an Arboricultural Report by "The Tree File"[741] on which it relies as to that necessity. It is briefly recounted in the Inspector's report.[742] Colbeam's submissions cite it as proposing:

- the loss of 34 trees (26 sustainable) and 10 to 15 metres of treeline.
- the retention of 24 trees/groups, including 100 metres of treeline.
- the planting of 56 new high-quality trees.
- a net gain of 22 trees, increasing the number of sustainable trees from 48 to 78.

558. Colbeam's Landscape Report states that the replacement trees will be 56[743] semi-mature[744] (17) & extra-heavy standard[745] (39). The Applicants describe these as "tiny". While the Landscape Report should have been written in terms clearer to the layperson[746], I am satisfied they will not be tiny. In particular, the 9 oaks to be removed are early mature[747] of average height 10m[748] and the 9 replacement oaks will be extra-heavy standard – 4 to 4.5m high. While not tiny, neither will they be, as to size, like-for-like.

559. The Landscape Report is to the effect that tree retention and planting will be such as to create a designed perimeter woodland route or trail, which benefits from existing mature trees to be retained, and is wider than 7.7m at its tightest point (along the northern boundary) but is generally significantly wider, extending to 30m on its western flank. It is not necessary to otherwise recite content of the Landscape Report.

741 The Tree File Ltd, Consulting Arborists.
742 See below.
743 There is a minor discrepancy as to the number of new trees to be planted. The Landscape Report says 457 but its table lists 56. The other sources say 56. Nothing turns in the discrepancy in my view.
744 Defined in the Arboricultural Report as "A young tree, having attained dimensions that allow it to be regarded independently of its neighbours but typically, would be less than 50% of its ultimate size." Semi-mature is not defined in the Landscape Report but the Planting table requires 1.8m of clear stem.
745 Defined in the Landscape Report as "Extra Heavy Standard trees shall have a total height of 4.0 to 4.5 metres and a girth of 14-16 cm at 1m above ground level."
746 The "size" column in the Table at p12 is not explained.
747 Defined in the Arboricultural Report as "A specimen, typically 50% - 100% of ultimate dimensions but with substantial capacity for mass and dimensional increase remaining."
748 Range 6-12 m – see Arboricultural Report Table 1 – Tree Data Table.

560. Returning to the Arboricultural Report, it articulates what the author sees as the basic and general issue with tree preservation where development is intended and expresses views as to this Site. It is necessary to set out the content of the report at some length:

1. Report Summary

1.1 This report intends to provide a realistic assessment of the Arboricultural implications of the proposed development on trees within and directly adjoining the site. This is an updated report and includes amendments relating to changes adopted in light of issues and recommendations discussed at preplanning stage.

1.2 Particularly, there have been adjustments to the proposed layout that has allowed for increased tree retention. This is most pertinent to the site's western boundary, where "Tree line 3" is now retained in its entirety, as are tree nos. 74 and 75, thereby greatly improving site screening in this area and tree retention for the site. This provides for a further increase in tree and tree line retention in comparison to the previously permitted development (ABP Ref. PL06D.304420) by allowing for the retention of 2 additional trees and circa 40 metres of tree line.

1.3 This report also addresses the requirement to better explain the rationale behind the apparent conflict between the design proposals in respect of trees and the site being subject to an objective to "protect and preserve trees and woodland". This has been addressed in greater detail in "Section 8" of this report.

1.3.1 As part of the design process, it was considered that trees adjoining the boundaries offered greatest amenity value and screening to neighbours, as well as offering the greatest potential for protection during construction and therefore for sustainable retention. By contrast, many of those trees toward the centre of the site are small and of little visual significance. More importantly, they could be readily replaced with new stock, elsewhere on the site and therefore should not be considered as a constraint to development, as their loss could be readily mitigated and made good.

1.3.2 Additionally and though many of the centrally located trees are still small, the species encountered often include large growing trees such as Sycamore, Oak, Ash and Scots Pine. Such trees cannot be considered suitable for highly urbanised context and would require consideration of mature sizes to account for realistic sustainability. In this respect, the efficient use of site space could not include set-asides enough to allow for the retention of trees that could readily exceed 20 to 30 metre in height and spread.

1.4 In respect of the broader development, sustainable tree retention is subject to many factors as explained in "Section 6" of this report. Fundamentally this relates to the preservation and conservation of specific amounts of ground space associated with any tree intended for retention. Therefore and to provide the necessary quantum student accommodation we must consider all unavoidably associated modern standards of development, including "DMURS" compliant access roads and parking, "Part M" compliant access and the provision of standard modern underground infrastructure including "SuDS" compliant drainage and other

underground services. These considerations combine to create great demands on available space, particularly towards the centre of the site.

1.5 Issues of contested space and trees have been addressed by design and consideration. The intention is, as far as practicably possible, to retain many of the site's trees, particularly where their location is significant to neighbours of the site. Elsewhere, limited significance within the existing landscape and the ease with which that they will be replaced with new stock, has been addressed in the landscape scheme for the site[749]. Overall, it should be noted that the proposed development will provide a substantial gain in both tree numbers and tree sustainability in comparison to the "do nothing" scenario."

……..

8 Arboricultural Considerations and Design Iterations[750]

8.1 The primary issue with this and all developments is the consumption of available space. This relates to a combination of minimum unit delivery requirements with the provision of all standard infrastructure and facilities. Particularly, we find that over and above the primary buildings, the provision of DMURS compliant roads and access, the associated requirement to provide "Part M" compliant pedestrian access, as well as all elements of underground infrastructure including drainage, SuDS and other utilities, combine to require the unavoidable conversion or excavation of available site space. The greater proportion of these requirements result in the loss of ground space or its conversion to a degree greatly beyond any capacity to sustainably retain trees.

8.3 The design process took note of the constraints presented by trees ….

8.4 From the design outset, the location and nature of the tree population was considered. This includes the relationship between the site and its neighbours, as well as the sustainability of trees within the site. This led to an appreciation that the trees located near the boundaries performed important screening and therefore were considered important to the development.

8.5 In contrast to the above, the sustainable retention of trees, was considered elsewhere. At the centre of the site, it was appreciated that tree retention would severely affect the efficient use of space. This was particularly pertinent in that many of the species encountered were large growing species, including Ash, Sycamore, Scots Pine and Oak, all of which can exceed 20 metres in hight and similar dimensions in spread. Accordingly, any design intending to see the sustainable retention of such trees must include a set-aside that allows for this growth. This means that the sustainable retention of such trees would constitute a massive constraint to development by way of sterilisation of space

8.6 … similar considerations can be applied to the existing smaller trees, ….., they can be replaced with ease with new stock, at positions that do not compromise the efficient use of space, but at the same time providing for a "no loss" scenario at completion.

749 Sic.
750 Colbeam cited §8.1 to §8.7 in particular.

8.7 At first sight, the expected tree losses would appear to contradict the planning objective to "protect and preserve trees and woodland" applicable to the subject site. However, the objective is qualified as being "as far as practicable" and furthermore notes that if in some instance tree removal is necessary, that "the council will require commensurate planting". This planting has been accounted for within the landscape scheme associated with this application, that defines a planting extent that greatly exceeds tree losses. In this respect it might be asserted that the development will result in net Arboricultural gains and tree numbers, when compared with the "do nothing" scenario."

561. §10 of the Arboricultural Report as to "Tree Retention and Loss" notes 57 individual trees and 2 lines/groups of trees on site, of which

- a total of 24 trees are for removal.
- there are no "Category A" trees.[751]
- 19 of 28 "Category B" (i.e. fair quality) trees are for removal.
- 7 of 20 "Category C" trees are for removal.
- 8 of 9 category "U" trees are for removal. The 9th can't be removed as it is off-Site. Category "U" trees are of poor quality and normally all will be removed in development.

562. Significantly, given the Applicants' complaint that the necessity of the removal of trees – in particular the oaks - had not been demonstrated and that their removal was unnecessary was demonstrated by the earlier permission which had allowed their preservation, the Arboricultural Report states:

"10.10 These tree losses provide for a notable improvement in comparison to the previously permitted development[752] *…. The current proposal will see the retention of 4. additional individual trees and circa 110 metres of tree line as formed by Tree Line 2 and Tree Line 3."*

563. By way of comment, I observe that the Arboricultural Report takes the "*necessary quantum (of) student accommodation*" as a given rather than as a matter to be "*demonstrated*" as necessary so as to require a particular element of tree removal. And it seems that its acceptance of that necessity – "*efficient use of site space*" - is at least one driver of the proposals as to tree removal. While that necessity may not have been for the arboriculturist alone, or even primarily, to demonstrate, one would have expected it to be articulated in his report as informing his view regarding the proposed tree removals. So, and for example, he does not interrogate the possibility that the Tree Preservation Objective may require that such quantum of student accommodation be

751 The Arboricultural Report cites "BS 5837, Trees in Relation to Design, Demolition and Construction – Recommendations". BS 5837 puts trees to be considered for retention into 3 categories, A, B & C. Category A is trees of high quality with an estimated remaining life expectancy of at least 40 years. Category B is trees of moderate quality with an estimated remaining life expectancy of at least 20 years; Category C is trees of low quality with an estimated remaining life expectancy of at least 10 years, or young trees with a stem diameter below 150 mm. Trees unsuitable for retention are identified as Category U - those in such a condition that they cannot realistically be retained as living trees in the context of the current land use for longer than 10 years.
752 ABP Ref. PL06D.304420.

lower than might otherwise be possible or that elements of the Proposed Development be omitted or redesigned in the cause of Tree Protection.

564. This last observation may be somewhat unfair as it is clear that he cites adjustments to the proposed layout allowing increased tree retention: most pertinently "Tree line 3" and trees #74 and #75 on the site's western boundary, now retained, greatly improving screening. In this respect I note that the Development Plan specifically provides that *"the retention of existing planted site boundaries will be encouraged."*

Trees - The Chief Executive's View

565. The Chief Executive's view[753] is very different to Colbeam's and the Board's. It is based on a report by the Parks Section of the Local Authority. The Chief Executive's view was that:

- The objective to protect and preserve trees and woodlands on site applied.
- The Proposed Development will remove 35 of the 57 trees on Site including Category B trees.
- The best trees on Site are ## 37-70 - in the line running east/west across the centre of the site and the line running north/south to the north and centre of the site. All those best trees are for removal, including all the 9 Irish Oaks on Site.
- The Irish Oaks are of particular interest. They are all early mature with the potential to develop into substantial trees over the long term. They have high biodiversity potential to support a large number of species.
- The proposed offset by planting 56 trees will have a much lower ecological and diversity value compared with existing trees.
- Given the size and location of the Site, with no major development constraints, plenty of development design options would allow retention of existing valuable trees, in line with the Development Plan objectives.
- The removal of existing trees, in particular the Irish Oaks, is not justified. They should be retained and incorporated in the scheme.

566. The Chief Executive referred the reader of his report to the attached Parks Section report. In that Parks Section report the following additional material appears:

- Irish Oak is highly prized – for reasons stated including that it has the "highest" biodiversity index.
- The two lines of Leyland Cypress trees for retention for screening purposes are of very low amenity or biodiversity value. Screening is their only benefit.
- The only trees of note to be retained are nos. 87-90.
- There is wholesale loss of trees across the site otherwise.
- Conclusion: The loss of nearly all of the existing trees on the site is hard to justify. Most of the trees being retained have no landscape or nature value.

753 Chief Executive's report p24/59.

- Policy OSR7: Trees and Woodland is cited.[754]
- Refusal of permission is recommended – inter alia for the reasons set out above.

