THE HIGH COURT

JUDICIAL REVIEW

2019 No. 20 J.R.

BETWEEN

HEATHER HILL MANAGEMENT COMPANY CLG

GABRIEL MCGOLDRICK

APPLICANTS

AND

AN BORD PLEANÁLA

RESPONDENT

BURKEWAY HOMES LTD

NOTICE PARTY

JUDGMENT of Mr. Justice Garrett Simons delivered on 21 June 2019.

SUMMARY

1. The within proceedings seek to challenge a decision to grant planning permission for residential development at Bearna, Co. Galway. The proposed development would comprise 197 residential units, and, as such, constitutes "strategic housing development" as defined. The application for planning permission was made directly to An Bord Pleanála pursuant to the Residential Tenancies and Planning and Development (Housing) Act 2016 ("*the PD(H)A 2016*"). The decision to grant planning permission is dated 16 November 2018, and bears An Bord Pleanála reference "PL07.302216".

2. For the reasons set out in detail in this judgment, I have concluded that the decision to grant planning permission was *ultra vires* and should be set aside. The proposed development would involve a material contravention of the Galway County Development Plan ("*the County Development Plan*") in two respects. First, the scale of the proposed development would breach the population allocation for Bearna as set out in the core strategy and settlement hierarchy, and as recently affirmed by a variation made to the County Development Plan on 23 July 2018. Secondly, part of the application site lies in an area which has been identified as being at risk of flooding. The County Development Plan provides that proposals for development works in this area are to be subject to a development management "justification test". This was not done. An Bord Pleanála also erred in law in purporting to defer the completion of a site specific flood risk assessment. See Condition No. 12(e) of the planning permission.

3. The fact—if fact it be—that there is a conflict between two objectives of a development plan does not allow a decision-maker 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. The board must first consider whether the statutory criteria under section 37(2)(b) of the PDA 2000 have been met, and must indicate in its decision the "main reasons and considerations" for contravening materially the development plan. On the facts of the present case, An Bord Pleanála mistakenly concluded that the proposed development did not involve a material contravention, and, as a consequence, did not address its mind to these statutory requirements. These legal errors vitiate the decision to grant planning permission.

4. Separately, An Bord Pleanála failed to carry out a proper screening exercise for the purposes of the EU Habitats Directive, as implemented under Part XAB of the PDA 2000. The board erred in relying on measures which were intended to avoid / reduce potential harmful effects of the proposed development on two European sites located in Galway Bay. Measures of this type cannot lawfully be taken into account for the purposes of a stage 1 screening exercise. See Case C 323/17 *People Over Wind*.

APPLICATION SITE

5. The application site is located in the village of Bearna, which is some 6.5 km from Galway City (Eyre Square). The population of Bearna as *per* the Bearna Plan (§1.1) is stated to be in excess of 2,000 persons. The application site is located behind the existing village, and also behind a proposed inner relief road. The site is adjacent to the existing Heather Hill residential development. The first named applicant is the management company for that development.

6. The physical feature of the site which is of most immediate relevance to these proceedings is the presence of a stream running through the site from north to south. This stream is referred to as the "Trusky stream". The stream does not evenly bisect the site: more land lies to the west of the stream than to its east. After exiting the application site, the stream continues running south through the village, and ultimately enters Galway Bay at Bearna pier, which is approximately 700 m from the boundary of the application site. There are two protected European sites in Galway Bay, located some 1.4 km to 1.5 km to the east of Bearna pier. As discussed at paragraphs 131 *et seq*., An Bord Pleanála and the Developer, in the context of their analysis of the Habitats Directive issues, attach importance to the fact that the stream does not discharge *directly* into either European site.

7. The application site is approximately 7.2 ha. The site is generally zoned for residential development ("*R – Residential (Phase 1)*"). However, an area of circa 1.5 ha. of the site is zoned as open space ("*OS – Open Space / Recreation and Amenity*"). This open space area is generally located within the vicinity of the Trusky stream.

8. A smaller part of the application site is subject to "*Objective CCF 6 – Inappropriate Development on Flood Zones".* The nature of the legal requirements imposed by this objective are one of the principal issues in dispute between the parties. For introductory purposes, it is to be noted that both An Bord Pleanála and the Developer accept that Objective CCF 6 represents an objective for the zoning of land. See the board inspector's report (§9.2.1), and the affidavit of Gus McCarthy on behalf of the Developer (at paragraphs 37 to 40). The legal significance of this is that An Bord Pleanála is precluded from granting permission for "strategic housing development" where the proposed development, or a part of it, contravenes materially the development plan in relation to the zoning of the land. (See section 9(6) of the PD(H)A 2016).

9. Counsel for An Bord Pleanála has sought to characterise the overall development as comprising a residential development configured around a linear park which follows the contours of the stream. Counsel says that this reflects the open space zoning objective which is, ultimately, intended to protect the stream and to deal with ecological and flooding consequences of the stream. (Day 2, 11.50 am). As discussed presently, however, certain limited development works, consisting of the provision of roads, footpaths, bridges and car parking, will be carried out on lands subject to the open space zoning. (See, for example, the Developer's statement of consistency, page 14).

BEARNA PLAN

10. Given that much of the Applicants' case involves allegations that An Bord Pleanála did not properly comply with the County Development Plan, it may be helpful at this point to provide an overview of the provisions of the plan.

11. Somewhat unusually, the planning policy for Bearna has been adopted by way of a *variation* to the Galway County Development Plan rather than by way of the making of a local area plan ("*LAP*"). In effect, the planning policy for Bearna sits as a chapter within the County Development Plan. Its provisions have the full force of a development plan, rather than the slightly attenuated status of an LAP. For ease of reference, I will refer to this as the "*Bearna Plan*". Of course, strictly speaking, it is not a *separate* plan, but rather forms part of the overall County Development Plan.

12. (It is to be noted that An Bord Pleanála mistakenly refer to the Bearna Plan as an LAP in their written legal submissions, this reflects the same error on the part of the board inspector in her report).

13. The Bearna Plan was made by way of a statutory variation to the existing County Development Plan pursuant to section 13 of the PDA 2000. This variation bears the formal title "Variation No. 2(a)". The making of the variation was subject to a strategic environmental assessment ("*SEA*") for the purposes of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment ("*the SEA Directive*"). The SEA Directive has been transposed into domestic law by *inter alia* the Planning and Development (Strategic Environmental Assessment) Regulations 2004 (as amended).

14. As explained (i) in the statement of consistency, prepared by McCarthy Keville O'Sullivan on behalf of the Developer, submitted as part of the planning application; and (ii) in the report prepared by An Bord Pleanála's inspector; the zoning of the lands the subject-matter of the planning application had been the subject of some debate during the course of the process leading up to the making of the variation on 23 July 2018. (See also Exhibit "GMG5" to Mr Gabriel McGoldrick's affidavit of 14 January 2019). In response to the first round of public consultation on the *original* draft of the Bearna Plan, the chief executive had recommended that an area of 0.48 ha. within the application site should be zoned as "open space" rather than "residential". However, the elected members subsequently proposed a number of "material alterations" to the draft plan. One of these, known as "Material Alteration 3" or "MA3" related to the application site. In brief, it was proposed to remove the area increased as open space and to rezone this area as "Residential / Phase 1" instead. The chief executive of Galway County Council made a recommendation against this proposed alteration in his statutory report prepared pursuant to section 13 of the PDA 2000. The elected members, as they are lawfully entitled to do, chose not to follow this recommendation, and the variation as adopted contains the material alterations. At the same meeting at which the variation was adopted, a further amendment, Objective CCF 6, was introduced whereby these lands were identified in the plan as being "Inappropriate Development on Flood Zones". As discussed at paragraphs 64 *et seq*., the Applicants contend that the decision to grant planning permission represents a material contravention of this objective.

15. The making of the Bearna Plan was also subject to a strategic flood risk assessment ("*SFRA*") as recommended under the statutory guidelines issued in respect of flood risk management. As appears from the board inspector's report, following on from the adoption of the material alterations, the final version of the SFRA, most unusually, expressly states that the Bearna Plan was made *in breach of* the guidelines on flood risk management.

(1). POPULATION ALLOCATION

OVERVIEW

16. A county council, such as Galway County Council, is required to include, as part of the core strategy of its development plan, a "settlement hierarchy". Relevantly, the settlement hierarchy must indicate the projected population growth of cities and towns in the hierarchy. For this purpose, a settlement with a population of more than 1,500 persons constitutes a town or village. The Bearna Plan indicates that, under the 2016 National Census, Bearna had a population of 1,998 persons.

17. See section 10(2A)(f) of the PDA 2000 (as inserted by the Planning and Development (Amendment) Act 2010) as follows.

> "(2A) Without prejudice to the generality of subsection (1A), a core strategy shall
>
> […]
>
> (f) in respect of the area of the development plan of a county council, set out a settlement hierarchy and provide details of —
>
> (i) whether a city or town referred to in the hierarchy is designated as a gateway or hub for the purposes of the National Planning Framework,
>
> (ii) other towns referred to in the hierarchy,
>
> (iii) any policies or objectives for the time being of the Government or any Minister of the Government in relation to national and regional population targets that apply to towns and cities referred to in the hierarchy,
>
> (iv) any policies or objectives for the time being of the Government or any Minister of the Government in relation to national and regional population targets that apply to the areas or classes of areas not included in the hierarchy,
>
> (v) projected population growth of cities and towns in the hierarchy,
>
> (vi) aggregate projected population, other than population referred to in subparagraph (v), in —
>
> (I) villages and smaller towns with a population of under 1,500 persons, and

(II) open countryside outside of villages and towns,

(vii) relevant roads that have been classified as national primary or secondary roads under section 10 of the Roads Act 1993 and relevant regional and local roads within the meaning of section 2 of that Act,

(viii) relevant inter-urban and commuter rail routes, and

(ix) where appropriate, rural areas in respect of which planning guidelines relating to sustainable rural housing issued by the Minister under section 28 apply,"

18. See also section 10(2C) as follows.

"(2C) In subsection (2A)(f) 'settlement hierarchy' means a rank given by a planning authority to a city or town in the area of its development plan, with a population that exceeded 1,500 persons in the census of population most recently published before the making by the planning authority of the hierarchy, and given on the basis of —

(a) its designation as a gateway city or town or as a hub town, as the case may be, under the National Planning Framework,

(b) the assessment by the planning authority of —

(i) the proposed function and role of the city or town, which assessment shall be consistent with any regional spatial and economic strategy in force, and

(ii) the potential for economic and social development of the city or town, which assessment shall be in compliance with policy directives of the Minister issued under section 29, have regard to guidelines issued by the Minister under section 28, or take account of any relevant policies or objectives of the Government, the Minister or any other Minister of the Government, as the case may be."

19. The Galway County Development Plan sets out its core strategy and settlement hierarchy at Chapter 2 (as varied by Variation No. 1). The "Core Strategy Table: February 2015" at page 25 sets out in tabular form the following information in respect of each individual town and village (with a population of greater than 1,500 persons) in the settlement hierarchy:– (1) name of town or village; (2) core strategy population allocation 2015 – 2021; (3) housing land requirement in hectares; (4) housing land requirement (including over zoning); (5) existing undeveloped residential zoned land; (6) proposed zoning; (7) housing units yield and indicative density specifications; (8) housing units yield on other lands; and (9) shortfall / excess using 50% over zoning.

20. In the case of Bearna, the core strategy population allocation is 420 persons. Column 7 of the table identifies a housing unit yield of 130 units. The figure of 420 persons is subsequently expressly referenced in the Bearna Plan (at §1.3 thereof).

21. The planning permission impugned in these proceedings purports to authorise the construction of 197 residential units in Bearna. It is common case, therefore, that the proposed development in and of itself would exceed the population allocation of 420 persons. Separately, planning permission has been granted for 48 residential units at Forramoyle East (Reg. Ref. 17/134; An Bord Pleanála Ref. PL 07.246315). A small number of the population allocation is also accounted for by extant planning permissions granted within the Bearna Plan area. See the board inspector's report at page 32.

22. The dispute between the parties centres on the legal status attributable to this figure of 420 persons and, in particular, as to whether An Bord Pleanála was entitled to aggregate the figure with the separately tabulated population allocation for Oranmore.

23. Leading counsel for the Applicants, Mr Neil Steen, SC, submits that the interpretation of the development plan is clear. A figure of 420 persons / 130 residential units has been allocated to Bearna. There is nothing in the development plan to the effect that these are arbitrary figures, nor is there anything reserving the right to transfer an allocation from one town to another. Contrary to what An Bord Pleanála has stated in its written legal submissions, the settlement hierarchy is not the only place where the figure of 420 persons is referenced. It is expressly referenced in the Bearna Plan.

24. The permitted development, at one fell swoop, bursts through those figures. It alone exceeds the allocated figure under the core strategy / settlement hierarchy. This meets the test for "material contravention" as per *Roughan v. Clare County Council*, unreported, High Court, Barron J., 18 December 1996. A proposal to increase the population of a town by 25% is precisely the type of thing that would be likely to excite opposition.

25. Counsel also draws attention to section 37(2)(a) of the PDA 2000 (as applied to "strategic housing development" by section 9(6) of the PD(H)A 2016) which treats of "conflicting objectives" in a development plan.

26. Insofar as the principles governing the interpretation of a development plan are concerned, counsel commends the approach of the UK Supreme Court in *Tesco Stores Ltd. v. Dundee City Council* [2012] UKSC 13.

AN BORD PLEANÁLA'S APPROACH

27. The board inspector's assessment of this issue is to be found at pages 31 to 34 of her report. Having noted that the core strategy in the County Development Plan designates Bearna as within the Galway Metropolitan Area, i.e. at the top of the settlement hierarchy, and having noted that the population allocation of 420 entails a total of circa 162 residential units, the inspector then stated as follows (at page 32).

"The proposed development of 197 no. units would therefore significantly exceed the core strategy population allocation for Bearna. However, I note section 10.3 of the Inspector's report of ABP-300009-17, which stresses the strategic role of Bearna within the GMA and concur with this view. That development proposed a total of 113 no. dwellings at the subject site, with a residential density of c. 20 units/ha excluding the EMZ lands at the site. The Board decision of ABP-300009-17 refused permission on the basis that (i) the residential density of that development was contrary to the Guidelines for Planning Authorities on Sustainable Residential Development in Urban Areas; (ii) the development would not be of a sufficiently high density to provide for an acceptable efficiency in serviceable land usage given the proximity of the site to the built-up area of Bearna and Galway City and to the established social and community services in the immediate vicinity and to its location on Phase 1 lands and within the GMA. I also note the comment of Galway Council, which accepts that Bearna should be viewed in the context of overall quantum of development permitted by the development

plan core strategy and the fact that there is a significant gap between the overall development envisaged under the core strategy and that which has actually taken place. The proposed quantum of development is acceptable on this basis.

[…]

9.2.3. Principle of Development Conclusion

To conclude, the proposed quantum of development, residential density and housing mix are considered to be acceptable in the context of site constraints and to be generally in accordance with the Bearna Plan, the Galway County Development Plan 2015-2021 and relevant national policies. The development is therefore considered to be acceptable in principle."

28. An Bord Pleanála maintains the position that the grant of planning permission did not involve a *material* contravention of the County Development Plan. Leading counsel for An Bord Pleanála, Ms Nuala Butler, SC, submits that whereas there is an acknowledged contravention of the figure of 420 persons, the decision to grant planning permission is nevertheless consistent with the core strategy. The core strategy is centrally aimed at providing for an anticipated population growth—in accordance with the regional planning guidelines—of approximately 13,000 people during the life of the County Development Plan 2015 – 2021.

29. Counsel emphasises the connection between Bearna and Oranmore as towns which both form part of the Galway Metropolitan Area ("*GMA*"). The GMA straddles either side of that part of Galway City which falls within the functional area of the other Galway planning authority, i.e. Galway City Council. The GMA is identified as the top tier of the settlement hierarchy at Chapter 2, page 18 of the County Development Plan (as varied by Variation No. 1).

"1. Galway Metropolitan Area

Galway City is the identified Gateway and vital economic driver for the entire West Region. The types of services provided by the city reach beyond the city/county boundary. Significant employers include large public service and industrial organisations that draw employees from the network of satellite towns surrounding the City. The Galway Metropolitan Area includes the Gateway and a number of electoral divisions adjacent to the City which are inextricably linked to and function as part of a greater Galway City and includes the thriving satellite settlements of Oranmore and Bearna. The longer term plans to develop the Ardaun and Garraun areas will also contribute to strengthening the Galway Metropolitan Area."

30. It is submitted that the inspector's analysis stands up to scrutiny in circumstances where there are "conflicting objectives" in the plan. (Day 2, 3.30 pm). One cannot achieve an appropriate density of development on the application site, in order to avail of public infrastructure, if this site is only permitted to accommodate 90 houses, i.e. the unused portion of Bearna's allocation of 130 residential units. To limit the development in that way would render it inconsistent with the *other* objectives of the core strategy. The population growth following the grant of the impugned planning permission is still within the envelope for the GMA once regard is had to the shortfall in the delivery of housing in Oranmore. Counsel suggests that it is difficult to understand how a decision intended to give effect to the core strategy could be said to be a material contravention.

31. Counsel submits that the figure of 420 persons / 130 residential units allocated to Bearna under the Core Strategy Table at page 25 of the County Development Plan (as varied) should be read as merely an *indicative* population allocation, particularly in circumstances where there has been a shortfall in the delivery of residential development in the GMA during the life time of the plan, i.e. the shortfall in delivery of housing units at Oranmore. The analysis in the plan which precedes the table emphasises the role of the GMA as the vital economic driver for the entire West Region.

32. By the time the planning application came to be made in July 2018, the plan had not delivered. The proposed development is said to be consistent with the other requirements of the core strategy, i.e. in terms of density of development and the zoning objectives of the land. The only inconsistency is with the allocated population growth. The figures in the table are not "core" in light of a policy which is to provide for a population increase of 13,000 persons.

33. The board accepts that the correct interpretation of a development plan will normally involve a question of law for the court. Counsel does, however, draw attention to the judgment in *Navan Co-ownership v. An Bord Pleanála* [2016] IEHC 181 to the effect that the application of certain provisions of a development plan may require the exercise of *planning judgment* on the part of a planning authority and An Bord Pleanála, and that this will only be subject to judicial review on the grounds that it is irrational or perverse.

34. Counsel emphasises that a development plan should be interpreted in a "holistic" manner, and that no section should be considered in isolation from the entire document. Reliance is placed in this regard on the judgment of the High Court (Baker J.) in *Byrnes v. Dublin City Council* [2017] IEHC 19, [20] to [25].

DISCUSSION

35. The compass of the dispute between the parties is very narrow. It is accepted on behalf of An Bord Pleanála that the decision to grant planning permission contravenes the population allocation for Bearna under the settlement hierarchy. The board maintains, however, that the contravention is not a *material* contravention.

36. Before turning to consider the provisions of the County Development Plan in detail, it is necessary first to say something about the standard of review which the court is required to apply in interpreting a statutory development plan. The parties all agree that the general rule is that the interpretation of a plan is a question of law, and, accordingly, the court is not required to show deference to the views of An Bord Pleanála (or even to the views of the local planning authority who is the author of the plan).

37. It is important to understand the rationale underlying this principle that the interpretation of a development plan is a question of law for the court. The rationale is predicated on the legal effect of a development plan and, in particular, the manner in which it acts as a fetter on the discretion of An Bord Pleanála. An Bord Pleanála enjoys a broad discretion in determining planning applications, and its decision on whether proposed development is in accordance with proper planning and sustainable development is subject only to the most limited merits-based review under the principles in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39. The board is, however, required to "have regard to" the provisions of the relevant development plan. Further, 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. The board cannot grant planning permission under the PD(H)A 2016 where the proposed

development, or a part of it, contravenes materially the development plan in relation to the zoning of the land. This difference in treatment between a "strategic housing development" application and a conventional application is, presumably, intended to reflect the fact that an application of the former type is made directly to An Bord Pleanála without there being any application to the planning authority. The enhanced status afforded to the zoning objectives ensures that the planning authority's role, as author of the development plan in setting planning policy, is respected.

38. Insofar as non-zoning objectives are concerned, An Bord Pleanála may only grant planning permission in material contravention of a development plan by reference to the statutory criteria under section 37(2)(b) of the PDA 2000. See section 9(6)(c) of the PD(H)A 2016.

39. These criteria read as follows:

> (i) the proposed development is of strategic or national importance,
>
> (ii) there are conflicting objectives in the development plan or the objectives are not clearly stated, insofar as the proposed development is concerned, or
>
> (iii) permission for the proposed development should be granted having regard to regional spatial and economic strategy for the area, guidelines under section 28, policy directives under section 29, the statutory obligations of any local authority in the area, and any relevant policy of the Government, the Minister or any Minister of the Government, or
>
> (iv) permission for the proposed development should be granted having regard to the pattern of development, and permissions granted, in the area since the making of the development plan.

40. 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 imposed by section 9(6) of the PD(H)A 2016. The board would, in effect, be allowed to determine its own jurisdiction.

41. Of course, An Bord Pleanála will, as a matter of daily practice, have to take a view on the interpretation of development plans as part of its decision-making on individual planning appeals and applications This is entirely proper. There is no suggestion that the board has to pause and refer the question of interpretation to the High Court. Rather, the point of the above analysis is that, in the event that a planning decision is challenged by way of judicial review, then An Bord Pleanála's view on the interpretation of the plan is subject to full-blooded review, and not the attenuated form of review under the principles in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39.

42. In some instances, objectives of a development plan will—on their correct interpretation—be formulated in broad terms and it will be a matter of planning judgment as to how to apply those objectives to any given planning application. However, the correct interpretation of a development plan is always a logically anterior question to the application of the plan's objectives in the assessment of any particular development proposal. This point is illustrated by the judgment of the UK Supreme Court in *Tesco Stores Ltd. v. Dundee City Council* [2012] UKSC 13, [21].

> "A provision in the development plan which requires an assessment of whether a site is 'suitable' for a particular purpose calls for judgment in its application. But the question whether such a provision is concerned with suitability for one purpose or another is not a question of planning judgment: it is a question of textual interpretation, which can only be answered by construing the language used in its context. In the present case, in particular, the question whether the word 'suitable, in the policies in question, means 'suitable for the development proposed by the applicant', or 'suitable for meeting identified deficiencies in retail provision in the area', is not a question which can be answered by the exercise of planning judgment: it is a logically prior question as to the issue to which planning judgment requires to be directed."

43. The judgment in *Tesco Stores Ltd*. has been cited with approval by the High Court in *Navan Co-ownership v. An Bord Pleanála* [2016] IEHC 181 and *Kelly v. An Bord Pleanála* [2019] IEHC 84 ("*Kelly (Aldi Laytown"*)).

GALWAY COUNTY DEVELOPMENT PLAN

44. The approach to be adopted in interpreting a development plan is well established. The provisions of the plan fall to be interpreted as they would be understood by a reasonably intelligent person, having no particular expertise in law or town planning. See *Tennyson v. Dun Laoghaire Corporation* [1991] 2 I.R. 527 at 535.

45. A member of the public consulting the Bearna Plan would note from §1.3 that Bearna has been assigned a population growth target of 420 persons by 2021, with a land allocation of 12.12 hectares provided to accommodate new residential development over the plan period.

> "1.3 Settlement Hierarchy/Core Strategy
>
> Bearna is located within the Galway Transportation and Planning Study (GTPS) area and is a key settlement in the Galway Metropolitan Area, which is on the first tier in the settlement hierarchy. A key component of the Bearna Plan is to ensure that it aligns with the Core Strategy/Settlement Strategy, as set out in the Galway County Development Plan. The Core Strategy indicates that *Bearna has been assigned a population growth target of 420 persons by 2021** with a land allocation of 12.12 hectares provided to accommodate new residential development over the plan period."
>
> *Emphasis (italics) added.

46. If the hypothetical member of the public then turned to consider the core strategy and settlement hierarchy in chapter 2 of the County Development Plan (of which, of course, the Bearna Plan forms part), he or she would find the following explanation of the purpose of the core strategy and the settlement hierarchy at §2.4.7 and §2.4.8 (as varied by Variation No. 1).

> "2.4.7 Application of the Core Strategy Population Allocations
>
> The Core Strategy sets out the relevant figures for the population targets and the associated housing land requirement for the various urban areas listed in the Core Strategy Table at the end of this chapter. The housing land requirement is

reflected through the quantum of zoned lands which facilitate residential development. The Galway County Development Plan 2015-2021 does not contain detailed zoning for the settlements, as zoning for the various towns and villages is specifically addressed in the relevant Local Area Plans, as appropriate, which are generally in place for all towns with a population over 1500 persons. The Core Strategy must also set out how it is proposed to address the issue of any over-zoning in the Local Area Plans in place. In this regard, the approach assumed is that of phased sequential development and the re-zoning of lands as appropriate, in order to address any over-zoning and environmental constraints identified. This will ensure that the quantum of zoned lands that is available for development remains within the allocation outlined under the Core Strategy and that the Local Area Plans are consistent with the County Development Plan. This approach will also ensure that the urban settlements are consolidated by keeping them as physically compact as possible, which in turn reduces travel demand, better integrates land use and transportation options, allowing the promotion of more sustainable transportation modes.

2.4.8 The Core Strategy and Settlement Hierarchy

The Core Strategy is statutorily required to provide for a Settlement Hierarchy which forms the basis of the Spatial Strategy for the County. The settlement hierarchy means a rank assigned to a town based on an assessment by the Planning Authority of the proposed function, role and the potential for economic and social development of the town. The Settlement Strategy and Settlement Hierarchy are dealt with in detail in Section 2.6 below, which also provides details on the rural areas of the County in respect of which the ministerial planning guidelines Sustainable Rural Housing-Guidelines for Planning Authorities (2005) apply."

47. The reference to the statutory requirement to provide for a settlement hierarchy is to Section 10(2A)(f) of the PDA 2000. A settlement hierarchy must provide details *inter alia* of projected population growth of cities and towns in the hierarchy. (See paragraph 16 above).

48. A more detailed statement of the purpose of the settlement hierarchy is to be found at §2.6.1 of the County Development Plan as follows.

"2.6.1 Settlement Hierarchy

The Settlement Strategy builds on the Spatial Strategy taking account of the maximum Core Strategy population provision of 13,160 persons. *The Settlement Hierarchy has been developed to allocate future population growth between the various towns, villages and the rural area of the County.** It has taken account of the analysis of a range of criteria including the capacity of the settlement to contribute towards achieving the objectives of the Spatial Strategy and Core Strategy, the existing settlement size in terms of trends in population and household growth over previous census periods, the presence and capacity of water and wastewater services including planned investments in water and wastewater infrastructure, service functions (such as the number of services and retail units), accessibility, zoned land, landscape and heritage considerations.