567. Given the view later imputed by the Inspector to the Planning Authority, it is important to record the conclusion of the Chief Executive's Report as it bears on contravention of the Development Plan. It is that:

- "The planning authority considers that the proposed development is inconsistent with the policies of the County Development Plan on a number of fronts. Therefore, it is recommended that permission be refused on the following reasons"

6 reasons follow, as to, respectively,

- Loss of space for schools – which would "*materially contravene*" the Development Plan.
- Insufficient open space/open character "*contrary to*" the Development Plan
- Failure to retain high quality trees "*contrary to*" the Development Plan
- Deficient open space quality "*not in accordance with*" the Development Plan
- Excessive density – which would "*materially contravene*" the Development Plan.
- Inadequate ensuite room width.

568. By way of comment, it seems to me unlikely that the Planning Authority, in explicitly designating loss of space for schools and excessive density to be material contraventions, was not being deliberate in refraining from that designation as to its other recommended reasons for refusal. While some may find it surprising in light of the strength of view expressed by the Planning Authority on the subject of tree loss, it is difficult to avoid the conclusion that the Inspector was correct when she later observed[755] that "*the planning authority have not raised the issue of material contravention with regard to tree removal"*.

Trees - The Inspector's Report

569. The Inspector recites the relevant content of the file as to trees – more or less as set out above. In particular, she recites the Chief Executive's views[756] - albeit initially in less detail than I have above. But, inter alia, she explicitly recites the view that other design options would have increased retention of valuable trees and refers the Board to the Parks Section report. She also returns in her Planning Assessment[757] to the Chief Executive's/ Parks Section's views reciting further content as to the oaks. The Inspector's planning assessment[758] refers again to the views of the Chief

754 See text above.
755 Inspector's report p86.
756 Inspector's report p42.
757 Inspector's report §10.4.
758 Inspector's report §10.4.

Executive, the Parks Section and third parties as to tree loss. She records Colbeam's Arboricultural Report as stating that:

- in the design process it was considered that the trees on site boundaries provided the greatest amenity value and screening to neighbours.
- many of the trees in the centre of the site are small, of little visual significance and could readily be replaced with new trees elsewhere.
- The Proposed Development would provide a substantial gain in tree numbers and tree sustainability as compared to a 'do nothing' scenario.

The Inspector records third parties' objections that the proposed tree loss would materially contravene the Development Plan site-specific objective *'to protect and preserve trees and woodlands'*. In my view, her account of those various views of objectors, the Planning Authority and Colbeam is not inadequate.

570. The Inspector responds[759] to the Chief Executive's views, noting:

- that the proposed removal of 34 trees and the provision of 56 new trees for an overall net gain of 22 trees.
- that there are no category A trees on Site.
- that the Proposed Development, which includes the provision of public open space, with associated tree planting and landscaping would improve the open character of the Site and provide an amenity to the wider area that currently does not exist.
- Her satisfaction that the Proposed Development represents a reasonable and acceptable response to its context.

She notes §8.2.8.6 of the Development Plan[760] as wording *"sufficiently flexible to allow for the removal of a number of trees"*, considers that the scheme has been designed to retain a significant number of trees and treelines. She agrees with Colbeam that "*the retention of trees along the southern and western site boundaries provides the greatest amenity value to the proposed area of open space and to the amenities of adjacent properties"* and that is "*welcomed, in terms of both biodiversity and screening".* The Inspector notes that the Site is in an urban area on zoned and serviced lands and, therefore, she has no objection in principle to the loss of 34 trees which would be adequately compensated by the planting of an additional 22 trees and the significant landscaping proposed within the areas of open space.

571. As to a phrase on which the Applicants laid great stress, the Inspector explicitly referred[761] to the passage of the Development Plan which reads *"where it proves necessary to remove trees to facilitate development, the council will require commensurate planting or replacement trees and other plan material".* There is no reason to believe that where, three short sentences later, she said that the proposed tree loss would be adequately compensated by the proposed planting she had forgotten or forgotten to apply that passage of the Development Plan.

759 Inspector's report §11.4.
760 Set out above.
761 Inspector's report §10.4.5.

572. Importantly, the Inspector concluded that concerns that the trees to be planted have a much lower ecological and diversity value compared with the existing trees could be addressed by a condition that the final details of the landscape and planting plan be agreed with the Planning Authority. Separately, in considering ecology, the Inspector did conclude[762] that *"Having regard to the proposed mitigation measures, the high quality landscaping proposals including the retention of existing trees and vegetation and the significant area of open space, it is my opinion that the proposed development would not have a significant negative impact on the biodiversity of the area."* That observation implicitly but clearly contemplated the relevant Planning Condition.

573. However it is notable that the condition the Inspector recommends, and the Board imposed – Condition 12 – does not achieve the end they identify for it. The Condition is that *"The site shall be landscaped, and earthworks carried out in accordance with the detailed comprehensive scheme of landscaping, which accompanied the application submitted, unless otherwise agreed in writing with, the planning authority prior to commencement of development."* This imposes no obligation on Colbeam to enhance the ecological and diversity value of its intended planting nor any means of enabling the Planning Authority to interrogate the ecological and diversity value of its intended planting or impose such an obligation.

574. The Inspector returns to the subject of trees again under the rubric of material contravention.[763] Having helpfully repeated earlier content, she also repeats that §8.2.8.6 is sufficiently flexible to allow for the removal of a number of trees. She opines *"that the proposed development would not be a material contravention of the plan. It is noted that the planning authority have not raised the issue of material contravention with regard to tree removal."*

575. I should record that the Applicants and the Planning Authority[764] on the one hand and the Board and Colbeam on the other, take very conflicting views on the issues of the necessity and practicality of tree retention and removal on this site. I need not set out those views in detail. And whether one agrees with her or not, there can be no doubt that, save as to her suggested condition, the Inspector carefully and comprehensively addressed the issue of tree removal and the views of the Planning Authority and Third Parties in that regard and the question whether the Proposed Development represented a material contravention in that regard.

762 Inspector's report §10.11.3.
763 Inspector's report §10.14.2.
764 Chief Executive's Report p24/59.

Trees – Decision on The Applicants' First Two Points

576. In an earlier judgment in this case[765] I assumed in the Applicant's favour, but without so deciding, that the prospect of replacement planting in mitigation of tree loss is irrelevant to whether there is a material contravention - on the basis that to "*protect and preserve*" is not the same thing as to "replace". In yet another judgment in this case[766] and in considering whether the Applicants had shown "*a stateable argument that damage to the environment is occurring or is likely to occur*", I considered it at very least arguable that to "*protect and preserve*" woodland and trees is not the same thing as to replace them. Having not on those occasions decided that issue, I now must.

577. I must interpret the Development Plan on "**XJS** principles"[767] as a whole, and as if by an intelligent informed layperson. As in even legalistic interpretation of statutes and contracts, text must be interpreted in context – and not least in the context of the whole document of which it forms part. A fortiori, that is so of documents to be interpreted on XJS principles, such as development plans.

578. Ultimately, it seems to me that 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. The Development Plan as to trees includes the words and phrases "*as far as practicable*", "*amenities offered by existing trees*", "*developments shall have regard to objectives to protect and preserve trees and woodlands*", "*necessary to remove trees to facilitate development*", "*retention of the maximum number of significant and good quality trees"* "*retention of existing planted site boundaries will be encouraged*". These provisions must also be read in the context of the Development Plan as a whole. These lands, in a suburban and generally residential area, are zoned for residential development, albeit subject to limitations imposed by the Institutional designation and the Tree Protection Objective. Planning decisions, even within the confines of a Development Plan, are of their nature multi-factorial, 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 ecological and like concerns may prioritise Oaks and other particular types of trees, such are not the only "amenities" trees provide. Screening is another, if by Leylandii. It is difficult to see that this consideration did not inform the Plan's encouragement of "*retention of existing planted site boundaries*". 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

765 [2022] IEHC 11 - I declined to stay operation of the Impugned Planning Permission in respect of a limited part of the permitted works.
766 [2022] IEHC 249 – as to whether the Applicants should have a Protective Costs Order.
767 Re XJS Investments Limited [1986] IR 750.

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.

579. As I have said, 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 – for example as between otherwise low value trees providing boundary screening and higher value trees inimical to development of more central locations and between the value of the trees on site and other planning objectives such as the residential development of the site. This required a significant exercise of multifactorial planning judgement.

580. It therefore seems to me to fall into the category of material contravention identified by Laffoy J in **O'Reilly** as reviewable, not "*full bloodedly*"[768] but rather for irrationality. And whatever view one takes of the present state of the law of irrationality[769], remembering that its requirement is "*extremely high and .. almost never met in practice*" [770], 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. She did incorporate her error as to open character into the analysis but, as to tree protection, I do not consider that fatal to her conclusion that there was no material contravention. Not without hesitation, I conclude that the Applicants have not made out their case for material contravention as to tree removal. That leaves the Applicants' third point.

<u>Trees – Decision on The Applicants' Third Point - Commensurate Planting</u>

581. The Board says that §8.2.8.6 of the Development Plan provides options – including "*the commensurate planting or replacement trees"* and it says that the word 'the' before 'commensurate' highlights that the adjective 'commensurate' does not apply to 'replacement trees'. I have already stated my view that "or" is a typo for "of" – which discounts the Board's point. But even leaving that correction aside, I reject the Board's point. The Board cites the Oxford dictionary[771] definition of "*Commensurate*" as "*corresponding in size or degree: in proportion*". As such, "*commensurate planting*" to the intelligent layperson means, the Board says, planting of an equivalent <u>*number*</u> of trees. There is nothing in the meaning of "*commensurate*" to suggest equivalent ecological value:

768 Heather Hill Management Company clg v An Bord Pleanála [2019] IEHC 450 (High Court (General), Simons J, 21 June 2019) §41; Redmond v An Bord Pleanála [2020] IEHC 151 (High Court (Judicial Review), Simons J, 10 March 2020) §26.
769 See above.
770 Stanley v An Bord Pleanála [2022] IEHC 177 @ §§ & 77; Board of Management of St. Audeon's National School v An Bord Pleanála [2021] IEHC 453 (Simons J).
771 Oxford Concise English Dictionary 11th ed.

only equivalent numbers of trees. So, the Board says, the Development Plan does not require that replacement trees be of equivalent ecological value as the trees removed.

582. The Board's analysis of the phrase "*the commensurate planting or replacement trees"* seems to me exactly the type of legalistic parsing which XJS rejects. The Board's analysis also ignores that the meaning of the phrase falls to be considered as text in context. The context here is a general objective to preserve and protect the trees on site and that the necessity of commensurate planting or replacement trees arises precisely because the necessity of less than complete preservation and protection has arisen. Borrowing from statutory interpretation the concept of purposive interpretation – though the intelligent informed layperson would not do so explicitly, s(he) would in substance do so – it seems to me one can also borrow the highly legalistic phrase "*restitutio in integrum*" - though the intelligent informed layperson would, again, not do so explicitly - s(he) would in substance take that view subject to concerns of practicality. While dictionaries can be useful, I do not think the intelligent informed layperson would feel the need to consult one in this instance. In my view, the words commensurate and replacement separately, and all the more so in combination, and all the more so again in light of the norm of preservation, suggest to the intelligent informed layperson, 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.

583. Clearly, one cannot precisely replace trees like-for-like and in the same places. Indeed, that 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. One may be removing trees unsuited for planting close to buildings (for example due to extensive root structures or canopies). 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. Trees may be more, or less, decorative. For example, some might hesitate to suggest a general rule that leylandii must be replaced by leylandii. Trees may provide valuable or excessive shade or shelter. Trees of lower ecological value may have or lack screening value. 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 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.

584. In my view, the intelligent informed layperson would understand from §8.2.8.6 as to "*commensurate planting of replacement trees and other plant material"* 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. I accept the Applicants' argument for equivalence - but it is a general equivalence, not a precise one. In some cases, ecological considerations will determine the

commensurate planting or replacement trees - perhaps, for example if the trees lost have high ecological value to protected species. In other cases, the need for screening will be a main consideration. In others again, questions of available space will be relevant. Incidentally, I accept that while it is relevant – will often be very relevant - to point out that landscaping will result in a net gain (or depending on the facts, loss) in the number of trees, the many considerations described above seem likely often to imply that the issue will not be merely a "numbers game" and will often involve a considerable and multi-factorial exercise of planning judgement.