This Settlement Hierarchy recognises that there are different categories of settlements throughout Galway, all with a complementary role to play in the future prosperity of the County. In this regard it has identified over 100 settlements in the County ranging from small crossroad settlements, to larger villages and main towns such as Ballinasloe and Tuam. It also recognises that the rural area must be catered for within the Settlement Hierarchy as it plays an essential role in the overall settlement structure by developing sustainable rural communities."

*Emphasis (italics) added.

49. If the hypothetical member of the public next turns to page 25 of chapter 2 of the County Development Plan (as varied), he or she will find a table entitled "Core Strategy Table: February 2015". The table allocates the predicted population increase for the plan area, i.e. 13,160 persons, throughout the towns and villages. Bearna is allocated an increase of 420 persons.

DECISION ON MATERIAL CONTRAVENTION

50. The hypothetical member of the public reading these various provisions of the Bearna Plan and the balance of the County Development Plan would understand that the objective of the settlement hierarchy is to allocate future population growth between the various towns, villages and the rural area of Galway County (§2.6.1). That person would also understand that the population allocations had been decided by reference to a range of settlement-specific criteria, e.g. the capacity of the settlement to contribute towards achieving the objectives of the core strategy, the existing settlement size, and the presence and capacity of public infrastructure, i.e. water and wastewater services. (§2.6.1). Bearna has been assigned a population growth target of 420 persons, with a land allocation of 12.12 hectares provided to accommodate new residential development over the plan period (Bearna Plan, §1.31). This translates to a figure of 130 residential units.

51. The meaning of the County Development Plan is unambiguous. The figures set out are objective, and not open to reinterpretation. This is not a case where planning policy has been set out in subjective terms or has left over a discretion as to how it should be interpreted.

52. The test for determining whether a contravention is material is that prescribed by the High Court (Barron J.) in *Roughan v. Clare County Council*, unreported, High Court, Barron J., 18 December 1996.

"It has been submitted on behalf of the Applicants that what is or is not a material development has to be considered in the light of the substance of the proposed development; whether or not any change of use would be significant; the location of the proposed development; the planning history of the site or area; and the objectives of the development plan. I accept that all these matters must be taken into account when considering whether or not any proposed contravention of the development plan is material. What is material depends upon the grounds upon which the proposed development is being, or might reasonably be expected to be, opposed by local interests. If there are no real or substantial grounds in the context of planning law for opposing the development, then it is unlikely to be a material contravention."

53. (This test has been very recently approved of by the High Court (Baker J.) in *Byrnes v. Dublin City Council* [2017] IEHC 19, [23]).

54. Applying this test to the facts of the present case, a decision to grant planning permission for 197 units at Bearna self-evidently represents a *material contravention* of the plan. The permitted development, in and of itself, breaches the allocated number of

residential units (130) by 50 per cent. If one calculates the population equivalent using the average household size of 2.6 specified in the County Development Plan (§2.4.11), the figure is 512 persons, i.e. the allocated population target is exceeded by almost 25 per cent. A breach of the population allocation on this scale is likely to excite local opposition. (The proposed development would result in an increase of the population of Bearna from approximately 2,000 to 2,500 persons). The breach is even greater when one factors in that, separately, planning permission has been granted for a further 48 residential units at Forramoyle East. See paragraph 21 above.

55. An Bord Pleanála has, very properly, conceded that the decision to grant planning permission represents a *contravention* of the plan, but maintains that the contravention is not material. To limit population growth in Bearna during the life time of the plan to 420 persons / 130 residential units would—the board submits—conflict with the overall objective of the core strategy which is to deliver sufficient residential units to accommodate a predicted population growth of 13,160 persons. This is because of what the board describes as a shortfall in the delivery of residential units in one of the other towns in the Galway Metropolitan Area, i.e. Oranmore.

56. With respect, An Bord Pleanála's submission seeks to conflate two distinct issues, namely (i) the threshold issue of whether a proposed development represents a material contravention of the development plan, and (ii) the separate question of whether, notwithstanding a material contravention of the plan, planning permission should nevertheless be granted. The fact—if fact it be—that there is a conflict between two objectives of a development plan does not allow a decision-maker 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 PDA 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. The board is also authorised to grant permission for proposed development having regard to the pattern of development, and permissions granted, in the area since the making of the development plan. This caters for a scenario where events on the ground might mean that the objectives of the plan might not otherwise be fulfilled.

57. The proposed development undoubtedly involves a material contravention of the County Development Plan. However, it bears repeating that the fact that the proposed development represents a material contravention of the plan does not necessarily preclude An Bord Pleanála from granting planning permission. In order to do so, however, the board would have to satisfy itself that the statutory criteria under section 37(2)(b) of the PDA 2000 (as applied by section 9(6) of the PD(H)A 2016) have been met. The board would also have to comply with the obligation under section 10(3)(b) of the PD(H)A 2016 to state the main reasons and considerations for contravening materially the development plan. In the event, however, An Bord Pleanála never reached this point in this case as the board had mistakenly concluded that the development did not represent a material contravention. This error of law operates to invalidate the decision to grant planning permission.

58. For the sake of completeness, it is necessary to address briefly two subsidiary arguments advanced on behalf of An Bord Pleanála. The first argument is to the effect that the fact that both Bearna and Oranmore are identified as forming part of the Galway Metropolitan Area, which is located at the top of the settlement hierarchy, allows for the population allocations to be *aggregated* between the two towns. With respect, there is nothing in the County Development Plan which warrants such an interpretation. The settlement hierarchy allocates a *separate* target population to each individual town and village (with a population of more than 1,500) in the hierarchy. The hypothetical member of the public would not understand the plan as allowing for the pooling or sharing of target populations between individual towns and villages. The figure of 420 persons is expressly referenced at §1.3 of the Bearna Plan. By contrast, the interpretation contended for on behalf of An Bord Pleanála would require a member of the public to attach no significance to this figure.

59. The second argument is to the effect that a population allocation has a lesser status than the core strategy, and that it must, in effect, yield to the latter. This argument is inconsistent with the express requirement under section 10(2A)(f) of the PDA 2000. It is mandatory for a county council, such as Galway County Council, to set out a settlement hierarchy *as part of* its core strategy. The Oireachtas has thus ordained that a settlement hierarchy is a fundamental element of the core strategy of a non-urban development plan. Given this statutory status, it is incorrect to suggest that the content of the settlement hierarchy can be dismissed as immaterial.

60. It should also be noted that the Bearna Plan was adopted on 23 July 2018, that is a matter of days before the planning application was submitted. It would be remarkable that if—as is now suggested by An Bord Pleanála—a population allocation of 420 persons is now in *conflict* with the achievement of the overall objectives of the core strategy that the Bearna Plan, far from amending this figure, instead expressly endorses same at §1.3.

(2). FLOOD RISK MANAGEMENT

OVERVIEW

61. It is common case that—in its current undeveloped state—parts of the application site fall within areas identified under the Bearna Plan as being at risk of flooding. The relevant lands are identified in both (i) the flood risk management map, and (ii) the two land use zoning maps. The Developer proposes to carry out certain development works on these parts of the application site. In most instances, the development works will consist of works which are ancillary to the residential units, such as areas of hard standing, roads and bridges. (See page 42 of the inspector's report). It does appear, however, that a small part of the residential accommodation would be located on parts of the application site identified in the Bearna Plan as being at risk of flooding. The Planning Authority, in its section 8 report to An Bord Pleanála, noted that proposed residential units No.'s 69, 70, 114 and duplex block 106 – 113 appeared to be located within or partially encroaching into flood zone A. (See page 26 of the inspector's report).

62. The Developer proposes to carry out certain ground re-profiling works so as to raise ground levels in some areas and provide compensatory ground lowering at other locations. The proposed re-profiling works consist of cut and fill works identified in a drawing (B861–H102) which accompanied the Trusky East Stream Flood Study (17 July 2018) submitted as part of the planning application. These proposed works were relied upon to produce a drawing which is described as the "Trusky East Stream Flood Extents Post-development". This drawing bears the reference B861–H103 and is dated 14 July 2017. This is referred to by the inspector as the "post-development flood risk zone" in her report. Put shortly, the Developer seeks to rely on this revised flood risk zone in preference to the flood risk zones actually set out in the Bearna Plan.

63. The Developer submits that it is legitimate to have regard to the implementation of mitigation measures, including the proposed cut and fill works, for the purposes of flood risk assessment. It is further submitted that the implementation of these mitigation measures will have the effect that all of the proposed residential units will be entirely outside the (revised) flood risk zones A and B. The only development works which will be carried out within these (revised) flood risk zones are ancillary works consisting of the provision of roads, footpaths, bridges and car parking. The Developer maintains that such works constitute "water-compatible development", and, as such, are not an "inappropriate" or "vulnerable" development within the meaning of the flood risk management

guidelines. It is also suggested that the works constitute "utilities infrastructure", and, as such, are permissible under the "OS" land use zoning ("*OS – Open Space / Recreation and Amenity*") (See Developer's Statement of Consistency, page 14).

64. Conversely, the Applicants maintain that the flood risk assessment should have been carried out in accordance with the procedure prescribed under the Bearna Plan. Objective CCF 6 expressly requires that a "justification test" must be carried out for development proposals on these lands. Counsel on behalf of the Applicants, Mr Neil Steen, SC, submits that it is not open to a developer to rely on proposed ground re-profiling works to amend *unilaterally* the contours of the flood risk zones which had been adopted under the Bearna Plan following a detailed process of public participation. Mr Steen further submits that the ground re-profiling works have not, in any event, been properly assessed by An Bord Pleanála and that it was not open to the board to rely on a planning condition to defer this assessment to be carried out post-grant.

65. Counsel contends that the entire development should be characterised as residential development for the purposes of flood risk assessment, and that it is inappropriate to treat the development in a piecemeal way, i.e. by purporting to distinguish the residential units from ancillary works such as roads, car parking and open space.

AN BORD PLEANÁLA'S APPROACH

66. An Bord Pleanála's inspector sets out her drainage and flooding assessment and conclusion at §9.4.4. and §9.4.5 of her report as follows.

> "9.4.4. Drainage and Flooding Assessment
>
> The submissions of local residents and the Bearna Plan SFRA are noted. The additional hatched areas identified in the Bearna Plan map that are subject to Objective CCF6 are locations where flooding has occurred in the past as per Figure 5 of the Bearna Plan SFRA and where a SSFRA is required, however development is not precluded in these parts of the site. The most substantive guidance available regarding flooding at the development site is the Flood Zones A and B as identified in the OPW PRFA, i.e. the OS zoned lands (the Environmental Management Zone under the previous Bearna LAP) and the 'pre-development' flood zones excluding mitigation measures and 'post development flood extents including mitigation measures', as identified in the SSFRA carried out by the applicant. The most relevant drawings illustrating these flood zones are the proposed site layout relative to OS zoned lands provided in Appendix 2 of the Design Statement and drawings no. B861-H101 of the 'pre-development flood zone' and B186-H103 of the 'post-development flood zone' provided with Appendix D of the Trusky Stream East Flood Study submitted with the application.
>
> The proposed residential units are entirely outside the Flood Zones A and B identified in the OPW PRFA and are outside the 'post-development flood zone' identified in SSFRA drawing no. B186-H103. The planning authority notes that several of the proposed units are located in the 'pre-development flood zone' as per drawing no. B861-H101, i.e. houses nos. 69, 70 and 114 and part of duplex block 106-113. It recommends the omission of house no. 69, the replacement of semi-detached houses nos. 70 and 71 with a detached unit outside the pre-development flood risk zone and moving duplex unit no. 106-113 and house no. 114 such that they are outside the zone.
>
> The 'post-development flood risk zone' identified in drawing no. B86-101 is based in the implementation of mitigation measures including cut and fill works at the development site to provide finished floor levels 500mm above the 1% AEP fluvial flood level, as per SSFRA drawing no. B861-H102. The planning authority states serious concerns about these measures on the basis that potential downstream impacts have not been fully considered in the SSFRA. The planning authority refers to the following comment in the Appendix 'Frequently Asked Questions' of The Planning System and Flood Risk Management Guidelines for Planning Authorities:
>
> 'Even in a defended floodplain, land-raising may reduce the potential amount of flood storage or affect a flood-flow route, with consequent effects on flood risk elsewhere. During a flood event that can be contained by the defences, land-raising behind those defences may have little or no impact. However, should overtopping or a breach occur (or the defences be by-passed by flood waters), land-raising could adversely affect the surrounding low-lying areas by causing areas to flood that would not have flooded previously due to loss of floodplain storage. The beneficial effects of land-raising should therefore be balanced against potential increased flood risk elsewhere. New development should be planned in such a way that residual flood risk is equitably shared by new development and maintained or reduced for existing developments.'
>
> I note that all of the proposed dwellings are located outside Flood Zones A and B as identified in the OPW PFRA, as per the layout provided in Appendix 2 of the applicant's Design Statement, however areas of hard standing and roads and bridges, etc. are inside the flood zones. While the concerns of the planning authority are noted, the Planning System and Flood Risk Management Guidelines for Planning Authorities allow for mitigation measures to be taken into consideration in the assessment of flood impacts of developments. However, I also consider that the omission of the proposed mitigation measures could result in other flood impacts that have not been considered. I note the guidance provided on conditions in the Flood Risk Guidelines, i.e. that in most cases conditions will be required to amend, clarify or further detail flood mitigation measures. I consider that permission should be granted for the development as proposed, subject to further assessment of any impacts of the proposed mitigation measures to the satisfaction and agreement of the planning authority prior to the commencement of development. I also note that the Bearna Plan provides for 'utilities infrastructure' within OS zoned lands and consider that the proposed roads, bridges, etc. within the flood zone and the 10m riparian buffer identified in Objective CCF6 are generally acceptable on this basis.
>
> 9.4.5. Drainage and Flood Risk Conclusion
>
> To conclude, I do not consider that the development would result in an unacceptable residual flood risk for the development, its occupants or adjoining property such as would warrant a refusal of permission."

67. As appears from the foregoing, the principal conclusions which the inspector reached in respect of the issues which are now in dispute in these judicial review proceedings are as follows.

68. First, the inspector accepted that it was legitimate to rely on the "post-development flood zone" in carrying out the flood risk assessment. The "post-development flood zone" refers to what the Developer says will be the (revised) flood risk zones *after* the proposed mitigation measures have been carried out, including ground re-profiling and the cut and fill. The inspector seems to have

thought that it was lawful to have regard to the (revised) flood risk zones in preference to the flood risk zones actually identified in the Bearna Plan. This was so notwithstanding that the inspector acknowledges that there should be further flood risk assessment. The inspector recommended that a condition be imposed on the grant of planning permission requiring the Developer to submit a revised site specific flood risk assessment to provide a full assessment of any impacts of the proposed ground works and cut and fill measures at the development site. See draft Condition No. 12 (e) as set out at page 64 of the inspector's report.

69. Secondly, the inspector appears to have accepted that, on the basis of the (revised) flood risk zones, the proposed residential units would all be located entirely outside flood zones A and B.

70. Thirdly, the inspector characterised development works consisting of the provision of areas of hard standing, roads and bridges as the provision of "utilities infrastructure". On this analysis, the inspector found that the development works proposed within the (revised) flood risk zones were generally acceptable by reference to Objective CCF 6.

71. The inspector's approach has been implicitly endorsed by An Bord Pleanála insofar as the Board Direction indicates that the board "decided to grant permission generally in accordance with the Inspector's recommendation". Relevantly, An Bord Pleanála included a condition similar to that recommended by the inspector in respect of the carrying out of further flood risk assessment. See Condition No. 12 (e) as follows.

> "(e) The developer shall submit a revised Site-Specific Flood Risk Assessment, to provide full assessment of any impacts of the proposed ground works and cut and fill measures at the development site, to the planning authority prior to the commencement of development.
>
> Reason: In the interest of public health and in order to address flood risk."

72. Counsel on behalf of An Bord Pleanála sought to elaborate upon An Bord Pleanála's approach as follows. By way of overview, counsel submitted that the Applicants' case on flood risk assessment is predicated on (mistakenly) treating all of the development works within the red line of the application site as if they consisted solely of residential development, i.e. a form of development which is highly vulnerable to flood risk. There is no warrant to this approach. Rather, it is legitimate to distinguish between the residential units and the provision of public utilities infrastructure. All of the residential units are to be located on lands which are zoned for residential use, and which, after the proposed cut and fill works, will come within the (revised) flood zone C. Part of the purpose of a site specific flood risk assessment ("*SSFRA*") is the assessment of proposed mitigation measures and the residual risk *after* the mitigation.

73. The only works which are to be located on lands which are zoned as open space lands and/or subject to the (revised) flood zone A or B are roads, bridges and hard standing. Development works of this type are not "vulnerable" or "inappropriate" development in a flood zone. Nor are they inconsistent with the land use zoning matrix for "open space".

74. Counsel further submits that the Applicants' argument is predicated on a misinterpretation of the first bullet point of Objective CCF 6 of the Bearna Plan. Contrary to what the Applicants assert, there is no mandatory requirement to carry out a justification test pursuant to that objective in circumstances where a justification test is not actually required under the flood risk management guidelines. The "justification test" is only required where development is proposed that is considered "inappropriate" to the flood risk zone. This is evident from the table at §3.2 of the Bearna Plan (which summarises the flood risk management guidelines). The table indicates that in flood zone C there is no limitation on what types of development are considered "appropriate", but that it may be necessary to screen for flood risk. It is indicated that "water compatible development" is appropriate in flood zones A and B. The notes indicate that "water compatible development" includes "amenity open space", and thus the proposed linear park is appropriate in these zones.

75. Counsel appeared to suggest at one stage (Day 3, 11.05 am) that the "justification test" in the flood risk management guidelines had actually been applied. More specifically, it was suggested that whereas the board did not apply the "justification test" to the residential development because the residential development was not on flood zones A and B, the board did apply the "justification test" to the residual part of the development, i.e. the road and bridge infrastructure, and that this development met the relevant criteria. It is said that there has been a detailed flood risk assessment, and that there are mitigation measures e.g. road bridges are to have 500 mm freeboard between the bridge soffit and the 1.0% AEP flood level.

76. With respect, I do not think that the documentation bears out this suggestion that the board did apply the "justification test" to the residual part of the development. Whereas it is correct to say that a site specific flood risk assessment was submitted as part of the planning application, this is a different exercise than the carrying out of a "justification test" as set out in chapter 5 of the flood risk management guidelines. It is also inconsistent with the Developer's written legal submissions which confirm at paragraph 61 thereof that the development plan has not been circumvented because the justification test simply does not apply to this development.

JUSTIFICATION TEST

77. Before embarking upon a detailed discussion of the flood risk management issues, it is necessary first to pause, and to explain what is meant by the "justification test". This explanation is needed because part of the dispute between the parties turns on whether An Bord Pleanála was *required* to carry out a "justification test" in respect of the proposed development.

78. The concept of a "justification test" is introduced under the flood risk management guidelines. The guidelines advocate what is described as a "sequential approach" to planning. The sequential approach seeks to ensure that development, particularly new development, is first and foremost directed towards land that is at low risk of flooding. (§3.2). The sequential approach makes use of flood risk assessment and of prior identification of flood zones for river and coastal flooding. (§3.3) Flood zones are geographical areas within which the likelihood of flooding is in a particular range. In the case of Bearna, the flood zones have been identified in the Bearna Plan.

79. There are three types or levels of flood zones defined for the purposes of the guidelines, zones A, B and C. (§2.23). It is common case that—in its current undeveloped state—parts of the application site fall within areas identified under the Bearna Plan as flood zone A. See the flood risk management map on the final page of the plan. The planning implications for flood zone A are described as follows at §3.5 of the guidelines.

> "Zone A - High probability of flooding. Most types of development would be considered inappropriate in this zone. Development in this zone should be avoided and/or only considered in exceptional circumstances, such as in city and town centres, or in the case of essential infrastructure that cannot be located elsewhere, and where the Justification Test has

been applied. Only water-compatible development, such as docks and marinas, dockside activities that require a waterside location, amenity open space, outdoor sports and recreation, would be considered appropriate in this zone."

80. The justification test is discussed in detail at §3.7 and §3.8 of the guidelines. It is explained that the test is comprised of two processes, first, the plan-making justification test which is used in the context of making development plans, local area plans and regional guidelines; and, secondly, the development management justification test which is used at the planning application stage where it is intended to develop land at moderate to high risk of flooding for uses or development vulnerable to flooding that would generally be inappropriate for that land. The within proceedings are concerned principally with the second form of justification test, and unless otherwise stated all references to the "justification test" in this judgment should be understood as referring to the development management justification test.

81. The justification test is set out as follows at pages 47 and 48 of the flood risk management guidelines.

> "5.14 Assessment of the application should be based principally on the policies and detailed objectives of the development plan, with flood risk considered along with the full range of planning considerations for the application. In assessing development proposals in areas at risk of flooding, planning authorities should adopt a risk-based sequential and balanced approach that gives priority to development in areas of lowest risk, while at the same time allowing consideration of appropriate and necessary development, through the use of the sequential approach based on flood zones and application of the Justification Test.
>
> Application of the Justification Test in development management
>
> 5.15 Where a planning authority is considering proposals for new development in areas at a high or moderate risk of flooding that include types of development that are vulnerable to flooding and that would generally be inappropriate as set out in Table 3.2, the planning authority must be satisfied that the development satisfies all of the criteria of the Justification Test as it applies to development management outlined in Box 5.1 below. When considering proposals for development, which may be vulnerable to flooding, and that would generally be inappropriate as set out in Table 3.2, the following criteria must be satisfied:
>
> 1. The subject lands have been zoned or otherwise designated for the particular use or form of development in an operative development plan, which has been adopted or varied taking account of these Guidelines.
>
> 2. The proposal has been subject to an appropriate flood risk assessment that demonstrates:
>
> (i) The development proposed will not increase flood risk elsewhere and, if practicable, will reduce overall flood risk;
>
> (ii) The development proposal includes measures to minimise flood risk to people, property, the economy and the environment as far as reasonably possible;
>
> (iii) The development proposed includes measures to ensure that residual risks to the area and/or development can be managed to an acceptable level as regards the adequacy of existing flood protection measures or the design, implementation and funding of any future flood risk management measures and provisions for emergency services access; and
>
> (iv) The development proposed addresses the above in a manner that is also compatible with the achievement of wider planning objectives in relation to development of good urban design and vibrant and active streetscapes.
>
> The acceptability or otherwise of levels of residual risk should be made with consideration of the type and foreseen use of the development and the local development context.
>
> Note: See section 5.27 in relation to major development on zoned lands where sequential approach has not been applied in the operative development plan.
>
> Refer to section 5.28 in relation to minor and infill developments."

DISCUSSION

DEVELOPMENT PLAN / OBJECTIVE CCF 6

82. The analysis of the Applicants' grounds of challenge in respect of flood risk management must take as its starting point the relevant provisions of the development plan. This is because An Bord Pleanála is required to "have regard to" the provisions of the development plan, and, the board's discretion is constrained in circumstances where a proposed development would contravene materially the development plan. See section 9(6) of the PD(H)A 2016.

83. It is common case that part of the application site is subject to Objective CCF 6. The affected lands are indicated on the land use zoning maps by yellow hatching and an exclamation mark ("!"). The objective read as follows.

> "Objective CCF6- Inappropriate Development on Flood Zones
>
> Where a development/land use is proposed within any area subject to this objective the development proposal will need to be accompanied by a detailed hydrological assessment and robust SUDS design which demonstrates the capacity to withstand potential flood events to maintain water quality and avoid potential effects to ecological features.
>
> • Any development proposals should be considered with caution and will be required to comply with The Planning System and Flood Risk Management Guidelines for Planning Authorities/Circular PL2/2014 & the associated Development Management Justification Test. Climate Change should be duly considered in any development proposal.

> • Protect the riparian zones of watercourse systems throughout the plan area through a general 10 metre protection buffer from rivers within the plan area as measured from the near river bank, (this distance may be increased and decreased on a site by site basis, as appropriate).
>
> • Any development proposals submitted for this site will require a detailed ecological report(s), carried out by suitably qualified personnel for the purposes of informing Appropriate Assessment Screening by Galway County Council, the competent authority (in accordance with Objective DS 6 of the Galway CDP 2015-21).
>
> • The relevant lands will be outlined and flagged with a symbol on the land use zoning map and on the GIS system of Galway County Council so that staff and the public are aware of the special conditions/constraints attached.
>
> • A briefing will be provided to relevant staff within Galway County Council on the special conditions and constraints on relevant lands."

84. As with any provision of a development plan, Objective CCF 6 falls to be interpreted as it would be understood by a reasonably intelligent person, having no particular expertise in law or town planning. See *Tennyson v. Dun Laoghaire Corporation* [1991] 2 I.R. 527 at 535.

85. Applying this standard, I am satisfied that the objective requires that a "justification test" be conducted in respect of any application to carry out development upon lands subject to Objective CCF 6. The language employed under the first bullet point of the objective is unequivocal. Any development proposals "should be considered with caution". The requirements (i) to comply with the flood risk management guidelines, and (ii) to comply with the "justification test", are cumulative, not disjunctive. The use of the ampersand between the two requirements cannot be ignored. Had it been intended simply to require compliance with the guidelines, i.e. leaving over the decision on whether or not to carry out the "justification test" to be made on a case-by-case basis by reference to the guidelines themselves, then the second half of the first sentence would have been omitted from the first bullet point if Objective CCF 6. It follows from the language actually used that the objective expressly imposes a mandatory requirement to carry out a "justification test" in all cases where development is proposed on lands subject to the objective. This mandatory requirement is entirely understandable in circumstances where the lands have been identified, at plan level, as inappropriate for development because of the risk of flooding. Before a competent authority could grant planning permission, it would have to be satisfied that the development of these lands was justified.

86. Objective CCF 6 must also be read in conjunction with the other "CCF" objectives, i.e. the other "climate change and flooding" objectives. In particular, CCF 6 must be read in conjunction with CCF 1 as follows.

> "Objective CCF1 - Flood Zones and Appropriate Land Uses
>
> Protect Flood Zone A and Flood Zone B from inappropriate development and direct developments/land uses into the appropriate Flood Zone in accordance with The Planning System and Flood Risk Management Guidelines for Planning Authorities 2009 (or any superseding document) and the guidance contained in the Flood Risk Management Guidelines (DM Guidelines DM 2). Where a development/land use is proposed that is inappropriate within the Flood Zone, then the development proposal will need to be accompanied by a Development Management Justification Test and Site- Specific Flood Risk Assessment, in accordance with the criteria set out under with The Planning System and Flood Risk Management Guidelines for Planning Authorities 2009 & Circular PL2/2014 (as updated/superseded). In Flood Zone C, where the probability of flooding is low (less than 0.1%, Flood Zone C), the developer should satisfy him or herself that the probability of flooding is appropriate to the development being proposed."