585. 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.

586. 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. However, even that conclusion is not quite the end of the matter.

Implemented by Condition

587. It seems to me that the words in §8.2.8.6 of the Development Plan "*This will be implemented by way of condition*" are important to the question whether there is a material contravention. On one view they are otiose – surplusage as a planning authority can impose landscaping conditions independently of its development plan. And a development plan cannot fetter the statutory discretion and judgment of a planning authority as to the imposition of conditions. But, in reality, conditions as to landscaping are all but inevitable in residential development permissions of any consequence. Their absence in an SHD permission would in practical terms simply not arise, if only by way of the application of the usual Condition 1, as to development in accordance with plans and particulars, to the invariably submitted landscaping plan. In my view, these words "*This will be implemented by way of condition*" are intended to convey that the norm is important and the norm as to trees is preservation and protection. Removal is an exception to that norm such that the Planning Authority will play close attention to, and seek to impose its judgment as to, the question of what commensurate planting or replacement trees will consist. This importance is also reflected in the following sentence in §8.2.8.6 to the effect that *"A financial bond may be required to ensure protection of existing trees and hedgerows during and post construction".*

588. As the Board points out, the Inspector was broadly satisfied as to Colbeam's proposals as to tree removal and commensurate planting or replacement trees, saying "*that the proposed tree loss would be adequately compensated by the planting of an additional 22 trees and the significant landscaping proposed within the areas of open space"*. Yet the Inspector acknowledges the Planning Authority's concerns that the replacement trees proposed have a much lower ecological and diversity value compared with the existing trees and explicitly took the view that those concerns could be addressed by a "*condition that the final details of the landscape and planting plan be agreed with the planning authority*."[772] This necessarily implies the necessity for finalising the details - as opposed to merely approving those submitted by Colbeam. It must be presumed that the Inspector would not have explicitly envisaged such a condition unless she thought it was necessary. If mere approval of Colbeam's proposal was the position, no condition would have been needed.

589. Unfortunately, the condition the Inspector suggested and which the Board adopted did not achieve that end. While the condition envisages the necessity of agreement by the Planning Authority, it leaves it entirely up to Colbeam to decide whether that necessity arises. The Inspector envisaged a "*condition that the final details of the landscape and planting plan be agreed with the planning authority*." The condition imposed is not such a condition.

Trees - Conclusion

590. In that limited respect and given the Development Plan's clear intention, expressed in §8.2.8.6 of the Development Plan, that conditions would ensure that "*commensurate planting or replacement trees*" would be adequate, I find that the Impugned Permission is in material contravention of §8.2.8.6 of the Development Plan in failing to impose a condition having that effect. And, as the Board did not invoke the statutory bases on which permission in material contravention may be permitted, the Impugned Decision must be quashed on that account.

591. I should add that this finding proceeds from the Inspector's report as to the necessity of such a condition in the circumstances of this case and should not be interpreted as a general finding as to the necessity of conditions by reference to §8.2.8.6 of the Development Plan.

GROUND 9 – MATERIAL CONTRAVENTION STATEMENT

592. The 2016 Act does not assign a title to what is commonly called a "Material Contravention Statement" and is sometimes called a "Statement of Justification".[773] Nothing turns on this difference of nomenclature and, as a matter of marginal preference, I will use the former term. In an SHD Application the Developer's Material Contravention Statement must identify material

772 Inspector's report §10.4.5.
773 Redmond v An Bord Pleanála [2020] IEHC 322.

contraventions of the development plan and propose justifications for the grant of permission despite such material contraventions.

593. This ground asserts that the Impugned Decision is invalid for contravention of S.8(1)(a)(iv)(II) of the 2016 Act because, while Colbeam's Material Contravention Statement identifies 8 areas of material contravention, it is phrased so as to make it clear that Colbeam does not think 7 of those 8 are in fact material contraventions. They are included in the Material Contravention Statement in case the Board decides they are material contraventions.[774]

594. Notably, the Applicants do not plead that Colbeam's Material Contravention Statement failed to identify an issue or potential issue of material contravention – that there is an issue missing, as it were. There is no plea that the public or the Applicants were deprived of relevant information on these issues. While, no doubt and perfectly properly, the Applicants do not agree with the Material Contravention Statement as it advocates SHD Permission despite the Material Contravention issues identified, there is no plea of anything excessive or improper in that advocacy. The substance of the plea is confined to impugning Colbeam's equivocation as to whether the issues identified are material contraventions.

595. The Board's Opposition argues that a Developer is *"… entitled to indicate that its view is that the proposal will be consistent with the objectives of the development plan in a relevant aspect but acknowledging that a different interpretation is possible."*

596. S.8(1)(a)(iv)(II) of the 2016 Act obliges the SHD applicant to publish a notice in a newspaper stating, inter alia, 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,"*

597. The Public Notice and Site Notice in this case advised that the SHD Planning Application "contains a statement indicating why permission should be granted for the proposed development, having regard to a consideration specified in [S.37(2)(b) PDA 2000] …notwithstanding an argument that the proposed development materially contravenes a relevant development plan or local area plan other than in relation to the zoning of the land." So, the public was directed to the Material Contravention Statement and to the fact that it was at least arguable that the Proposed Development was in material contravention.

774 The plea gives an example from the Material Contravention Statement "While in our opinion the scheme does not contravene the Development Plan with regard to the quantum of car parking … this matter is included in the Material Contravention Statement in the event that the Board may assess the car parking in accordance with another land use i.e. residential".

598. The context here is that, in requesting pre-application consultation with the Board, the prospective SHD applicant must, where the proposed SHD would materially contravene the development plan other than as to the zoning of the land, indicate why, in the prospective applicant's opinion, permission should nonetheless be granted, having regard to a consideration specified in section 37(2)(b) PDA 2000.[775] Of some significance in this regard, the planning authority, the material contravention of whose development plan is in issue, must report to the Board in the pre-application consultation process, inter alia, its opinion on the proposed development having regard to the provisions of the development plan.[776] Necessarily, that will address any potential issues of material contravention insofar as identified by the Planning Authority. A consultation meeting ensues, attended by the Board, the prospective SHD applicant and the planning authority and, inevitably, the prospect of material contravention and why, in the prospective applicant's opinion, permission should nonetheless be granted, will be discussed. If, as a result, the Board considers it appropriate, it issues a notice to the prospective applicant and the planning authority stating its advice as to the issues that need to be addressed that could result in a reasonable basis for an SHD planning application. The effect of S.5(5) & (6) and S.6(7) of the 2016 Act is that such an opinion will address any perceived problems of material contravention. However, and importantly, that opinion does not trammel the Board as to its consideration of, or decision on, any ensuing SHD planning application.[777] The net result is that before any SHD Application is made, the Board, the prospective SHD applicant and the planning authority will have considered the prospect of material contravention and the Board will have addressed any such prospect in its opinion issued to the prospective applicant for SHD permission.

599. The Board's Pre-Application Consultation Opinion, dated 4th December 2020, was that the documents submitted with the consultation request required further consideration and amendment to constitute a reasonable basis for lodging an SHD planning application. 11 listed issues were to be addressed. Various of those 11 raise issues of compliance with the Development Plan. Colbeam's Response to that Opinion, submitted with its SHD Planning Application, is repeatedly cross-referenced to its Material Contravention Statement. The Material Contravention Statement states its purpose as being to identify and address issues as to which the Proposed Development "*may be*" determined/considered to materially contravene the Development Plan and justify the Proposed Development nonetheless. They are referred to as "possible" contraventions. Those issues are identified as: Height; Density; Quantum of Open Space; Removal of Trees; Quantum of Car Parking; Extent of Green Roofs; Compliance with Part V Policy[778]. Each issue is identified with specific reference to the assertedly relevant elements of the Development Plan.

600. It at very least desirable, and arguably necessary, that material contravention statements straightforwardly state whether, as to any issue and in the professional judgement of its authors, independent of their clients' interest,

775 S.5(6) of the 2016 Act.
776 S.6(4) of the 2016 Act.
777 S.6(9) of the 2016 Act.
778 i.e. Social and Affordable Housing.

- there is or is not a contravention of the Development Plan, and why.
- as to each such contravention, if any, whether it is or is not material, and why.

Such a clear statement can only 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.

Only once that has been done should a material contravention statement proceed to justification of the SHD application notwithstanding any material contravention.

601. However, that approach would not prevent precautionary and prudent justification also, in the material contravention statement, of any issues identified by the developer as not being, in its professional advisors' considered and impartial opinion, in material contravention but of which, the advisor might concede, a different view might be taken by the Board.

602. S.8(1)(a)(iv)(II) of the 2016 Act is phrased as if any material contravention inherent in the SHD proposal has been already definitively identified. In reality, that is often not the case at the point of making the planning application. Definitive identification occurs only in the decision of the Board on the SHD Application – and that only provisionally in that, if the decision is challenged, the Court in judicial review may take a different, and the binding, view. Accordingly, and at the point of making the SHD planning application, any material contraventions inherent in the SHD proposal will have only been provisionally identified. Certainly, at that stage, some may be so obvious as to be beyond serious dispute. But others may not be. It would be, frankly, absurd to suggest otherwise. It also strikes me as unfair. A developer should be entitled argue, perhaps as to a disputable interpretation of the development plan or as to an arguably minor contravention of it that - as to a specific issue - there is no contravention or that any contravention is immaterial.

603. There seems to me no good reason why failure in an argument that there is no material contravention on a particular issue should be on pain of the invalidity of the SHD planning application. Notably, that seems so to me in circumstances in which the Site Notice, Public Notice and Material Contravention Statement have in fact combined to bring that issue of arguable material contravention to public notice and its justification has been advanced in the Material Contravention Statement against the possibility that the planning applicant's view that there is no material contravention may not prevail.

604. For all that I am of the view that material contravention statements should be sequentially structured in the way described above, in my view it would be unfair to expect an intending SHD developer to perfectly anticipate the outcome of the Board's determination, and thereafter the Court's, whether and in what respects the proposed development would or would not be in material contravention – and that on pain of invalidation of the application or a resultant permission being quashed on judicial review. All that would be to no discernible purpose – and the Oireachtas is presumed not to act to no purpose.

605. In at least some cases, determination whether there has been a material contravention will have been the result of the exercise of planning judgement. It is inherent in such judgement that opinions may reasonably differ and so they are not perfectly predictable. Such judgements may also be the result of or informed by submissions by prescribed bodies and objectors made after the planning application has been made. Accordingly, I am reluctant as a matter of fairness and practicality, and see no need as a matter of statutory interpretation, to interpret the obligation in the manner for which the Applicants argue when an alternative obligation amply serves the clearly intended purpose of the section.

606. That purpose clearly is to ensure that potential issues of material contravention are identified in the SHD Planning Application and addressed by the Applicant with a view to assisting in the Board in addressing them. Part of that purpose of assisting in the Board in addressing those issues is the notification of the public and prescribed bodies of such issues so they too can assist the Board in that regard. In my view, it was open to the Inspector and the Board to conclude that the Material Contravention Statement in the present case had served that purpose. Indeed, the Applicants do not plead that it did not serve that purpose.