87. Objective CCF 1 addresses in general terms the need to protect flood zone A and flood zone B from inappropriate development. (See also endnote 6 to the land use matrix at page 19 of the Bearna Plan to similar effect). It will be recalled, however, that the logic of the argument advanced on behalf of An Bord Pleanála and the Developer is that the legal effect of Objective CCF 6 is simply to impose an obligation to comply with the flood risk management guidelines. In particular, the argument insists that the decision as to whether to carry out a "justification test" is to be made solely by reference to the guidelines, and that the carrying out of such a test has not been made mandatory by Objective CCF 6. Of course, if this were the correct interpretation of Objective CCF 6, then the objective would be entirely superfluous in circumstances where a general requirement to comply with the guidelines has already been imposed by Objective CCF 1. Unless Objective CCF 6 is mere surplusage, it must have been intended to address a *different* contingency than that addressed under CCF 1. On its proper interpretation, Objective CCF 6 is intended to impose a mandatory obligation to carry out a "justification test" in respect of land subject to that objective irrespective of whether or not such a test would have been triggered under the guidelines.

88. An Bord Pleanála and the Developer have also argued that it would be redundant to require the carrying out of the "justification test" in cases where no such requirement would be triggered by the guidelines themselves. With respect, that argument does not accurately reflect the interaction between statutory guidelines and development plans. It is always open to a local planning authority to impose more *stringent* requirements as part of its development plan. In the event of a conflict between the requirements of the development plan and statutory guidelines, the former prevails. See the judgment of the High Court (Baker J.) in *Brophy v. An Bord Pleanála* [2015] IEHC 433 as follows. (Although *Brophy* concerned a different set of guidelines, the principles are nevertheless applicable to all statutory guidelines issued under section 28 of the PDA 2000).

> "30. Thus in matters of interpretation either the planning authority or the Board, as the case may be, in considering a planning application must consider the planning guidelines, inform itself of these and give reasonable consideration to the relevant provisions in the interpretation of a planning policy, I consider, however, that in the case of a conflict between the general provisions contained in relevant guidelines and a specific provision contained in a planning policy, that the latter must prevail for the following reasons.

[…]

> 35 While none of these cases is directly on point, I consider that, in the case of the determination of a particular planning application, and where a difference is apparent, or where a test is more or less stringent in one than in the other, the 'solemn and common public contract' contained in the development plan itself must prevail. This is not merely on account of the solemnity of the document, and the requirement of the common good that the contract, once it has been adopted for the common good, carries with it an obligation on the part of the planning authority to implement its statutory functions in accordance with that plan, but also because the consideration of a development permission in each case is specific to, and intended to be specific to, an individual location and in respect of which it is to be assumed that the

individual local authority adopting a plan has a particular and specialist knowledge."

89. Much of the difficulty in the present case has arisen because of a failure on the part of An Bord Pleanála and the Developer to appreciate that the policy underlying the guidelines finds practical expression through the medium of development plans. The starting point for any flood risk assessment should, therefore, be the provisions of the relevant development plan. To elaborate: the guidelines require planning authorities to identify areas at risk of flooding in the development plan. Once this is done, then individual planning applications fall to be assessed by reference to the identified flood risk zones. A planning authority is entitled to indicate that in respect of particular areas the carrying out of a justification test will always be required.

90. It should also be borne in mind that at the time when the guidelines were first issued in 2009 most development plans did not, in fact, identify areas at risk of flooding. It followed, therefore, that there would be a transitional period during which planning applications would have to be decided without the benefit of a clearly stated policy in the development plan. Nowadays, at the remove of some 10 years since the issuing of the guidelines, almost all development plans will have identified flood zones. This outcome was anticipated in the guidelines at, for example, page 43. One of the key messages is stated as follows.

> "Most flood risk issues should be raised within strategic assessments undertaken by local authorities at the plan-making stage. Therefore, as more plans are reviewed and zoning reconsidered, there should be less need for development management processes to require detailed flood risk assessment."

91. Here, the flood risk presented by the CCF 6 lands has been identified at the plan-making stage.

92. As it happens, there is no inconsistency between the flood risk management guidelines and Objective CCF 6. This is because—as explained at paragraph 103 below—the carrying out of the "justification test" in respect of this planning application would have been necessary under the guidelines in any event.

93. For the reasons set out above, I am satisfied that on its ordinary meaning, as it would be understood by a reasonably intelligent person having no particular expertise in law or town planning, Objective CCF 6 would be interpreted as imposing a requirement to carry out a "justification test" in respect of any development proposal within any area subject to the objective. This requirement would be understood to arise irrespective of whether a "justification test" was triggered by the guidelines themselves. The language of the objective is unequivocal.

94. Any possible doubt as to the meaning of Objective CCF 6 is removed entirely when one has regard to §3.2 of the Bearna Plan under the heading "Flood Risk Management Guidelines". There is a note at the end of page 16 of the Bearna Plan which reads as follows.

> "Please refer to separate supporting document 'Stage 2 Strategic Flood Risk Assessment for the Bearna Plan'."

95. The Strategic Flood Risk Assessment ("*SFRA*") is thus expressly referenced in the development plan, and it is therefore legitimate to have regard to same in interpreting the development plan. This follows, by analogy, with the position in respect of the interpretation of planning permissions: where the permission incorporates other documents, it is the combined effect of the permission and such documents that must be looked at in determining the proper scope of the permission. See *Readymix (Eire) Ltd. v. Dublin County Council*, unreported, Supreme Court, 30 July 1974.

96. The role of an SFRA in the planning process is summarised at page 68 of the flood risk management guidelines as follows.

> "Where does the SFRA fit in the planning process?
>
> The SFRA is not a statutory planning document. It is a consultation document that should be used to inform a development plan or local area plan, enabling the implementation of the sequential approach and the testing of development zoning against flood risk criteria. It can also be used to assist other planning decisions, such as development management, and emergency planning. In any instance, a site-specific flood risk assessment may be required when deciding on the grant of planning permission."

97. The content of the SFRA in respect of the Bearna Plan has been summarised as follows in the board inspector's report of 30 October 2018 at pages 38 and 39.

> "Section 4.3 states:
>
> • Material Alterations No. 1-6 provide for a range of incompatible uses within areas that are at elevated risk of flooding (these areas were identified by the Strategic Flood Risk Assessment);
>
> • Material Alterations No. 1-6 provide incompatible uses that are contrary to proper and sustainable flood risk management and contrary to The Planning System and Flood Risk Management Guidelines for Planning Authorities (2009) and Circular PL2/14;
>
> • If any of the lands subject to Proposed Material Alterations No. 1-6 that are located within Flood Zones A or B were developed, there would be a heightened risk of flooding and associated adverse effects on people and their assets. Such effects are identified on Table 4.1 and range from loss of life, to damage to property, to loss of income; and
>
> • Material Alterations No. 1-6 would result in elevated potential for water quality to be adversely affected (as a result of flooding of water treatment systems and collection networks and flooding of unknown substances stored onsite). Polluted or contaminated waters would have the potential to adversely affect human health and biodiversity and flora and fauna (including designated European Sites).
>
> In addition, SFRA section 4.2 states:
>
> In order to be consistent with the need to contribute towards proper planning and sustainable development and in order to comply with the Flood Risk Management Guidelines, it was recommended by the SEA that zoning as proposed by Variation 2 (a) and not zoning as proposed by the Material Alterations was selected.

> Elected Members decided to select zoning as proposed by the Material Alterations. This zoning is contrary to The Planning System and Flood Risk Management Guidelines for Planning Authorities (2009) and Circular PL2/14. Consequently, the Variation is contrary to these Guidelines and associated Circular."

98. This last statement from the SFRA is striking. In effect, the SFRA concedes that the Bearna Plan, more properly known as Variation 2 (a) of the Galway County Development Plan 2015 – 2021, has been made *contrary* to the flood risk management guidelines. This conflict between the plan and the guidelines came about as a result of a decision of the elected members on 23 July 2018 to adopt as part of the final plan a number of "material alterations" to the original draft of the Bearna Plan. As appears from the extract from the SFRA as set out in the board inspector's report (above), the SEA, i.e. the strategic environmental assessment, carried out in respect of the "material alterations" had recommended that the zoning as proposed by the material alterations not be selected. The elected members chose not to follow this recommendation, and the plan as adopted included the altered zoning objectives. One of these "material alterations" related to the lands now subject to Objective CCF 6.

99. The reasonably intelligent person reading the SFRA would thus be alerted to the fact that certain of the zoning objectives under the Bearna Plan were contrary to the flood risk management guidelines. Knowledge of this fact would then inform that person's understanding of why it is that certain lands which are zoned for development are nevertheless made subject to a mandatory requirement for a "justification test" by Objective CCF 6.

100. In summary, I am satisfied that—irrespective of whether one interprets the objective on its own terms or interprets it by reference to the SFRA—the meaning of Objective CCF 6 is unequivocal. The objective makes it mandatory to carry out a "justification test" where it is proposed to carry out development on lands subject to the objective. It is common case that the proposed development the subject-matter of the impugned planning permission involves the carrying out of certain works on lands affected by Objective CCF 6. Accordingly, a "justification test" should have been carried out. This was not done.

101. The failure to carry out a "justification test" represents a material contravention of the development plan. Whereas An Bord Pleanála is, in principle, entitled to grant planning permission for development which materially contravenes the development plan, in order to do so it must apply the criteria under section 37(2)(b) of the PDA 2000 as applied by section 9(6) of the PD(H)A 2016. The board has disavowed any reliance on this section in the present case. The board—mistakenly—maintains the position that there was no material contravention. The decision to grant planning permission is therefore *ultra vires* by virtue of the failure to comply with these statutory provisions.

102. For the sake of completeness, I propose to address briefly some of the additional arguments advanced on behalf of An Bord Pleanála and the Developer.

JUSTIFICATION TEST REQUIRED UNDER THE GUIDELINES

103. Assuming for the purposes of argument only that—contrary to my finding under the previous heading above—Objective CCF 6 does not impose a mandatory requirement to carry out a "justification test", then the need for a "justification test" falls to be determined by reference to the criteria in the guidelines as replicated in the Bearna Plan.

104. It will be recalled that the requirement to carry out a "justification test" is set out at §5.15 of the guidelines as follows.

> "5.15 Where a planning authority is considering proposals for new development in areas at a high or moderate risk of flooding that include types of development that are vulnerable to flooding and that would generally be inappropriate as set out in Table 3.2, the planning authority must be satisfied that the development satisfies all of the criteria of the Justification Test as it applies to development management outlined in Box 5.1 below."

105. As appears, there is a cross reference to Table 3.2 of the guidelines. This table is set out at page 26 of the guidelines. The content of this table has been replicated by the table at §3.2 of the Bearna Plan as follows.

> "3.2 Flood Risk Management Guidelines
>
> Flood Risk Management Guidelines
>
> DM Guideline FL1 – Flood Zones and Appropriate Land Uses
>
> The table below indicates the types of land uses that are appropriate in each of the Flood Zones identified within the plan area, in accordance with The Planning System and Flood Risk Management Guidelines 2009 (and as updated). Where developments/land uses are proposed that are considered inappropriate to the Flood Zone, then a Development Management Justification Test and Site-Specific Flood Risk Assessment will be required in accordance with The Planning System and Flood Risk Management Guidelines 2009 (and as updated).

Land Uses	Flood Zone A	Flood Zone B	Flood Zone C
HVD – Highly Vulnerable Development	Inappropriate (if proposed then Justification Test & detailed FRA required	Inappropriate (if proposed then Justification Test & detailed FRA required)	Appropriate (screen for flood risk)
LVD – Less Vulnerable Development	Inappropriate (if proposed then Justification Test & detailed FRA required)	Inappropriate due to climate change (if proposed then Justification Test & detailed FRA required)	Appropriate (screen for flood risk)
WCD – Water-Compatible Development	Appropriate (detailed FRA may be required)	Appropriate (detailed FRA may be required)	Appropriate (screen for flood risk)

> Notes (refer to Flood Risk Management Guidelines 2009 for additional detail):

1. HVD – Houses, schools, hospitals, residential institutions, emergency services, essential infrastructure, etc.

2. LVD – Economic uses (retail, leisure, warehousing, commercial, industrial, non-residential institutions, etc.), land and buildings used for agriculture or forestry, local transport infrastructure, etc.

3. WCD – Docks, marinas, wharves, water-based recreation and tourism (excluding sleeping accommodation), amenity open space, sports and recreation, flood control infrastructure, etc.

Please refer to separate supporting document 'Stage 2 Strategic Flood Risk Assessment for the Bearna Plan'."

106. In order to apply these criteria, it is necessary first to identify which flood zone a proposed development falls within, e.g. flood zone A, B or C; and, secondly, to identify the nature of the development in order to determine whether it is "vulnerable" or "inappropriate".

107. Thus, for example, if residential units were to be located on lands designated as flood zone A, then the carrying out of a "justification test" would be required under the guidelines. This is because residential development is classified for flood risk management purposes as a "highly vulnerable" development.