607. I now turn to the question whether authority requires of me a different view. In **Redmond**[779], on which the Applicants rely, Simons J considered whether a quashed SHD Permission could be remitted where the Developer and the Board mistakenly considered that there was no material contravention as to housing density and public open space and so no public notice of a material contravention statement as to those issues had issued. Simons J cited S.8(1)(a)(iv)(II) of the 2016 Act to the effect that the public notice must indicate that the proposed development is in material contravention of the development plan, and that the planning application contains a statement indicating why permission should, nonetheless, be granted. Simons J refused remittal, holding[780] that

> *"In truth, the planning application was fatally flawed from the outset. The planning application failed to recognise that the proposed development represented a material contravention of the development plan. This resulted in non-compliance with the procedure prescribed for such applications. As correctly observed by An Bord Pleanála in its written submissions, the public were not notified that a planning application was being made for a development that would materially contravene the development plan. Nor were they given an opportunity to make submissions or observations on the developer's case as to why planning permission should be granted notwithstanding that material contravention."*

608. In my view the situation described by Simons J differs considerably from that in the present case. While in the present case Colbeam equivocated on the question whether there were material

779 Redmond v An Bord Pleanála [2020] IEHC 322.
780 §28.

contraventions as to particular issues, it did in its Site Notices and Public Notices draw the public's attention to its Material Contravention Statement and that Statement did identify all the relevant issues. In that context it is important to refer to Simon J's rationale:

> *"… the purpose of giving public notice of a proposed material contravention is to allow all members of the public concerned an opportunity to make submissions or observations on the planning application."*[781]
>
> *"All of this is intended to ensure that members of the public are, in the first instance, put on notice that An Bord Pleanála is being invited to grant planning permission in material contravention of the development plan; and, secondly, informed of the basis on which the developer says that such a contravention is justified by reference to section 37(2)(b). This will then allow members of the public to make meaningful submissions to An Bord Pleanála and to engage with the justification advanced on behalf of the developer.*
>
> *This ensures effective public participation. Moreover, it reflects the especial importance attached to the development plan under the PD(H)A 2016. There are statutory restrictions on the board's jurisdiction to grant planning permission for proposed development in material contravention of the development plan. These statutory restrictions are stricter in the case of a "strategic housing development" application under the PD(H)A 2016 than they are in the case of a conventional planning application."* [782]

609. Simons J also rejected an argument by the developer that public notice and a statement of justification are only required where the developer is of the "opinion" that the proposed development would be in material contravention. It is not difficult to see why he gave that argument short shrift. Simons J said that the requirements of S.8(1)(a)(iv)(II) are unequivocal and are *"triggered "where the proposed development materially contravenes" the relevant development plan. The test is objective: it is not qualified by reference to the subjective "opinion" of the developer, nor, indeed, of An Bord Pleanála. This is entirely consistent with the general principle of planning law that the interpretation of the development plan is objective not subjective and is ultimately a question of law."* I respectfully and entirely agree.

610. Flowing from this misconceived argument, the developer in Redmond argued that if it "*gets it wrong*", and (mistakenly) advances an application on the basis that no material contravention is involved, then the only party at a disadvantage is the developer because it will not have addressed the requirements of S.37(2)(b) PDA 2000.[783] The developer suggested that any other view would turn the SHD planning process into an "*extraordinarily hazardous obstacle course*" if an error by the developer as to interpretation of the development plan would mean the invalidity of the planning application. Simons J pointed out that this argument discounted the importance of public participation. As Simons J observed, while Mr Redmond had himself identified the relevant material

781 §30.
782 §20 & 21.
783 Which stipulates the permissible bases on which a permission in material contravention may be granted.

contraventions and argued them in his submissions to the Board even though the developer had not identified them, Mr Redmond been deprived of notice of and hence the opportunity to respond to the developer's arguments that S.37(2)(b) PDA 2000[784] permitted a grant of permission in material contravention. Simons J concluded:

> *"It behoves an applicant for strategic housing development to address their mind properly to the question of material contravention in advance of the making of a planning application. If, as will happen occasionally, the developer and its advisors misinterpret the plan and fail to recognise that a material contravention is involved, then the legal consequence is that the planning application is invalid. The legislation does not allow the developer's error to be visited upon the public by undermining their rights of public participation."*[785]

611. I confess to respectfully doubting that doubt as to the presence or absence of a material contravention happens merely occasionally. Otherwise, I entirely agree with Simons J as to the obligation of the developer and its professional advisors to carefully address their minds to the question of material contravention in advance of the making of a planning application. And I have already adverted to the duty of professional advisors to do so objectively and without regard to their client's interests. Though in truth, objectivity will almost invariably be in their clients' interests in the long run. I have also suggested that the Material Contravention Statement should clearly separate the identification of the Material Contravention from its justification. But as ever, a judgment must be understood as grounded in its factual circumstances and it is in light of the factual circumstances in Redmond that Simons J must be understood.

612. I hope I have successfully explained why the present factual circumstances differ in a respect which has ensured that the public participation and any other concerns which underly the view taken in Redmond have in fact been met by the course taken by Colbeam here in identifying all potential issues of material contravention while disputing that they represent material contravention. I do not see that Redmond or S.8(1)(a)(iv)(II) render Colbeam's SHD Application invalid and I refuse to quash it on the basis of Ground 9. If I am wrong and given the public was not discommoded and no public or private interest was prejudiced (including that of proper planning and sustainable development), I would refuse relief on a discretionary basis.

613. I note that a similar Material Contravention Statement survived judicial review in **Morris**.[786] But it does not seem that the point the Applicants now argue was made in that case, so I do not rely on it for the view I take.

784 Which stipulates the permissible bases on which a permission in material contravention may be granted.
785 §40.
786 Morris v An Bord Pleanála & Atlas GP Ltd. [2020] IEHC 529 (High Court (Judicial Review), Hyland J, 22 October 2020).

GROUND 10 – EIA UNLAWFULLY EXCLUDED AT PRELIMINARY EXAMINATION

EIA - Introduction & the Concept of Preliminary Examination

614. The Applicants assert that the Impugned Decision is invalid as the Board failed to comply with Article 299B(1)(b)(i) PDR 2001 and/or Article 4(5) of the EIA Directive.[787] They say it was not open to the Board to exclude at Preliminary Examination the possibility of significant effects on the environment. This ground relates primarily to the presence of bats on Site.[788] To a lesser degree, the plea relates to breeding birds.

615. I will consider it in greater detail below but, by way of introduction, Preliminary Examination is, in essence and to adopt a clumsy phrase, a form of pre-screening screening for EIA. The concept is not named Preliminary Examination in the EIA Directive, but it derives from the amendment of the EIA Directive in 2014 (For that matter, the word "screening" is used only in the recitals to the Directive). Article 4, which allows screening determinations whether sub-threshold Annex II projects require EIA, now also allows Member States to "*set thresholds or criteria to determine when projects need not undergo either*" EIA screening or EIA. The Directive does not elaborate on the concept, nor has the caselaw of the CJEU done so.[789] But presumably it is to be understood in light of the overall objective of the Directive that projects likely to have significant effect on the environment are subjected to EIA and understood as a concept applicable to cases in which EIA Screening is not necessary to rule out such effects.

616. Ireland availed of the facility afforded by that 2014 amendment of Article 4 of the EIA Directive by providing[790]

- that, as regards SHDs, the Board shall carry out a Preliminary Examination of, at least, the nature, size or location of the development, and that
- where the Board concludes, based on such preliminary examination, that there is no real likelihood of significant effects on the environment arising from the proposed development, it shall conclude that an EIA is not required.

617. I am not in this judgment concerned whether Ireland has adequately transposed Article 4 of the EIA Directive in this regard.

787 Directive 2011/92/EU Of the European Parliament and Of the Council of 13 December 2011 on The Assessment of the Effects of Certain Public and Private Projects on The Environment as Amended By: Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014.
788 Pleas as to lack of transport in the area, poor quality open space, substandard lighting and school capacity were not, as to EIA, pursued with any vigour.
789 See Environmental Impact Assessment of Projects, Rulings of The Court of Justice Of, The European Union November 2022 - Luxembourg: Publications Office of the European Union, 2022.
790 As applicable to SHD cases, at Article 299B(1)(b)(i) PDR 2001.

EIA - Colbeam's AA Screening Report, Ecological Impact Assessment Report & Environmental Report

618. Colbeam's AA Screening Report[791] discounted the need for AA in the absence of possibility of any significant effects on any European Sites. It describes[792] the bat and bird surveys as done in accordance with the relevant Guidelines[793] but as bats come under Habitats Directive Article 12 (Strict Protection of Species), not Article 6 (AA), they are more properly considered in Colbeam's Ecological Impact Assessment Report.

28. Colbeam's Ecological Impact Assessment Report,[794]

- identifies bats as a strictly protected species under Art 12 of the Habitats Directive.
- identifies essentially three types of potential effect on bats: effect on foraging and commuting by tree removal; effect by increased light levels; effect by tree removal - destruction of roosts and possible mortality.
- records investigations as to bats on the Site.[795]
- assesses the Site as moderately suitable as a habitat for bats: of local importance (higher value) as the Site is used by small numbers of common bat species for foraging and commuting[796] and holds potential roost features of low suitability.
- records that the most frequently recorded species[797] on Site have a widespread distribution across the region and Ireland, and their populations are increasing.

619. Colbeam's Ecological Impact Assessment Report contains the following:

Bat Foraging & Commuting

- Loss of treelines and foraging space "*will result in loss of ecological connectivity and foraging habitat for bat species within the proposed development site*".[798]
- Alternative foraging habitat available immediately nearby,[799] and tree-retention on Site as outlined in the landscape design, are together such that it is likely that, "*despite any temporary effects, the loss of foraging/commuting habitat associated with the proposed development site will not affect the conservation status of the local bat population and will not result in a likely significant negative effect, at any geographic scale."* Significant effects on bats due to loss of foraging/commuting habitat are not predicted to arise from the Proposed Development on its own.

791 Appropriate Assessment within the meaning of the Habitats Directive - Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.
792 §2.5.2.
793 Bat Conservation Trust's Bat Surveys for Professional Ecologists – Good Practice Guidelines (Collins, 2016). It describes the birds surveys as following an adapted version of the Royal Society for the Protection of Birds publication Bird Monitoring Methods - A Manual of Techniques for Key UK Species using the British Trust for Ornithology species and activity codes.
794 Not an Environmental Impact Assessment Report (EIAR) within the meaning of the EIA Directive - As to Bats see §6.6.
795 §5.4.2 Bats.
796 §5.4.2 & §6.6.1.2.
797 Common pipistrelle, Soprano pipistrelle and Leisler's bat.
798 §6.6.1.2 Habitat loss.
799 Such as within the HSE Central Mental Hospital and nearby UCD GAA grounds.

Bats – Light Pollution

- The most frequently recorded species on Site are some of the least light-sensitive - often recorded in towns and cities. Given the built-up and artificially-lit surrounding environment, the local bats would be expected to be habituated to artificial light.
- That said, it is possible that lighting required during the construction and operational stages of the Proposed Development may illuminate previously unlit feeding and/or commuting areas. making them unsuitable for bats and it is likely that bats may not use the Site to the extent that they do currently. In light of this and in the absence of mitigation, the Proposed Development could result in a significant negative effect, albeit at a local geographic scale.
- Various lighting design mitigation measures are proposed to avoid or minimise light-spill in habitat suitable for bats, such that baseline lux levels will be maintained along the retained periphery treelines during the operational phase of the Proposed Development.

Bats - Direct Mortality & Roosting

- A ground-based survey identified no bat roosts.
- But 9 trees had potential roost suitability, of which the 4 trees for removal had low potential roost suitability,
- Removal of those 4 trees could result in the potential loss of a bat roost, if present. That would be a significant impact on bats at a local scale.
- The Proposed Development, in the absence of mitigation, has the potential to result in a significant negative effect, with regard direct mortality, at a local geographic scale. As significant effects on bats due to direct mortality are predicted to arise from the Proposed Development on its own, there is a possibility of significant cumulative effects in that respect.
- The Report proposed careful, expertly-supervised, tree-felling[800] after endoscopic examination of the trees for removal for the existence of roosts and the presence of bats. If bats were found, works would cease pending application for a derogation licence.
- As to the possibility of a "small number" of bats roosting in the Afterschool building, *"a derogation licence from NPWS may be needed in order to permit removal of bats"*[801].
- The Report proposed six expertly-located bat boxes to provide additional roosts - recommended as an enhancement rather than as mitigation, as no confirmed roosts have been identified.