108. An Bord Pleanála and the Developer argue that—having regard to the proposed land re-profiling works—no "inappropriate" or "vulnerable" development will be carried out on lands subject to the risk of flooding if determined by reference to the revised flood risk zones. The argument continues to the effect that the identification of the flood risk zones should be done—not by reference to the objectives under the Bearna Plan or by reference to the flood zone map under that plan—but rather by reference to the revised flood risk zones as *per* the site specific flood risk assessment prepared on behalf of the Developer. It is said that this document indicates that subsequent to the carrying out of ground re-profiling works, none of the residential units will be located on flood zone A (as revised), and that the only development works which will take place there are what are described as "water compatible development", i.e. roads, car parks and hard standing. It is said, therefore, that it would be redundant to require the carrying out of the "justification test" because the justification test is not required under the guidelines in such circumstances.

109. This argument is predicated on two assumptions as follows. First, that it is legitimate to have regard to flood risk zones as revised by a developer in preference to the flood risk zones actually identified in the development plan. Secondly, that it is legitimate to treat ancillary works as being separate to and distinct from residential development. I address each of these arguments below in turn

110. Leading counsel for the Developer, Mr Jarlath Fitzsimons, SC, conducted a careful analysis of the flood risk management guidelines, and emphasised the fact that reference is made on a number of occasions to the consideration of "mitigation measures". Counsel placed particular emphasis on §5.9 of the guidelines which indicates that a site specific flood risk assessment should provide information *inter alia* on the effectiveness and impacts of any necessary mitigation measures. Counsel sought to characterise the ground re-profiling works, i.e. the cut and fill works, proposed by the Developer as mitigation measures. It was next submitted that the decision as to whether or not to require a "justification test" should be made by reference to *revised* flood risk zones which reflect the risk post-mitigation measures. On this analysis, no "justification test" was required in circumstances where no "inappropriate" or "highly vulnerable" development was proposed in flood zone A (as revised).

111. A similar argument was advanced on behalf of An Bord Pleanála. Counsel for the board placed particular emphasis on the content of the site specific flood risk assessment submitted by the Developer, and spent some time going through the detail of the maps included as part of that assessment. Indeed, this analysis was more thorough than that recorded in the inspector's report.

112. Notwithstanding the skilful submissions of the respective counsel for An Bord Pleanála and the Developer, I have concluded that the determination of whether or not a proposed development is to be located in an area at risk of flooding must be done by reference to the flood risk map provided for under the Bearna Plan. The language used at §3.2 of the Bearna Plan is unequivocal. It is expressly stated that the table indicates the types of land uses that are "*appropriate in each of the Flood Zones identified within the plan area*", and further that both a site specific flood risk assessment and a justification test will be required where developments / land uses are proposed that are considered inappropriate to the flood zone. There is nothing which suggests that a developer can unilaterally alter the flood zone so as to sidestep these procedural requirements. On the facts of the present case, a site specific flood risk assessment was submitted by the Developer as required. However, An Bord Pleanála failed to complete the assessment, and instead purported to leave this assessment over to be carried out post-grant. See Condition No. 12(e) of the planning permission. This was *ultra vires*.

113. Moreover, the separate requirement for a "justification test" was not complied with. This is so notwithstanding the fact that the proposed development would involve the location of a small number of residential units in flood zone A.

114. The flood zone map in the Bearna Plan was prepared following a detailed process of public consultation, which included the preparation of an SFRA and the carrying out of an environmental assessment for the purposes of the Strategic Environmental Assessment Directive, 2001/42/EEC ("*SEA Directive*"). It would set this procedure at naught if a developer were to be permitted to unilaterally modify the flood zones subsequently. This is especially so on the facts of the present case where there is no suggestion that the flood zone maps were incorrect or out of date. In fact, the Bearna Plan had only been adopted a mere *eight days* prior to the date upon which the planning application was made.

115. Whereas it may be correct to say that a site specific flood risk assessment may include mitigation measures, a developer is still required to comply with the "justification test". More specifically, the developer must justify the proposal to carry out development on land which has been identified, following a public participation process, as being at risk of flooding.

116. It must be doubtful whether the extensive land re-profiling, i.e. cut and fill works, proposed by the Developer represent mere "mitigation measures". At all events, on the facts of the present case it is evident from the inspector's report, and from the subsequent imposition of Condition No. 12 of the planning permission, that a robust assessment has not yet been carried out by An Bord Pleanála of these proposed works. It is inconsistent with both (i) national law, and (ii) article 7 of the Flood Directive (Directive 2007/60/EC) to purport to leave over this assessment to be dealt with *subsequent* to the grant of development consent.

117. The argument is also contingent on the classification of certain ancillary works as being separate and distinct from residential development. It is conceded that even allowing for the proposed ground re-profiling, certain development works will be carried out on

flood zone A or B, i.e. certain roads, bridges and hard standing. It is contended that these works are not "residential development" but rather should be treated as water compatible development.

118. With respect, this attempt to exclude what are essential elements of any residential development, i.e. roads and car parks, from the overall proposed development is untenable. On the Developer's own documents, it is clear that the entire development must be treated as residential development for the purpose of flood risk assessment. See, for example, the following statements from the Developer's site specific flood risk assessment.

> "3.10 Planning permission is currently being sought for residential development. The proposed development is residential in nature and can therefore be classed as a "highly vulnerable development" in accordance with Table 3.1 of the Guidelines.
>
> […]
>
> 5.1.2 The proposed development is entirely residential and is therefore considered to be a highly vulnerable development, in accordance with *The Planning System and Flood Risk Management Guidelines for Planning Authorities."*

119. This characterisation makes sense as a matter of logic. It would be artificial to attempt to treat what are integral elements of a residential development piecemeal. Moreover, this approach is entirely consistent with general principles of planning law. The use which is to be made of land is generally determined by reference to the *principal use*, and uses which are ancillary to the principal use are regarded as being part of, or subsumed within, the principal use. The approach taken to ancillary works under section 40 of the PDA 2000 is instructive. Section 40 regulates the duration of a planning permission. Sub-section 40(2)(a) ensures that notwithstanding the expiration of a planning permission, the obligation to provide roads, services and open spaces included in the relevant permission and which are necessary for or ancillary or incidental to the completed buildings, survives. This confirms that ancillary or incidental works are regarded as part and parcel of the overall development.

LAND USE ZONING MATRIX

120. The Applicants have put forward a second, related argument in respect of flood risk assessment as follows. This argument is based on the land use zoning map and the land use matrix. In short, the argument is to the effect that (i) certain ancillary works, such as roads, bridges hard standing, are to be carried out on lands which are subject to the zoning objective "OS", i.e. open space / recreation and amenity. It is next said that development works of this type are not normally permitted under that zoning objective.

121. This argument requires a consideration of the land use matrix at pages 18 and 19 of the Bearna Plan. This matrix sets out the type of development which is (i) permitted in principle; (ii) open for consideration; or (iii) not normally permitted under each of the land use zoning objectives. The Applicants characterise the works as *ancillary* to the residential development and, accordingly, fall to be considered as "residential development". This type of development is, unsurprisingly, not normally permitted under the open space zoning objective. Conversely, An Bord Pleanála and the Developer characterise the works as falling within the land use category "Utilities Infrastructure & Public Service Installations". This land use is "open for consideration" under the open space zoning objective but is subject to the following note.

> "6. *OS – See also Map 2 – Flood Risk Management, Objective CCF1 and DM Guideline FL 1.
>
> Notwithstanding the Open Space/Recreation and Amenity zoning, proposed uses in this zone must demonstrate compliance with The Planning System & Flood Risk Guidelines (2009) (or as updated) in particular Chapter 3. A Justification Test may be required as set out in said guidelines."

122. For reasons similar to those set out at paragraphs 118 and 119 above, I have concluded that the roads, bridges and hard standing are properly characterised as *ancillary* to the residential development, and, accordingly, must be characterised as "residential" development for the purposes of the land use matrix. The concept of "principal" and "ancillary" uses is well established in planning law. This is recognised in the context of zoning objectives, where section 10(2)(a) of the PDA 2000 speaks of the zoning of land for the use *solely or primarily* for particular purposes. It would be artificial to treat lands which are zoned primarily for residential use as not allowing for the provision of ancillary works such as car parking. Such works are necessary and incidental to the residential accommodation. The converse is equally true that such ancillary works should not be characterised as stand-alone works within a different land use category.

123. These ancillary works cannot properly be characterised as "utilities infrastructure". This term is not defined under the land use matrix. Applying the standard of the reasonably intelligent person, this term would be understood as referring to public utilities such as electricity, gas or waste water. It would be not understood as referring to bridges, roads and car parking which are ancillary to and intended to serve a specific residential development.

124. It is also to be noted that, under the category heading "General/Services and Infrastructure Uses" in the land use matrix, a "car park" is not normally permitted under the "open space" zoning objective. It would be inconsistent with this to interpret "public utilities" as including a "car park".

(3). HABITATS DIRECTIVE ISSUES

PURPOSE OF STAGE 1 SCREENING EXERCISE

125. Section 177U(4) of the PDA 2000 provides as follows.

> "(4) The competent authority shall determine that an appropriate assessment of a draft Land use plan or a proposed development, as the case may be, is required if it cannot be excluded, on the basis of objective information, that the draft Land use plan or proposed development, individually or in combination with other plans or projects, will have a significant effect on a European site."

126. The purpose of a screening exercise under section 177U of the PDA 2000 is to determine whether it is necessary to carry out an "appropriate assessment" of the implications for a European site of the proposed project. The trigger for the requirement for an "appropriate assessment" is that the project, either individually or in combination with other plans or projects, is "likely to have a significant effect" on the European site.

127. The case law of the CJEU makes it clear that the trigger for an appropriate assessment is a very light one, and that the *mere probability* or a *risk* that a plan or project might have a significant effect is sufficient to make an "appropriate assessment" mandatory. See Case C–127/02 *Waddenzee* at [41] to [43].

128. The position has been more recently considered by Advocate General Sharpston in Case C 258/11 *Sweetman*, [47] to [49].

> "It follows that the *possibility* of there being a significant effect on the site will generate the need for an appropriate assessment for the purposes of Article 6(3). The requirement at this stage that the plan or project be likely to have a significant effect is thus a trigger for the obligation to carry out an appropriate assessment. There is no need to *establish* such an effect; it is, as Ireland observes, merely necessary to determine that there may be such an effect.
>
> The requirement that the effect in question be 'significant' exists in order to lay down a *de minimis* threshold. Plans or projects that have no appreciable effect on the site are thereby excluded. If all plans or projects capable of having any effect whatsoever on the site were to be caught by Article 6(3), activities on or near the site would risk being impossible by reason of legislative overkill.
>
> The threshold at the first stage of Article 6(3) is thus a very low one. It operates merely as a trigger, in order to determine whether an appropriate assessment must be undertaken of the implications of the plan or project for the conservation objectives of the site. […]"

129. The High Court (Haughton J.) in *Alen-Buckley v. An Bord Pleanála (No. 2)* [2017] IEHC 541 held that the legal test for a stage 1 screening determination was whether the proposed development was likely to have a significant effect. The court rejected an argument that a different test with a lower threshold, based on the mere possibility of significant effect and without reference to any likelihood, applied. The court interpreted the relevant passages from Advocate General Sharpston's opinion in Case C 258/11 *Sweetman* as follows.

> "83. It is very clear from this passage that Advocate General Sharpston was not proposing a higher standard for Stage 1 than that which was set out in the legislation but was in fact defining the existing standard as being lower than the general definition of 'likely'. Upon reading the Opinion as a whole, it is clear that Advocate General Sharpston was of the view that the test to be applied at the screening stage is whether there is likely to be a significant effect, that the word 'likely' should be read as being less than a balance of probabilities standard and that there need not be any hard and fast evidence that such a significant effect was likely, it merely had to be a possibility that this significant effect was likely."

130. The applicable principles have been very helpfully summarised in the recent judgment of the High Court (Barniville J.) in *Kelly v. An Bord Pleanála* [2019] IEHC 84, [68] ("*Kelly (Aldi Laytown*)"). Barniville J. concludes by stating that whereas the threshold at the screening stage is very low, nonetheless it is a threshold which must be met before it is necessary to proceed to a stage 2 appropriate assessment.

AN BORD PLEANÁLA'S APPROACH

131. The Board Decision indicates that An Bord Pleanála carried out a stage 1 screening exercise for the purposes of the Habitats Directive. The board concluded that the proposed development was not likely to have a significant effect on any European site. The board did not, therefore, proceed to carry out a stage 2 appropriate assessment.

132. The board's screening determination is recorded as follows.

> "The Board noted the Statement of Screening for Appropriate Assessment submitted by the applicant and the Appropriate Assessment Screening determination carried out by the Inspector.
>
> In completing the screening for Appropriate Assessment, the Board accepted and adopted the screening determination carried out in the Inspector's report in respect of the identification of the European sites which could potentially be affected, and the identification and assessment of the potential likely significant effects of the proposed development, either individually or in combination with other plans or projects, on those European sites in view of the sites' conservation objectives.
>
> The Board was satisfied that the proposed development, either individually or in combination with other plans or projects, would not be likely to have a significant effect on European sites Galway Bay Complex Special Area of Conservation (site code 000268) and Inner Galway Bay Special Protection Area (site code 004031), or any other European site, in view of the sites' conservation objectives, and a Stage 2 Appropriate Assessment is not therefore required."

133. As appears, the board "accepted and adopted" the screening determination carried out in the inspector's report. This screening determination reads as follows. (See the inspector's report, page 54).

> "The AA screening report identifies potential effects of the development on designated sites with regard to their conservation objectives. Having regard to the source-pathway-receptor model and to the limited ecological value of the habitats present at the development site as per the Ecological Impact Assessment, I am satisfied that the above are the only two European sites with the potential to be impacted by the development and that there is no potential for direct, indirect or cumulative effects on any other European sites. The remaining sites within 15 km are considered to be of a sufficient distance so as not to be affected by the proposal having regard to the scale and nature of the development.
>
> I note the comment of the Department of Culture, Heritage and the Gaeltacht with regard to potential effects on the Galway Bay Complex SAC and Inner Galway Bay SPA. The development will not be immediately adjacent to these designated sites and will not involve any land take or loss of habitat. The only potential pathways for effects on the SPA and SAC are through hydrological connections, i.e. the Trusky Stream discharging to Galway Bay at Bearna. There will be no run-off from the site directly to any SAC or SPA. *Best practice measures will be undertaken to minimise emissions to the Trusky Stream during the construction and operation of the development. These measures will ensure the protection of water quality and fisheries resources in the Trusky Stream*. Emissions into Galway Bay at Bearna from the Trusky Stream will be negligible and any slight emissions that do enter Galway Bay at Bearna will be quickly dissipated by tidal currents. Waste water from the development will be accepted at the upgraded Mutton Island plant in Galway City.
>
> It is reasonable to conclude that on the basis of the information on the file, which I consider adequate in order to issue a screening determination, that the proposed development, individually or in combination with other plans or projects would not be likely to have a significant effect on European Sites Galway Bay Complex SAC (000268) and Inner Galway Bay SPA (004031), or any other European site, in view of the sites' Conservation Objectives, and a Stage 2 Appropriate Assessment (and submission of a NIS) is not therefore required."

*Emphasis (italics) added.

134. As discussed presently, much of the dispute in the present case centres on the inspector's reference to "best practice measures", and, in particular, as to whether it is legitimate to have regard to same as part of a stage 1 screening exercise.

135. Both the inspector's and the board's approach had been informed by a screening statement submitted on behalf of the Developer. This screening statement had been prepared by Noreen McLoughlin, MSc, MCIEEM, Ecologist. The approach of the board inspector reflects the following extract from the screening statement (at page 19 thereof).

> "Emissions: Neither the construction nor the operation of the proposed development will result in any emissions to the identified SACs or SPA. There will be no run-off from the site directly to any SAC or SPA. Best practice measures will be undertaken to minimise emissions into the Trusky Stream during the construction and operation of the development. These measures will be taken to ensure the protection of water quality and fisheries resources in the Trusky Stream itself, which is a non-designated watercourse. Emissions into Galway bay at Bearna from the Trusky Stream will be negligible and any slight emissions that do enter Galway Bay at Bearna will be quickly dissipated by tidal currents. Waste water from the development will be accepted at the upgraded Mutton Island plant in Galway City."

APPLICANTS' GROUNDS OF CHALLENGE

136. The Applicants have pleaded a number of grounds of challenge alleging that An Bord Pleanála failed to comply with the requirements of the Habitats Directive. These grounds can be conveniently considered under two broad headings as follows.

137. First, it is alleged that An Bord Pleanála had regard to "mitigation measures" proposed by the Developer for the purposes of making its screening determination, and that this is impermissible for the purposes of a stage 1 screening exercise under article 6 (3) of the Habitats Directive as interpreted by the CJEU in Case C-323/17 *People Over Wind*.

138. Secondly, it is alleged that the board did not have sufficient information and/or objective evidence before it capable of justifying its conclusion that the proposed development was not likely to have a significant effect on a European site. It is also alleged that the board misapplied the legal test required under section 177U of the PDA 2000.

139. For the reasons set out under the next heading below, I hold that the first ground of challenge is made out. An Bord Pleanála was not entitled to rely on "best practice measures" for the purposes of a stage 1 screening determination. Insofar as the board thought it necessary to rely on "best practice measures", it should have proceeded to a stage 2 appropriate assessment.

140. In the light of this holding, it is not necessary to consider the second head of challenge. In circumstances where I have concluded that a stage 2 appropriate assessment should have been—but was not—carried out, it is a moot point whether the limited exercise actually carried out by An Bord Pleanála would have passed muster even under stage 1.

MITIGATION MEASURES AND SCREENING

GROUNDS OF CHALLENGE

141. The first limb of the Applicants' case under the Habitats Directive involves an allegation that An Bord Pleanála impermissibly had regard to measures which were intended to avoid / reduce harmful effects on the European sites. More specifically, it is contended that the fact that the board relied on "best practice measures" for the purposes of reaching its screening determination indicated that the board had—impermissibly—taken avoidance / reduction measures into account for the purpose of its stage 1 screening determination.

142. Counsel on behalf of the Applicants, Mr Steen, SC, submitted that the approach of An Bord Pleanála was inconsistent with the judgment of the CJEU in Case C 323/17 *People Over Wind*. The legal test is whether measures are intended to avoid and/or reduce a potential harmful effect on a European site. The French language version refers to "intended measures", i.e. the measures become the focus of the phrase. At all events, intention must be ascertained in an objective way: it cannot be sufficient for a developer to say subjectively that it did not intend this raft of mitigation measures to have any effect on a European site. The proper approach is to ask whether a measure is intended to avoid and reduce a harmful impact especially when that measure had, in fact, been taken into account in the screening assessment.

143. Counsel also emphasised that the measures proposed in Case C–323/13 to reduce polluting matters entering the water course were very similar to what is being proposed in this development.

144. Counsel suggests that it is not enough for the board simply to note that the application site is some distance from the two nearest European sites. Neither the inspector's report nor the Developer's screening statement contains a proper assessment. There is, for example, no attempt to quantify or assess (i) the emissions, (ii) the effect of distance on the concentration of the emissions, or (iii) the effect of tidal currents. The assessment has not been done to justify the inspector's conclusion that "any slight emissions that do enter Galway Bay at Bearna will be quickly dissipated by tidal currents".

145. The Applicants have filed an affidavit in these proceedings sworn by a chartered ecologist, Paula Kearney, B.Sc., who is employed by RPS Group, Engineering and Environmental Consultants. This affidavit is dated 15 January 2019. Insofar as the principal findings of the screening determination are concerned, namely that emissions will be negligible and will be dispersed by tidal currents, Ms Kearney states as follows.

> "17. However, the scale of the pollution event / pathway is not quantified in terms of scale, duration or intensity. The rationale relies on the assimilative capacity of the receiving water body, but there is no information or analysis provided on the assimilative capacity of Galway Bay and whether the in-situ European Sites will experience significant negative effects as a result of the proposed development. The issue is simply not evaluated and analysed.
>
> […]
>
> 22. The Screening for AA report considers that there will be no direct discharge or emissions from the proposed development to European Sites, but indirect discharge of emissions are possible. The effective discharge or run-off from the proposed development site to Galway Bay and its constituent European Sites are not assessed in the Screening for AA report. The effect of all discharges from the proposed development site, during both the construction and operational phase, should be quantified and determined in terms of all interconnected European Sites (and European Sites within the

project Zone of Influence) and their associated Qualifying Interests (QIs) and Species of Conservation Interest (SCI). This was not assessed in the Screening for AA report prepared for this development and therefore the determination (and the Screening conclusion) is not informed by clear, precise or definitive findings. In such circumstances, the Board has based it is appropriate assessment screening decision on unclear, imprecise findings."

DISCUSSION

146. The resolution of this dispute requires consideration of two issues as follows. First, at the level of general principle, does a commitment to comply with "best practice" construction methods represent an avoidance / reduction measure which must be *excluded* for the purposes of reaching a screening determination. Secondly, on the facts of the present case, what is meant by the reference to "best practice measures" in the screening determination. In particular, was it intended to incorporate the construction methodology outlined in the (separate) ecological report submitted on behalf of the Developer. I address these two issues in turn under separate sub-headings below.

(i) Construction management / Best practice measures

147. Prior to the judgment in Case C 323/17 *People Over Wind*, the legal position was clear-cut. It was legitimate for a competent authority—in reaching a screening determination—to have regard to the fact that a developer would adopt "best practice" in carrying out development works. In *Ratheniska Timahoe and Spink Substation Action Group v. An Bord Pleanála* [2015] IEHC 18, the High Court (Haughton J.) accepted that it was reasonable for An Bord Pleanála, in the context of assessing any "likely significant effect", to assume that best practice construction management techniques would be adopted to prevent any deterioration of water quality within or upstream of the protected river. See also *Rossmore Properties Ltd v. An Bord Pleanála*, unreported, High Court (Hedigan J.), 28 August 2014 (best practices could be taken into account in the context of a section 5 reference).

148. This approach is consistent with that which had been adopted by the High Court of England and Wales in *R. (on the application of Hart District Council) v. Secretary of State for Communities and Local Government* [2008] EWHC 1204 (Admin) and the Court of Appeal in *Smyth v. Secretary of State for Communities and Local Government* [2015] EWCA Civ 174, [76], as follows.

> "[76] If the competent authority can be sure from the information available at the preliminary screening stage (including information about preventive safeguarding measures) that there will be no significant harmful effects on the relevant protected site, there would be no point in proceeding to carry out an 'appropriate assessment' to check the same thing. It would be disproportionate and unduly burdensome in such a case to require the national competent authority and the proposer of a project to undergo the delay, effort and expense of going through an entirely unnecessary additional stage (and see in that regard paras 72-73 of AG Kokott's Opinion in *Waddenzee*, where she explains that 'it would be disproportionate to regard any conceivable adverse effect as grounds for carrying out an appropriate assessment')."

149. The correctness of this approach will have to be reconsidered now in light of the judgment of the CJEU in Case C 323/17 *People Over Wind*. That case concerned proposed grid connection works, i.e. the laying of a cable to connect a wind farm to the national electricity grid. Whereas the construction of the wind farm proper, i.e. the erection of the turbines and ancillary works, had been subject to the requirement to obtain planning permission, the grid connection works had been treated as exempted development. It was nevertheless necessary for the developer to make a screening determination for the purposes of regulation 42 of the EC (Birds and Natural Habitats) Regulations 2011. This determination had been informed by an "appropriate assessment screening report" prepared by expert planning consultants. This report had stated *inter alia* that, in the absence of protective measures, there was potential for the release of suspended solids into waterbodies along the proposed route, and that if the construction of the proposed cable works was to result in the release of silt or pollutants, such as concrete, into the pearl mussel population area of the river through the pathway of smaller streams or rivers, there would be a negative impact on the pearl mussel population. The pearl mussel was a qualifying interest of the relevant European sites, and is especially sensitive to pollution. The report went on to detail protective measures, and concluded that there was no potential for significant effects on the European sites due to the following reasons (i) the distance between the proposed grid connection and the European sites; and (ii) the protective measures that have been built into the works design of the project.

> "The development will involve the excavation of road surface, soil and subsoil during the installation / construction phase and the use of reception and launch pits for directional drilling (for full project description see Section 1.4). In the absence of protective measures, there is potential for the release of suspended solids into waterbodies along the proposed route, including directional drilling locations. A reduction in water quality due to sedimentation and release of suspended solids may impair plant growth and impact on lamprey and salmonid spawning habitat. This could have knockon effects further up the food chain on invertebrates, birds, fish and mammals. With regards to Freshwater Pearl Mussel (FPM), if the construction of the proposed cable works was to result in the release of silt or pollutants such as concrete into the pearl mussel population area of river through the pathway of smaller streams or rivers, there would be a negative impact on the pearl mussel population. Sedimentation of gravels can prevent sufficient water flow through the gravels, starving juvenile FPM of oxygen. A reduction in water quality may also impact on Otters within and downstream of the study area. Theoretically, should large quantities of suspended solids enter waterbodies in the vicinity of the proposed development it could potentially affect the riverine habitat and associated protected species of the River Barrow and River Nore SAC. An accidental spillage and release of hydrocarbons to sensitive watercourses in the immediate surroundings could have significant effect on the qualifying interests of the SAC. In the absence of controls and management techniques, there is potential for bentonite spill or blow out as a result of directional drilling."

150. This is then reflected in the reasoned recommendation of 14 July 2016 (relied upon in the formal screening determination) as follows.

> "As set out in detail in the RPS Appropriate Assessment Screening Report, on the basis of the findings of that Report and in light of the best scientific knowledge, the grid connection works will not have a significant effect on the relevant European sites, in light of the conservation objectives of the European sites, alone or in combination with the Cullenagh wind farm and other plans or projects, and an Appropriate Assessment is not required. This conclusion was reached on the basis of the distance between the proposed Cullenagh Grid Connection and the European Sites and the protective measures that have been built into the works design of the project.
>
> On that basis, I recommend that creature reaches a conclusion under Article 42 (7) of the 2011 Regulations that an Appropriate Assessment is not required."

151. The formal determination by the competent authority similarly concluded that the grid connection works would not have a

significant effect on the relevant European sites.

152. The objectors had argued that river pollutants, such as silt and sediment, resulting from the laying of the cable would have a harmful effect on the Nore Freshwater Pearl Mussel.

153. The High Court (Barrett J.) referred the following question to the CJEU: whether, or in what circumstances, mitigation measures can be considered when carrying out screening for appropriate assessment under article 6(3) of the Habitats Directive. See *People Over Wind v. Coillte* [2017] IEHC 171.

154. The CJEU noted that the concept of "mitigation measures" is not referenced in the Habitats Directive, and that the measures at issue in the proceedings should instead be understood as denoting measures that are intended to avoid or reduce the harmful effects of the proposed project on the site concerned. The court held that article 6 (3) of the Habitats Directive must be interpreted as meaning that, in order to determine whether it is necessary to carry out, subsequently, an appropriate assessment of the implications, for a site concerned, of a plan or project, it is not proper, at the screening stage, to take account of the measures intended to avoid or reduce the harmful effects of the plan or project on that site.