Bats – Residual Effects

- Potential impacts on bats include mortality during construction and/or disturbance from the Proposed Development Site during construction and operation, particularly from artificial light spill. However, assuming the full and successful implementation of the mitigation measures, no long-term significant impacts are predicted, and the Proposed Development will not result in significant negative residual effects on the local bat population at any geographical scale.

800 Soft-felling i.e. section-felled using controlled rigging under the supervision of an experienced ecologist, and tree limbs are cut and left grounded overnight to allow any bats to make their way out.
801 §6.6.2.1 Measures to Protect Bats during Construction.

620. Colbeam's Ecological Impact Assessment Report[802] similarly treated of breeding bird species recorded as having used the Site. 3 are Amber listed.[803] The Site was deemed "*of local importance (higher value) for breeding birds."* The Report concluded that bird habitat loss and displacement and potential mortality to nesting birds during construction will likely result in a negative effect on the local bird population, but mitigation will minimise the impact. The Proposed Development is unlikely to result in any long-term effects on local breeding bird populations, and there will be no likely significant negative residual effect, at any geographic scale. It is apparent that this conclusion is contingent on mitigation - but for which, effects would be significant.

621. Colbeam's Ecological Impact Assessment Report concludes:[804]

- Citing content set out above and the AA Screening Report, that the Proposed Development will result in some temporary loss of treeline habitat, but this will not result in any significant negative effects following the implementation of the identified mitigation and enhancement measures.
- The landscape design will ensure that the biodiversity value of the habitats to be retained and created as part of the Proposed Development, are maximised.
- The Proposed Development may have significant negative effects on habitats (treelines), breeding birds and bats at local geographic levels. On implementation of mitigation measures, no residual impacts on any key ecological receptors are predicted.
- The proposed comprehensive suite of mitigation measures will be implemented in full and are best practice, tried, tested, and effective to protect biodiversity and the receiving environment.
- No significant residual ecological effects are predicted, either alone or cumulatively with any other projects.

622. Colbeam also submitted an Environmental Report[805] - stated as intended to be read with the Planning Report, Statement of Consistency and all other plans and reports that accompanied the Planning Application. It describes itself as *"a summary review of the outputs of preliminary scoping carried out on the proposed development on possible effects on the environment and detail targeted measures to address any matters potential impacts."*

623. It briefly describes the law of EIA Screening and conducts an "*EIA Screening exercise*"[806] which sequentially considers the matter by reference to the criteria set out in Schedule 7 PDR 2001[807] for deciding whether EIA is necessary. It concludes that EIA is not required. Essentially, in

802 See §6.7 as to Breeding Birds.
803 Medium conservation concern. A categorisation deriving from the list of Birds of Conservation Concern in Ireland.
804 §8.
805 It erroneously described itself as prepared to address S.5(5)(iii) of the 2016 Act, "which states that any Strategic Housing Development Planning Application to the Board should include 'a brief assessment of the nature and purpose of the development and of its possible. effects on the environment'." In fact, S.5(5)(iii) relates to pre-application consultations with the Board – not to the actual planning applications. However, it does not seem to me that anything turns on this.
806 By reference to Schedules 5 and 7 PDR 2001.
807 Being a) Characteristics of Proposed Development; b) Location of Proposed Development; and c) Characteristics of Potential Impacts and sub-criteria of each.

doing so as to Biodiversity (Flora and Fauna), it cites and adds no more to the Ecological Impact Assessment Report and AA Screening Report.

EIA - The Inspector's Report, the Preliminary Examination Form & the Board's Decision

624. The Inspector identified[808] the development as sub-threshold. The threshold is more than 500 dwelling units, and she considered that 698 bedspaces fell below it *"having regard to the average household size of 2.7 persons".* She does not say so, but it is probable that her calculation was 698/2.7 = 258.5 dwelling units.[809]

625. The Inspector did a Preliminary Examination for EIA.[810] She does not say so, but it was clearly a Preliminary Examination within the meaning of **Article 299B(b)(i) PDR 2001**, which transposes in part Article 4 of the EIA Directive and, in part, requires that as to sub-threshold development "*the Board shall carry out a preliminary examination of, at the least, the nature, size or location of the development*" and "*Where the Board concludes, based on such preliminary examination, that there is no real likelihood of significant effects on the environment arising from the proposed development, it shall conclude that an EIA is not required ….."* The Inspector concluded on that basis that EIA was not required.

626. In so doing she expressly had regard, inter alia, to the criteria set out in Schedule 7 PDR 2001.[811] Schedule 7 includes the likely significant effects on the environment with regard to impact on the factors specified in the definition of EIAR[812] in S.171A(*b*)(i)(I) to (V) PDA 2000. Those factors include "*biodiversity, with particular attention to species and habitats protected under the Habitats Directive and the Birds Directive*". Thus, while the section of her report as to Preliminary Examination for EIA does not explicitly consider species, she implicitly asserts that she had done so. In that light, and while her Preliminary Examination for EIA does not explicitly address bats or birds, it must be read with her consideration of bats and birds elsewhere in her report.

627. That consideration of bats and birds elsewhere in her report consists of the following:

- She notes objections that Colbeam's bat surveys were inadequate and out of date.[813]

808 Citing Class (10)(b) of Schedule 5 Part 2 PDR 2001 (as amended) – Classes Listed in Annex II of the EIA Directive.
809 She also considered the threshold of Urban development which would involve an area greater than 2 ha in the case of a business district, 10 ha in the case of other parts of a built-up area and 20 ha elsewhere. She noted that the Site was not in a business district (hence by implication to the 10ha criterion applied) and was of approx. 2.2ha.
810 §12 of her report.
811 Criteria for Determining Whether Development Listed in Part 2 of Schedule 5 Should be Subject to EIA. Ordinarily these are applicable in EIA Screening.
812 Environmental Impact Assessment Report.
813 Inspector's Report P33.

- She notes that the Ecological Impact Assessment Report notes that, from the 2018 inspection, the afterschool building (to be demolished) building was[814] considered to be of low suitability for bats, with a flat roof and hence not attic, and no evidence of roosting bats was observed.[815]
- She notes that the Ecological Impact Assessment Report notes that the Proposed Development would result in the loss of treeline habitat and recommends mitigation to avoid or minimise the effects on the receiving ecological environment.[816] That includes the retention and protection of vegetation during construction, provision of bat boxes and avoidance of tree felling between March and August to avoid direct impacts on nesting birds.
- She opines, having regard to the proposed mitigation, the high-quality landscaping proposals including the retention of existing trees and vegetation and the significant area of open space, that the Proposed Development would not have a significant negative impact on the biodiversity of the area.[817]

628. The Inspector concludes[818] that "Having regard to the limited nature and scale of the proposed development and the absence of any connectivity to any sensitive location, there is no real likelihood of significant effects on the environment arising from the proposed development. The need for environmental impact assessment can, therefore, be excluded. An EIA - Preliminary Examination form has been completed and a screening determination is not required".

629. The Inspector asserts that the site is outside of any sensitive location specified in Art 109(4)(a) PDR 2001. Art 109(4)(a)(iv) refers to "*a development which would be located on, or in, or have the potential to impact on*" inter alia, "(*VI) a place, site or feature of ecological interest, the preservation, conservation or protection of which is an objective of a development plan*"

630. The EIA - Preliminary Examination Form was completed by the Inspector herself on the same date as her report. It says "No" to each of the following questions:

1. Is the size or nature of the proposed development exceptional in the context of the existing environment?	No
2. Will the development result in the production of any significant waste, or result in emissions or pollutants?	No
3. Is the proposed development located on, in, adjoining or have the potential to impact on the ecologically sensitive site or location*?	No
4 . Does the proposed development have the potential to affect other significant environmental sensitivities in the area?	No

814 The word "not" appears here in the Inspector's report but is clearly an error. That is apparent from the context in the Inspector's report but in any event given the content of the Ecological Impact Assessment Report §5.4.2 which reads in part: "No evidence of bats was encountered during the internal and external inspection of the Grove After School (GAS) building within the proposed development site on 2nd May 2018. The GAS building is considered to have low suitability for roosting bats. The building has a flat roof and therefore has no available roof space to inspect."
815 Inspector's Report §10.11.1.
816 Inspector's Report §10.11.2.
817 Inspector's Report §10.11.3.
818 Inspector's Report §12.3.

Based on a preliminary examination of the nature, size or location of the development is there a real likelihood of significant effects on the environment?	
1. There is no real likelihood of significant effects on the environment.	✓

"*Sensitive locations or features include … any other ecological site which is the objective of a CDP"(sic) .[819] I take this text to refer to Art 109(4)(a) PDR 2001 – as to which see above.

631. The Board agreed with the Inspector as to exclusion of EIA on a Preliminary Examination. The Board's decision does not mention bats – but that is not, per se, a problem as it agrees with the Inspector's Report, which does address bats.

EIA - The Applicants' Pleadings & Submissions & Some Comment Thereon.

632. As the Board raises a pleading point, it is necessary to separately consider the Applicants' Pleadings and Submissions.

Grounds

633. The Applicants plead that the Impugned Decision is invalid because the Board failed to comply with Article 299B(1)(b)(i) PDR 2001 and/or Article 4(5) of the EIA Directive as it was not open to the Board to exclude at Preliminary Assessment the possibility of significant effects on the environment.[820]

634. The Applicants plead, as to the facts:

- The content of Colbeam's Ecological Impact Assessment Report, as to bats and birds, as I have set it out above.
- The content of Colbeam's Environmental Report in concluding that EIA not required, as I have set it out above.
- The Board's answer *"No*" to the question on its EIA-Preliminary Examination check-list as to whether the Proposed Development had *"the potential to affect other significant environmental sensitivities in the area".*
- The Inspector's conclusion[821] and the Board's agreement, based on Preliminary Examination, that EIA Screening and EIA were not required.

635. The Applicants plead, as to the application of the law to the facts, that

819 i.e. Development Plan. This text is reproduced verbatim.
820 Submissions observe that this ground is without prejudice to the validity ground that preliminary examination has no basis in the EIA Directive. That validity ground is not for decision in this judgment.
821 Inspector's Report §12.3.

- the Inspector "*could not possibly*" have excluded the requirement for (at least) EIA Screening where the Proposed Development will have an acknowledged impact on bats entitled to strict protection under Article 12 of the Habitats Directive.
- the Board therefore failed to take into account relevant considerations and/or failed to give adequate reasons as to why a screening determination was not required.
- the Board failed to give adequate reasons explaining:
  - its reference to "*limited nature and scale of the proposed development*". The Applicants say that the Proposed Development is substantial in nature and scale.[822]
  - the description of the Proposed Development as below the 500 housing unit threshold for mandatory EIA purposes. The Applicants say the Board failed to explain why it did not consider each of the 698 bedspaces as individual housing units.
- in light of Colbeam's own materials, the correct answer to the check-list question, whether the Proposed Development had *"the potential to affect other significant environmental sensitivities in the area"* must have been "Yes". The Board's answer "No" was unsupported by evidence and irrational, as the evidence clearly demonstrates that the proposed development will potentially and actually affect significant environmental sensitivities, including strictly protected bats and red and amber listed bird species. As a result, the Board failed to take relevant considerations into account.

Submissions

636. The Applicants submit that:

- The Ecological Impact Assessment Report says that, in the absence of mitigation, the Proposed Development is likely to have a potential significant effect both on bats, and birds.
- Mitigation should not be considered in Preliminary Examination. They cite by analogy **MRRA**[823] and **Gillespie v First Secretary of State**[824] as to EIA screening.

637. The Applicants also orally submitted[825] that the Inspector erred in considering, for purposes of Preliminary Examination for EIA, that the Site is outside of any sensitive location specified in Art 109(4)(a) PDR 2001. Art 109(4)(a)(iv) refers to "*a development which would be located on, or in, or have the potential to impact on*" inter alia, "(*VI) a place, site or feature of ecological interest, the preservation, conservation or protection of which is an objective of a development plan*" and the Development Plan's Tree Protection Objective was an objective for the preservation, conservation or protection of a feature of ecological interest. This point was not pleaded. The Board makes that point and I agree that the issue cannot be raised now.

822 comprising 698 bedspace and associated facilities in 8 blocks ranging from 3 to 7 storeys over a site area of 2.12 ha.
823 Monkstown Road Residents Association v An Bord Pleanála [2022] IEHC 318 §166 et seq.
824 [2003] 3 PLR 20 – cited sub nom. Bellway Urban Renewal Southern v Gillespie [2003] EWCA Civ 400 §§36-37. Note - it predates the 2014 amendment to the EIA Directive.
825 D2 p49.

638. Finally, and as far as the Applicants are aware, the requirements of the EIA Directive as to the test to be applied in Preliminary Examination has never been considered in the Irish Courts or by the CJEU. They submit that this issue should be disposed of in their favour but can't be resolved *against* them without first determining if case-by-case Preliminary Examination is permitted by the EIA Directive and referring the matter to the CJEU under Art 267 TFEU. However, as Article 299B(1)(b)(i) PDR 2001 explicitly permits case-by-case preliminary examination, this submission appears directly to engage the issue of adequacy of transposition of Article 4(3) of the EIA Directive and validity accordingly of Article 299B(1)(b)(i) PDR 2001 which issues have been excluded from the scope of this judgment.

EIA - The Board's & Colbeam's Pleadings & Submissions

639. The Board's Opposition Statement interprets the Applicants' pleas that "It was not open to the Board to conclude that the possibility of significant effects on the environment could be excluded at preliminary assessment stage" and that the Board "could not possibly have excluded at Preliminary Examination the requirement for (at least) EIA Screening where the proposed development will have an acknowledged impact on bat fauna" as pleading irrationality - a plea that "no reasonable decision-maker could have arrived at this conclusion and/or that there was no evidence before the Board to support this conclusion".[826] My first instinct was that the Board was defending a straw man argument. But, on reflection, I think they were correct to so address the matter. The Board is not obliged to take the risk that an objection that irrationality was not pleaded will not succeed. Also, the Applicants did plead irrationality of the Board's answer to the check-list question, whether the Proposed Development had "the potential to affect other significant environmental sensitivities in the area" and identified the significant environmental sensitivities which the Board had failed to identify as including strictly protected bats and red and amber listed bird species.

640. The Board pleads that its decision was "*consistent with the evidence and rational*". Colbeam does likewise, asserting that the decision in Preliminary Examination was "*not irrational*". Colbeam again addresses irrationality in submitting that there was evidence before the Board which entitled it to conclude that the Proposed Development did not have the potential to affect environmental sensitivities. They point out, correctly, that the validity of Article 299(B) PDR 2001[827] is not at issue and the Court must apply it.

641. The Board's Opposition Statement[828] defends its reasons as to the 500-unit threshold in terms I need not further consider as, as will be seen, I am with the Board on that issue.

826 Board's Opposition Statement §112.
827 Which allows for preliminary examination of whether EIA or EIA Screening is required as to sub-threshold development.
828 Board's Opposition Statement §113(a).

642. The Board's Opposition Statement[829] defends its reasons for finding that there was no real likelihood of significant effects on the environment merely by repeating them, referring only "*to section 12 of the Inspector's Report and page 5 of the Board Order*". It does not plead reasons as to the issues of bats or birds or plead that reasons can be found in the content of the Inspector's report as to bats or birds (which content, as has been seen, appears elsewhere in the report than in the section dealing with Preliminary Examination).

643. Colbeam pleads that the Inspector and the Board, in Preliminary Examination, gave their reasons "*in great detail*" and "*clearly reasoned*" in section 12 of the Inspector's Report. These adjectival pleas are unwarranted. They are certainly unwarranted as to bats and birds. However, what matters is the legal adequacy of the reasons. Colbeam also pleads that the Applicants did not plead, and so can't argue, that the Board impermissibly had regard to mitigation in Preliminary Examination.

EIA - Discussion and Decision

644. I respectfully observe that the Applicants' plea that the Board "*could not possibly have excluded*" the need for EIA Screening [830], though perhaps primarily introductory to what follows, is unhelpful and causes confusion. It does not invoke a cognisable legal test and prompts more questions than it answers. That said, taking the later plea[831] of irrationality as to the answer in the checklist into account, and for reasons stated above, I think the Board was correct to interpret it as a plea of irrationality.

Reasons - Nature & Scale of Development & Sub-Threshold Development

645. Two points are easily disposed of. The Inspector and the Board gave adequate reasons to explain their view of the Proposed Development both as "*limited nature and scale*" and as sub-threshold. The plea, which is an allegation of failure to give reasons, has no basis in fact. The reason was given and is simple. As a superficial reaction one can easily consider that 698 bedspaces and associated facilities in 8 blocks ranging from 3 to 7 storeys high over a 2.12 ha site is substantial in nature and scale. Nor can that reaction be dismissed as unreasonable. However, the Board's assertion of limited nature and scale here was explicitly in the context of EIA and a threshold of 500 dwelling units. In its view and on the basis of a 2.7-person average occupancy assumption, the 698 bedspaces equated to 258.5 dwelling units. It is clear why the Board considered the Proposed Development sub-threshold. And on that reasoning the assertion of limited nature and scale is readily comprehensible. More to the point, that reasoning has not been challenged. No doubt that reasoning was intended only as a rough approximation with a view to a broad understanding of the

829 Board's Opposition Statement §113(b).
830 Statement of Grounds §92.
831 Statement of Grounds §94.

size of the Proposed Development. But one would have to double the approximation to reach the 500-unit threshold and it seems to me to have amply sufficed to allow a conclusion, within a very appreciable margin, that the Proposed Development indeed fell within that threshold. The 2016 Act refers, not merely to "student accommodation" but to "student accommodation units" in terms distinguished from bed spaces and I have indicated my reasons for considering that, as to student accommodation, a cluster is analogous to an apartment and is the "unit". However, I need not so conclude: the complaint is of failure to give reasons. The reason for the inspector's view is very clear. The Applicants are entitled to reasons they can understand - not to reasons with which they agree. I reject their challenge on this account.

The Article 109 Point

646. As recorded above, the Applicants submitted[832] that the inspector erred in considering, for purposes of Preliminary Examination for EIA, that the site is outside of any sensitive location specified in Art 109(4)(a) PDR 2001 as Art 109(4)(a)(iv) refers to "*a development which would be located on, or in, or have the potential to impact on*" inter alia, "(*VI) a place, site or feature of ecological interest, the preservation, conservation or protection of which is an objective of a development plan*" and the Development Plan's Tree Protection Objective was an objective for the preservation, conservation or protection of a feature of ecological interest. The Board objects that this point was not pleaded. I agree that the issue cannot be raised now. In any event, there is nothing in this point as it refers only to the content of the Preliminary Examination form, which is merely a brief non-statutory/ administrative checklist that subsists in the shadow of the Inspector's report. The Inspector addressed the Tree Protection Objective in her report.

Birds & Bats

647. That leaves the question whether it was intra vires the Board to exclude EIA on a Preliminary Examination given the material before it as to bats and birds.

EIA & Preliminary Examination

648. I have briefly introduced the concept of Preliminary Examination above. I must now return to it. By **Article 2** of the **EIA Directive**[833] EIA is required, for development projects of classes defined in **Article 4 and Annexes 1 & 2**, before development consent (in this case planning permission) is given for such projects, where those projects are "*likely to have significant effects on the*

832 Transcript Day2 p49.

833 Directive 2011/92/EU of the European Parliament and Of the Council Of 13 December 2011 on the Assessment of the Effects of Certain Public and Private Projects on the Environment as Amended By: Directive 2014/52/EU Of the European Parliament and of the Council Of 16 April 2014.

environment". That is a general requirement applicable as to any project falling within one of the prescribed classes, regardless of the size of the project. As to any such project, a decision must be made whether EIA is required.

649. As Ireland has transposed the EIA Directive, projects requiring EIA are identified in three ways by **S.172 PDA 2000** and **Schedule 5 PDR 2001**.

- First, EIA is automatically required of certain classes of project.[834]
- Second, EIA is automatically required of certain other classes of project – but only where they exceed a quantitative threshold or limit set for each class.[835]
- Third, and as relevant here, EIA is required, in accordance with Article 2 of the EIA Directive, for those projects in the second group[836] which do not exceed the threshold or limit set for each class but which, nonetheless, are likely to have significant effects on the environment. These projects are termed "*sub-threshold development*".

650. The need for EIA of sub-threshold development is decided on a case-by-case basis. Typically, this is done by a formal "EIA Screening"[837] - for which **Articles 4, 5 & 6 & Annex IIA of the EIA Directive** and, in the case of SHD, **Article 299B & Schedule 7 PDR 2001**[838] provide. To that end, the developer must provide to the Board the information specified in **Schedule 7A PDR 2001**. As has been observed in **EU Commission Guidance**, screening must implement the EIA Directive's overall aim of ensuring that projects likely to have significant effects on the environment receive EIA. [839] Screening must strike the right balance between that aim and the aim, as the Directive recites[840], of ensuring that EIA is required, but required only, for projects likely to have significant effects on the environment - to ensure efficient use of public and private resources.

651. Presumably as it was found in practice that even formal EIA Screening was, in reality, unnecessary and wasteful in respect of many, typically small, developments of which it was in truth obvious that they were not likely to have significant effects on the environment and did not require EIA, the 2014 amendment of Article 4(3) of the EIA Directive[841] allowed Member States to "*set thresholds or criteria to determine*" when projects do not need even EIA Screening.[842] By the

834 Listed in Annex I of the EIA Directive & Part 1 Schedule 5 PDR 2001.
835 Listed in Annex II of the EIA Directive & Part 2 Schedule 5 PDR 2001.
836 Listed in Annex II of the EIA Directive & Part 2 Schedule 5 PDR 2001.
837 Article 4, 5 & 6 & Annex IIA of the EIA Directive.
838 Article 299B is inserted by article 94 of S.I. No. 296/2018 European Union (Planning and Development) (Environmental Impact Assessment) Regulations 2018 – See also S.172(1)(b)(ii) PDA 2000.
839 Environmental Impact Assessment of Projects, Guidance on Screening, European Commission 2017 p23. The legal status of such Guidance was addressed in Monkstown Road Residents' Association v An Bord Pleanála [2022] IEHC 318 (High Court (General), Holland J, 31 May 2022) §115 as follows: - "Such EU Commission Guidance is not and does not purport to be binding nor an aid to interpretation of the EIA Directive nor even necessarily the official opinion of the Commission……. However, the 2018 DoHPLG EIA Guidelines were issued under S.28 PDA 2000 such that the Board is obliged by statute to "have regard" to them. The 2018 DoHPLG EIA Guidelines839 identify "Other important guidance documents that should be consulted" as including the ……. three 2017 EU Commission EIA Guidance documents on, respectively, Screening, Scoping and EIAR preparation. Their aim is to provide "practical insight" "for use by Competent Authorities, Developers, and EIA practitioners". In those circumstances it is unsurprising that all these Guidelines are widely considered likely to reflect EIA law and as at least indicative of good practice in its implementation."
840 EIA Directive Recital 27.
841 Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment.
842 Environmental Impact Assessment of Projects, Guidance on Screening, European Commission 2017 p25.

Directive, Preliminary Examination[843] is intended to impose a lesser obligation of inquiry and examination than is imposed by EIA Screening.

652. This amendment prompted the introduction in Ireland[844] of what may be considered a "pre-screening" or "sub-screening" process, called "Preliminary Examination" – 3 outcomes of which are possible: that EIA is not required; that EIA Screening is required; that EIA is required. As to SHD planning applications for sub-threshold development not accompanied by an EIAR,[845] **Article 299B PDR 2001** provides for Preliminary Examination in terms I have set out above.

653. The express criterion for determining in EIA Preliminary Examination that EIA is unnecessary is "*no real likelihood of significant effects".* The 2016 Act and PDR 2001 give no greater direct guidance as to the criteria to be applied in Preliminary Examination. But that standard for concluding that EIA is not required is the same in Preliminary Examination as in EIA Screening. While a gloss on the concept of "real likelihood" may not be required, I confess to finding helpful English authority to the effect that the question in EIA screening is whether there is a "*serious possibility*" of significant effect on the environment – see **Bateman**[846] and **Devon Wildlife Trust**.[847] I do not attribute any exaggerated meaning to the word serious - it connotes merely a likelihood worthy of being taken seriously.

654. There is, as yet, no practically useful authority on Preliminary Examination.[848] But, as the standard for concluding that EIA is not required is the same and as the concept of significance of effect must be the same in Preliminary Examination as in EIA Screening and in EIA (the difference lies in the depth of inquiry), the law on EIA Screening illuminates that of Preliminary Examination. In my view that implies, and I respectfully agree with **Garcia-Ureta**, that Annex III of the EIA Directive – "*Criteria to Determine Whether the Projects Listed in Annex II Should be Subject to an Environmental Impact Assessment*" - must apply in Preliminary Examination as in EIA Screening.[849]

843 I use the Irish nomenclature as convenient.
844 S.I. No. 296/2018 - European Union (Planning and Development) (Environmental Impact Assessment) Regulations 2018.
845 Which was the case in this instance. An additional criterion is that a request for a determination under section 7(1)(a)(i)(I) of the Act of 2016 was not made.
846 R (Bateman) v South Cambridgeshire District Council [2011] EWCA Civ 157.
847 R (Devon Wildlife Trust) V Teignbridge District Council [2015] All ER (D) 359 (Jul) [2015] EWHC 2159 (Admin).
848 It was considered in Waltham Abbey v An Bord Pleanála [2021] IEHC 587 & [2022] IESC 30 but not in any detailed manner or any relevant to the present case.
849 Garcia-Ureta asserts that if Member States decide to apply the second sentence of Article 4(3) ('[they] may set thresholds or criteria to determine when projects need not undergo either the determination under paragraphs 4 and 5 or an EIA, and/or thresholds or criteria to determine when projects shall in any case be made subject to an environmental impact assessment without undergoing a determination set out under paragraphs 4 and 5'), then they inevitably have to apply the new drafting of Annex III. - Environmental Liability, Law Practice and Policy/2014 - Volume 22/Issue 6, 1 December/Articles/Directive 2014/52 on the Assessment of Environmental Effects of Projects: New Words or More Stringent Obligations? – (2014) 22(6) Env Liability: 239; Agustìn Garcìa-Ureta Professor of Law, University of the Basque Country, Bilbao Visiting Scholar, Cambridge University. Article cited in Waltham Abbey Residents Association v An Bord Pleanála [2021] IEHC 312 (High Court (Judicial Review), Humphreys J, 10 May 2021). (Annex III sets the criteria for screening decisions).

655. Statutory guidelines on EIA[850] ("the EIA Guidelines"), to which the Board must have regard[851] but which cannot alter the law, were issued in light of the 2014 amendments to the EIA Directive and coincided in point of time with the regulations[852] transposing those amendments, inter alia by the insertion of Article 299B. Those EIA Guidelines explain[853] that,

> *"A preliminary examination is undertaken, based on professional expertise and experience, and having regard to the 'Source – Pathway – Target' model[854], where appropriate. The examination should have regard to the criteria set out in Schedule 7 to the 2001 Regulations."*

656. Schedule 7 PDR 2001 replicates Annex III of the EIA Directive in listing criteria for determining whether development listed in Part 2 of Schedule 5 PDR 2001 should be subjected to EIA. For the reasons I have just stated, the EIA Guidelines seem to me correct in this regard. And in this case the Inspector's report explicitly records her adverting to Schedule 7 for purposes of her Preliminary Examination.

657. The EIA Guidelines say of Preliminary Examination that where the resultant conclusion is that there is no real likelihood of significant effects on the environment and, so, that EIA is not needed, this "*considered view*" should be recorded, with reasons for this conclusion stated. Those reasons may be brief and concise but should be adequate to inform the public. In my view this guidance is consistent with the pre-screening nature of Preliminary Examination and its function of eliminating EIA only where it is obviously not required.

EIA Preliminary Examination - Taking Mitigation into Account - Pleading

658. Colbeam pleads that the Applicants did not plead, and so can't argue, that the Board impermissibly had regard to mitigation in Preliminary Examination. As the case was run orally, that the Board impermissibly had regard to mitigation in Preliminary Examination was, indeed, a considerable focus of the Applicants' case. Colbeam is correct that it was not pleaded. The question whether mitigation can be considered in a screening assessment is an issue well-identified in the case law and has been controversial. In terms of the law of judicial review, it amounts to an allegation that the decision-maker in making the impugned decision took an irrelevant consideration into account. That is a well-recognised basis of attack on an impugned decision. Whereas the Applicants as to Ground 10 pleaded failure to take a relevant consideration into account, they did not plead that the Board took an irrelevant consideration into account. Taking an irrelevant consideration into account is a distinct ground of judicial review and must be specifically pleaded

850 Guidelines for Planning Authorities and An Bord Pleanála on carrying out Environmental Impact, Assessment August 2018.
851 S.28(2) PDA 2000 - (2) Where applicable, the Board shall have regard to any guidelines issued to planning authorities under subsection (1) in the performance of its functions.
852 European Union (Planning and Development) (Environmental Impact Assessment) Regulations 2018 (S.I. No. 296 of 2018).
853 §3.5&6.
854 Described in the 'Glossary of Terms' in Annex IV of the Guidelines as "A model identifying the source of likely significant impacts, if any, the environmental factors which will potentially be affected and the route along which those impacts may be transferred from the source to the receiving environmental factors."

both as a legal proposition and as to identifying as a fact the irrelevant consideration into account. Neither was pleaded here. So, I agree with Colbeam that the Applicants cannot mount that case on this occasion.

EIA Preliminary Examination - Taking Mitigation into Account - Gillespie v First Secretary of State - 2003 & MRRA - 2022 & Comment thereon

659. That said, and while I do not decide the issue whether mitigation can be taken into account in Preliminary Examination for EIA, some obiter comments may assist given the possibility of remittal of the Impugned Decision as quashed on other grounds.

660. Colbeam's Ecological Impact Assessment Report concludes[855] inter alia and explicitly as to bats and birds, that:

- the proposed comprehensive suite of mitigation measures will be implemented in full and are best practice, tried, tested, and effective to protect biodiversity and the receiving environment.
- on implementation of mitigation measures, no residual impacts on any key ecological receptors are predicted.

661. The English Court of Appeal in **Gillespie** envisaged taking mitigation into account in EIA Screening where the efficacy of the envisaged mitigation was clear.[856] EIA Screening required a practical judgment as to whether the project would be likely to have significant effects on the environment. It need not, as a matter of law, ignore proposals in the planning application for remedial[857] measures to prevent significant effects but their success cannot be assumed. Pill LJ said that

- "*In some cases, the remedial measures will be modest in scope, or so plainly and easily achievable, that the Secretary of State can properly hold that the development project would not be likely to have significant effects upon the environment, even though, in the absence of the proposed remedial measures, it would be likely to have such effects.*"
- But **Bozen**[858] requires full scrutiny, including of "*the nature of any proposed remedial measures, the extent to which those measures have been particularised, their complexity and the prospects of their successful implementation*."
- Scrutiny would encompass *"the nature and extent of the scheme for remediation, including its uncertainties, … and the likely final result*." In screening "*these contingencies must be considered, and it cannot be assumed that, at each stage, a favourable and satisfactory result will be achieved."*

855 §8.
856 In using the word "clear" I am summarising and paraphrasing – I do not intend to suggest a precise legal criterion.
857 The site was already heavily contaminated.
858 World Wildlife Fund v Autonome Provinz Bozen C-435/97 [2000] 1 CMLR 149; [2000] 2 PLR 1.

- *"There will be cases in which the uncertainties are such that, on the material available, a decision that a project is unlikely to have significant effects upon the environment could not properly be reached."*
- *"The error was in the assumption that the [remedial] works … could be treated, at the time of the screening decision, as having had a successful outcome."*

Laws LJ took the view that a decision-maker could screen out EIA on the basis of proposed remedial measures whose nature, availability and effectiveness are already plainly established and plainly uncontroversial. But if they are not plainly established, and are not plainly uncontroversial, then, the case calls for EIA. So, far from being an authority against consideration of mitigation in EIA Screening, **Gillespie** permits it where the nature, availability and effectiveness of mitigation are already plainly established and plainly uncontroversial.

662. Since **Gillespie,** and by its 2014 amendment, Article 4(4)&(5) of the EIA Directive as to EIA Screening permits developers to submit and decisionmakers to consider *"any features of the project and/or measures envisaged to avoid or prevent what might otherwise have been significant adverse effects on the environment."* As cited in **MRRA**,[859] **Eco Advocacy**[860] confirms that the 2014 Directive resolved any doubt – in favour of considering mitigation in EIA Screening. But as that should not be interpreted as absolving the decisionmaker from considering for purposes of EIA Screening the effectiveness of proposed mitigation, Gillespie remains relevant. And, as I have suggested above, agreeing with **Garcia-Ureta**[861], Annex III of the EIA Directive – "*Criteria to Determine Whether the Projects Listed in Annex II Should be Subject to an Environmental Impact Assessment*" - applies in Preliminary Examination as in Screening. Annex III §3(h) lists *"the possibility of effectively reducing the impact".*

663. Accordingly it seems to me that there is no objection in principle to taking mitigation into account in Preliminary Examination as suggesting that EIA Screening (and EIA) is not required. However that must be done in accordance with the precautionary principle and bearing in mind that exclusion of EIA Screening and EIA at Preliminary Examination stage is reserved for obvious cases. Gillespie is authority that such a conclusion will, at least generally, require that the nature, availability and effectiveness of mitigation are already plainly established and plainly uncontroversial. However, and for reasons stated above, this view is obiter.

859 §167.
860 Eco Advocacy CLG v An Bord Pleanála [2021] IEHC 610 (Humphreys J, 4 October 2021).
861 Garcia-Ureta asserts that if Member States decide to apply the second sentence of Article 4(3) ('[they] may set thresholds or criteria to determine when projects need not undergo either the determination under paragraphs 4 and 5 or an EIA, and/or thresholds or criteria to determine when projects shall in any case be made subject to an environmental impact assessment without undergoing a determination set out under paragraphs 4 and 5'), then they inevitably have to apply the new drafting of Annex III. - Environmental Liability, Law Practice and Policy/2014 - Volume 22/Issue 6, 1 December/Articles/Directive 2014/52 on the Assessment of Environmental Effects of Projects: New Words or More Stringent Obligations? – (2014) 22(6) Env Liability: 239; Agustìn Garcìa-Ureta Professor of Law, University of the Basque Country, Bilbao Visiting Scholar, Cambridge University. Article cited in Waltham Abbey Residents Association v An Bord Pleanála [2021] IEHC 312 (High Court (Judicial Review), Humphreys J, 10 May 2021). (Annex III sets the criteria for screening decisions).

EIA Preliminary Examination - Failure to take Relevant Matters into Account

664. The Applicants' plead that the Inspector could not possibly have excluded by Preliminary Examination the requirement for EIA Screening where the Proposed Development will have an acknowledged impact on bats entitled by Article 12 of the Habitats Directive to strict protection[862]. Therefore, they plead, the Board erred in law in that it failed to take a relevant consideration into account in making the Impugned Decision. This is a difficult issue as it turns in part on the unpleaded argument that the Board took irrelevant mitigation into account. Once one strips out the mitigation, so the Applicants argue, one is left with the significant effects on bats which rendered the mitigation necessary. Had the plea of taking irrelevant mitigation into account been made, such a plea would have been open. But as matters stand, it seems to me that it is not, so I reject the point.

665. Lest I am wrong in that conclusion I will consider the matter further.

666. The conclusions of the Ecological Impact Assessment, as to bats, assuming full and successful implementation of the mitigation measures, is that no long-term significant impacts on bats are predicted, and the Proposed Development will not result in significant negative residual effects on the local bat population at any geographical scale. That is an entirely proper observation in the Ecological Impact Assessment.

667. However, the EIA Directive does not confine itself to long-term effects. It requires identification and assessment of significant short-term, medium-term and temporary effects.[863] Though it must be said that, ceteris paribus, the shorter-term the effect, the less likely it will be significant. Amongst the possible significant short-term effects identified in the papers before the Board is the possibility of bat mortality in removal of trees with roost potential.

668. **MRRA**[864] was cited to me. It briefly considers the recent opinion of AG Kokott and the decision of the CJEU in **Namur Est**[865] as to the relationship between EIA and Habitats Directive derogation licenses - though Namur Est was not more directly cited to me in the present case. It seems likely to require some revisiting of Irish authority on that relationship. As it was only obliquely cited to me, a detailed consideration of Namur-Est must await argument. However, it is necessary to note that, in essence, Namur-Est requires that the environmental effects of carrying a derogation licence into effect be considered in EIA. Though in Namur-Est the derogation licence preceded the

862 Article 12 of the Habitats Directive requires Member States to establish a system of strict protection for listed animal species prohibiting, inter alia, deliberate killing of specimens of these species in the wild; deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration; deterioration or destruction of breeding sites or resting places. Article 16 permits derogation from Article 12 prohibitions in limited circumstances. Ireland transposed Articles 12 and 16 in by Articles 51 and 54 respectively of the Birds and Natural Habitats) Regulations 2011862. Article 51 criminalises actions prohibited by Article 12 unless a derogation is licensed under Article 54.

863 EIA Directive Annex IV – Information required in EIAR - §5.

864 Monkstown Road Residents Association v An Bord Pleanála [2022] IEHC 318 §166 et seq.

865 Case C-463/20 Namur-Est Environnement ASBL v Région Wallonne & Cimenteries CBR SA (Opinion 21 October 2021) (Judgment 24 February 2022).

development consent, the case in effect raises the issue of what environmental effects ought to be foreseen and assessed in EIA where a derogation licence is recognised as possibly required in the future. I noted, but did not decide, the issues arising in that regard in MRRA.

669. AG Kokott has expressed the view in Namur-Est that EIA "*covers all significant environmental effects, including, where relevant, significant effects on protected species. …. such effects must therefore be described by the developer. No exceptions are provided for certain environmental effects."* AG Kokott continues:

> *"… derogations from the rules of EU law on the protection of species, that is to say, from the prohibitions under Articles 12 and 13 of the Habitats Directive and Article 5 of the Birds Directive, must also be described. This is because such derogations from the requirements of EU environmental law are significant by their very nature, irrespective of whether they should ultimately be justified under Article 16 of the Habitats Directive or Article 9 of the Birds Directive."*

She had expressed a similar view in **Holohan**[866] - that "*potential effects on species which are protected by the Habitats Directive (or by national law), for example, are, as a rule, to be regarded as significant[867] and must therefore also be included in the information provided by the developer, <u>even if only individual specimens are affected</u> in the case in question*."

670. To put it another way, AG Kokott was of the view that environmental effect on protected species is not rendered insignificant, such as to render EIA unnecessary, by reason only of its being licensed by a derogation licence. AG Kokott also considered that where such an issue arises the authorities responsible for species protection must be involved in the EIA.[868]

671. So, Namur-Est, at least generally, canvasses issues similar to the plea in the present case that the Inspector could not possibly have excluded by Preliminary Examination the requirement for EIA Screening where the Proposed Development will have an acknowledged impact on bats entitled by Article 12 of the Habitats Directive to strict protection.

672. Though it should not affect the general principle of consideration in EIA of effects on protected species, a further issue likely to require consideration in Ireland is that Namur-Est reflected a Belgian practice in which the Habitats Directive derogation licence preceded the development consent and EIA, whereas in Irish practice that sequence is, at least often, reversed.

866 Case C-461/17 Holohan v An Bord Pleanála & NPWS, Opinion of Advocate General Kokott delivered on 7 August 2018.
867 Judgment of 24 November 2011, Commission v Spain (Alto Sil/Spanish brown bear), C-404/09, EU:C:2011:768, paragraph 86).
868 §48 & 50 – citing Art 6(1) EIA Directive. "Member States shall take the measures necessary to ensure that the authorities likely to be concerned by the project by reason of their specific environmental responsibilities or local and regional competences are given an opportunity to express their opinion on the information supplied by the developer and on the request for development consent …".

673. Returning to the present case, the inspector clearly read the Ecological Impact Assessment. She clearly adverted to the possibility of bats on Site. Her reference to bat boxes is taken from the content of the Ecological Impact Assessment.[869] That content also refers - though the Inspector does not at all, much less in her Preliminary Examination - to the possibility of bat roosts in trees to be felled, the expert soft-felling of those trees and the prospect of halting works pending application for a derogation licence. The Inspector does not mention the prospect of derogation licences at all. As to the only species protected by Art 12 of the Habitats Directive found on Site and given that, according to AG Kokott in Namur-Est, derogation licences "*as a rule*"[870] imply significant environmental effect, it is at very least to be regretted that the Inspector did not explicitly address these issues in her report – and very preferably explicitly in, and as a matter of, her Preliminary Examination. The failure to do so renders needlessly necessary a consideration of what, in this regard, may be inferred from her report which should, and could readily, have been explicit.

674. In fairness to the inspector, and indeed to the Board, it may be that this omission derives from a view, for which there is Irish authority, that development consent regimes and derogation regimes are quite separate. Though the issue of their relationship is raised in a pending reference to the CJEU in **Hellfire-Massey**,[871] Namur-Est was not cited to the High Court in that case. The Inspector's report and the Impugned Decision in the present case preceded all of the opinion of AG Kokott and the judgment of the CJEU in Namur-Est and the judgments in Hellfire-Massey. But such an explanation of the omission implies that the prospect of a derogation, as to the significance of environmental effects arising on foot of reliance on any derogation licence, was not considered by the Inspector and the Board.

675. I have struggled to discern whether and if so in what terms, Colbeam's Ecological Impact Statement identifies for what, other than very generally removal of bats, and in what terms, a derogation licence, if needed, would be sought. The possibility of a need for a derogation is stated in very general terms. How bats, once found, would be removed on foot of a derogation licence and with what effect on them, is not stated. I consider that I can take judicial notice that, to date at least, derogation licences are often conditioned on compliance with an expert report, as to proposed method and precautions, submitted with the derogation licence application. The Applicants complain of the inadequacy of the ground-based bat surveys of tree roost potential to date, but it is primarily for the Board, not the courts, to decide on the adequacy of information before it in this regard. For my own part, I can understand that, given the inevitable passage of time between pre-application surveys and works and even between the grant of permission and works, what matters, from a practical species protection point of view, may be what is found on expert endoscopic examination of the trees immediately prior to their removal - though that observation, necessarily tentative, may be to incorrectly devalue the early identification of roosts used intermittently. The results of endoscopic examination may well inform the content of a derogation licence application. How that timing is to be reconciled with Namur-Est to the effect that EIA must encompass the effects of reliance on a derogation licence may require consideration in a suitable case.

869 §6.6.2.1.
870 By which phrase she clearly meant "generally", as opposed to meaning it was a strict rule.
871 Hellfire Massy Residents Association v. An Bord Pleanála [2022] IECH 2 & [2022] IESC 38.

676. It seems to me, on balance, that Colbeam's Ecological Impact Statement is properly to be interpreted as meaning that, while precautionary soft-felling will not require a derogation licence if no roosting bats are found, if they are found essentially the same soft-felling will require a derogation licence. But Colbeam's Ecological Impact Statement does not identify any potential significant effects on bats of carrying a such a derogation licence into effect – for example as to disturbance. Perhaps the terms of a derogation licence would result in a risk of bat mortality. Perhaps not. Carrying a derogation licence into effect would result at least in disturbance within the meaning of Article 12 of the Habitats Directive – that is the purpose of the derogation and otherwise no derogation licence would be needed.

677. As I have noted above, AG Kokott in Namur Est states[872] that all likely significant effects of a proposed development, including effects on protected species and of derogations from their protection, must be considered in EIA. Hence, the potential for such effects must be considered in EIA Screening and in EIA Preliminary Examination. In turn, this may bear on the required content of reasons to be given in EIA, EIA Screening and in EIA Preliminary Examination.

EIA as to Bats & Birds - Moot/Discretion & Conclusion

678. Colbeam's written submissions contend that this ground is moot as the trees identified as for removal, including those with bat roost potential, have already been removed. The same is true of any trees with nesting potential for breeding birds. The reasons I have stated above as to Ground 8 as to trees suggest that I should reject that argument. Also, and as will have been seen, I am by no means clear that the Impugned Decision has correctly applied, as to bats, the law as to EIA and Habitats Directive derogation licences – not least in light of Namur-Est.

679. However, I think the position as to bats and birds differs from the position as to trees. My view on mootness as to trees was based considerably on the prospect of remediation of the kind deemed possible in **Doorly**. However, no-one has suggested that any damage done to bats and nesting/breeding birds by the removal of trees in this case is in any degree remediable or that, at this point, any practical purpose of protection of bats or birds from the prospect or consequences of removal of trees would be served by quashing the Impugned Decision on this account. There is no possibility of remediating any bat mortality. Nor, indeed, has anyone suggested that the tree-felling in this case in fact transpired to require a derogation licence or that any bat mortality, morbidity or disturbance in fact occurred.

872 §§41 & 44 & 47.

680. I do not consider that anything essential turns on whether I regard Ground 10 as moot given the removal of the trees or whether I refuse on discretionary grounds to quash the Impugned Decision on the basis of Ground 10. The factual and practical basis for either view is the same and on either view I refuse relief. And given I will quash the Impugned Decision on other grounds, any remaining EIA issues will in any event fall for reconsideration by the Board in accordance with law if the Impugned Decision is remitted to it.

CONCLUSIONS

681. For the reasons stated above, I will quash the Impugned Permission on the Grounds I identify below in terms intended as no more than aides-memoires to the subject-matters addressed above:

- Ground 2b as to consideration of the Open Character of the Site.
- Ground 2c as to Density.
- Ground 5 as to SPPR3 of the Height Guidelines and Daylight Analysis.
- Ground 8 as to the Planning Condition relating to Landscaping/Tree Planting.

However, it will have been noted that, as to certain of the Grounds I have rejected, I have made observations which the Board should consider if the matter is remitted to it.

682. Finally, I should note that Colbeam objected to Grounds 3, 7, 9, 10 and 11 as raising issues not relied on by the Applicants before the Board. As I have found against the Impugned Decision on none of these Grounds, the reader is spared my views on this difficult area of the law.

683. I am provisionally of the view that the Applicants should have their costs – essentially for the reasons given by Humphreys J in **Hickwell**,[873] with the generality of which I agree.

684. I will list this matter for mention only on 27 February 2023 with a view to making final orders or making arrangements for argument as to final orders, including on the question of remittal.

DAVID HOLLAND
17 February 2023

873 Hickwell v Meath County Council [2022] IEHC 631.