155. It follows from the judgment in Case C 323/17 *People Over Wind* that the key determinant of whether a measure is an avoidance / reduction measure is its intended purpose. This can only be ascertained by reference to the predicted impact of the proposed development on a European site, and whether the measures are intended to avoid or reduce a potential impact. The nature of the measures themselves will not necessarily be decisive. In some instances, standard construction methods will represent avoidance / protective measures; in most case, they will not. It will all depend on the context.

156. This distinction can readily be applied in cases where the competent authority has adopted a stepped-approach in its screening determination, such as that adopted on the facts of *People Over Wind*. In that case, the screening report which informed the screening determination had, first, identified a potential impact upon the qualifying interest, and, secondly, put forward measures to avoid and reduce that impact.

157. The *intention* of the measures was expressly stated to be protective. In the circumstances, the newly introduced legal test under *People Over Wind* could readily be applied to the facts of the case.

158. There is an obvious temptation in cases where a detailed construction methodology has been offered by a developer and/or imposed by way of planning condition to *pre-suppose* that these measures were required precisely because the proposed development would be likely to have a significant effect in their absence. This temptation should be resisted. It is not legitimate to work backwards from the existence of measures and to assume therefrom that "but for" these measures the proposed development would have been likely to have had a significant effect. The emphasis must always be on the intended purpose of the measures.

159. This point is illustrated by *Kelly v. An Bord Pleanála* [2019] IEHC 84 ("*Kelly (Aldi Laytown)*"). On the facts, the planning application had indicated that the developer intended to comply with the sustainable urban drainage systems requirements ("*SUDS*"). An Bord Pleanála reached a "negative" screening determination, and made a decision to grant planning permission. The permission was then challenged in judicial review proceedings taken by a third-party objector.

160. The objector argued that the SUDS requirements represented mitigation measures, and contended that An Bord Pleanála had impermissibly relied upon same in reaching its screening determination. The objector placed particular emphasis on the fact that the board's inspector had made mention of the SUDS techniques in that part of her report recording her recommended screening determination.

> "8.6.3 The appeal site is 30m from the boundary of the River Nanny Shore & Estuary SPA and is separated by the public road so it is submitted in the report that no direct interference or loss of habitat would occur as a result of the development. Recognising that there is a pathway from the site via wastewater flows to the Boyne Estuary, it is stated that the volume of wastewater from the operation of a supermarket would be lower than the previous use on site (nursing home) and that the Drogheda WWTP is operating well within its design capacity and compliant with its licenced treatment standards. Accordingly, it is submitted that there can be no effect to water quality arising from this development and that no significant effects on the status of the SAC or the SPA are likely. During operation, the surface water infrastructure would maintain discharge rates to 'greenfield' levels, incorporating SUDS techniques. Run-off during construction is likely to be absorbed to ground as there is no watercourse on the site which could act as a pathway to any Natura area. Because of the separation distance from the site to the River Boyne & River Blackwater SAC and SPA, significant effects can be discounted. It is concluded that the proposed development, either alone or in combination with other plans or projects would not result in significant effects to the integrity of the Natura 2000 network."

161. Barniville J. rejected the objector's argument, saying that it was clear from the uncontested evidence before the court that the inclusion of the SUDS measures had not been done with the *intention* of avoiding or reducing any potentially harmful effect of the development on any European site, and had been included entirely without reference to the proximity of the application site to a European site.

> "131. Furthermore, the policy behind requiring SUDS and the inclusion of SUDS measures in a development is not in any way directed to the protection of any European site which might potentially be affected by a particular development off that site. It is clear that the key driver for the requirement to incorporate SUDS in development is the Water Framework Directive and not the Habitats Directive. SUDS are required entirely without reference to the presence of a European site within the zone of influence of a particular development.
>
> […]
>
> 139. I am also satisfied from a review of the screening report that they were not considered as mitigation measures within the correct meaning of that term as interpreted by the CJEU in People over Wind in that report. The inspector makes reference to SUDS measures in para. 8.6.3 of her report (under the 'appropriate assessment' heading) however, she is merely summarising the contents of the screening report when referring to the incorporation of SUDS techniques into the surface water infrastructure enabling discharge rates to be maintained during operation to 'greenfield' levels. *She does not consider the SUDS measures as measures which are intended to avoid or reduce any harmful effects from the development on any European site within the zone of influence of the development*. I conclude, therefore, that the inspector did not consider the SUDS measures incorporated in the development as mitigation measures for the purposes of the Habitats Directive.

[…]

141. For these reasons, I conclude that on the evidence the SUDS measures incorporated in the development, as required under the policy contained in the GDSDS, are not mitigation measures as that term has been defined and considered by the CJEU in *People over Wind*. It is clear from the uncontested evidence before the court that the inclusion of the SUDS measures is not with the intention of avoiding or reducing any potentially harmful effect of the development on any European site and that their inclusion is required for completely different reasons. Those measures are included entirely without reference to the proximity of the site to a European site. In my view, therefore, the applicant's challenge on this ground is misplaced and must be rejected."

*Emphasis (italics) added.

162. It follows from this case law that the question of whether a particular measure is an avoidance / reduction measure falls to be answered by reference to the intended purpose of the measure. This will require consideration of the rationale for the imposition of the measure. If, as in *People Over Wind*, a measure is expressly described as a protective measure, then it falls within the category of avoidance / reduction measures which cannot legitimately be taken into account as part of a stage 1 screening exercise. Conversely, if, as in *Kelly (Aldi Laytown),* the measures are required for purposes entirely unrelated to the Habitats Directive, then the mere fact that reference is made to same in the context of the discussion of the screening determination does not invalidate that decision. It all depends on what reliance is placed upon same. As appears from the inspector's report in *Kelly (Aldi Laytown),* there was no watercourse on the application site in that case which could act as a pathway to any European site. See paragraph 160 above.

163. An example of a case which falls on the other side of the line is provided by *Dunne v. Offaly County Council* [2019] IEHC 328. On the facts of that case, the screening determination had concluded that the impacts of the proposed development on European sites would be limited due to the proximity to the designated areas, and could be "controlled through the implementation of appropriate mitigation measures/permit conditions." The High Court (O'Regan J.) held that mitigation measures had been improperly taken into account.

164. The label which the parties choose to attach to a particular measure is not necessarily dispositive of the issue. The question of whether something is or is not intended to avoid / reduce an impact on a European site is something which must be determined on an *objective* basis, and not by reference to the subjective views of the parties.

165. It will not always be helpful to consider whether the measure is "integral" to the project or is something "additional". This is because it may be difficult in practice to draw a meaningful distinction between the two. The developer may well anticipate the need for particular mitigation measures and arrange for these to be "built in" to the project. The litmus test must be whether the measure is intended to avoid or reduce harmful effects.

166. I turn next to apply these principles to the facts of the present case.

(ii) What is meant by "best practice measures" in the present case?

167. It will be recalled that the board's inspector expressly references the fact that "best practice measures" will be undertaken to minimise emissions to the Trusky East stream during the construction and operation of the development. The dispute between the parties centres on what the *intention* of these best practice measures is. One aspect of this dispute is whether this phrase must be understood as having the same meaning as it does when used by the ecologist in her (separate) ecological report.

168. Before turning to consider that aspect, it should be noted that, on its own terms, the inspector's recommendation indicates that there are two strands to her reasoning: (i) best practice measures will minimise emissions into the stream; and (ii) any slight emissions from the stream that do enter Galway Bay at Bearna will be quickly dissipated by tidal currents. On this analysis, the "best practice measures" are intended to avoid / reduce any harmful effect on the European sites. To put the matter another way, the inspector does not rely solely on tidal dispersion in reaching her screening determination. The avoidance / reduction of emissions to the stream in the first instance forms part of her reasoning. A straightforward analysis of the wording indicates that the inspector was taking the best practice measures into account. This approach has been "accepted and adopted" by the board.

169. An Bord Pleanála and the Developer contend that the "best practice measures" are intended to address the impact of the proposed development on the immediate locality, i.e. they are confined to "local impacts". Emphasis is placed upon the *next* sentence in the inspector's report: "These measures will ensure the protection of water quality and fisheries resources in the Trusky Stream".

170. With respect, this argument cannot be reconciled with the language of the inspector's recommended screening determination when taken as a whole. It cannot be overlooked that the inspector chose to make express reference to "best practice measures" in what is a very summary of the screening exercise. The inspector self-evidently attached importance to these measures. The fact that the measures would have a benefit to flora and fauna within the application site does not preclude a finding that the measures would also avoid / reduce the impact on the European sites. The two outcomes are entirely compatible. There is nothing in the judgment in *People Over Wind* which says that the effect on the European sites has to be the only intended purpose.

171. There was much debate at the hearing before me as to the interaction, if any, between the recommended screening determination in the Developer's screening statement, and the ecological impact assessment submitted separately. This assessment was prepared by the same ecologist, Noreen McLoughlin, who had prepared the screening statement.

172. In order to understand the relationship between the two documents, it is necessary to refer back to Objective CCF 6 (Inappropriate Development on Flood Zones) of the Bearna Plan. Part of the application site had been expressly identified in the Bearna Plan as being of questionable suitability for development because of the risk of flooding. It will be recalled that the fourth bullet point of CCF 6 reads as follows.

> "Any development proposals submitted for this site will require a detailed ecological report(s), carried out by suitably qualified personnel for the purposes of informing Appropriate Assessment Screening by Galway County Council, the competent authority (in accordance with Objective DS 6 of the Galway CDP 2015-21)."

173. As appears therefrom, the precise purpose of the requisite detailed ecological report is to inform the screening exercise. Whereas the bullet point refers to the planning authority, namely Galway County Council, as competent authority, this must be understood as referring to An Bord Pleanála in the context of an application for strategic housing development which is, of course, made directly to the board, bypassing the local authority stage. The board is required to have regard to the development plan under section 9 of the PD(H)A 2016.

174. It is clear, therefore, that the ecological impact assessment is something which is to be considered in the context of the screening determination. Accordingly, it is legitimate to have regard to the content of the ecological report when considering the meaning and effect of the screening determination. The ecological report identifies at pages 30 and 31 impacts within the application site. Relevantly, it refers to a decrease in water quality as follows.

> "Decrease in water quality – The preparation and development of the site will involve the excavation of soil and the pouring of concrete for foundations and other hard surfaces. In addition, there are six proposed crossings over the Trusky Stream. These works all have the potential to generate run-off into the Trusky Stream. If appropriate mitigation measures are not taken during the construction of the proposed development, then there is the possibility that water quality in the stream may be negatively impacted upon. Possible direct impacts include the pollution of the waters during construction with the silt, oil, cement, hydraulic fluid etc. This would directly affect the habitat of protected species by reducing water quality. These substances would also have a toxic effect on the ecology of the water in general, directly affecting certain species and their food supplies. In addition, an increase in the siltation levels of local water bodies could result in the smothering of fish eggs, an increase in the mortality rate in fishes of all ages, a reduction in the amount of food available for fish and the creation of impediments to the movement of fish. Pollution of the water with hydrocarbons, cement and concrete during the construction phase of this proposed development could also have a significant negative effect on the aquatic invertebrate populations."

175. A detailed set of mitigation measures are set out at pages 32 to 34. These include in*ter alia* the following.

> "6. MITIGATION MEASURES
>
> In order to mitigate against the impacts listed above, then the following mitigation measures should be adhered to during all phases of the development.
>
> • All works associated with the development should be confined to the proposed development site. All site development works should adhere to best practice.
>
> • Site preparation and construction should adhere to best practice and should conform to the Inland Fisheries Ireland document *Requirements for the Protection of Fisheries Habitats during Construction Works in and Adjacent to Waters* (www.fisheriesireland.ie).
>
> • It is vital that there is no deterioration in water quality in the Trusky Stream. This will protect both habitats and species that are sensitive to pollution. Therefore, strict controls of erosion, sediment generation and other pollutants associated with the construction process should be implemented, including the provision of attenuation measures, silt traps or geotextile curtains to reduce and intercept sediment release into any local watercourses. The protection of water quality in this area is of utmost importance.
>
> • The riparian zone of the Trusky Stream must be maintained and cordoned off from the development activities on site. If the bank or riparian zones of the stream are damaged during the development, they should be restored as soon as possible using natural materials. All measures must be taken during the construction of the bridges to ensure that no impacts on the stream will occur from the works or the pouring of concrete (See Ireland Fisheries Guidelines cited above). The installation of the bridges must be done under the advice and supervision of personnel from Inland Fisheries Ireland.
>
> The architects and engineers working on the design of the bridges have taken the concerns of NPWS and Inland Fisheries Ireland on board in the most recent design of the bridges. The vehicular bridges will avoid the river bed and their span will result in minimal impacts on the riparian zone of the stream. They will consist of a pre-cast structure with MY bridge beams, in-situ concrete toping (*sic*) and pre-cast parapets, which will be stone faced.
>
> […]
>
> • During the operation of the development as a residential facility, the riparian corridor of the stream should also be fenced off to prevent habitat fragment arising from human activity.
>
> • In order to avoid pollution of the Trusky Stream, the decommissioning and removal of the existing wastewater treatment plant and percolation area on site should only be done in dry weather and under the supervision of a suitably qualified engineer. Run off from the plant and percolation area into the stream must be prevented.
>
> • The techniques of SUDs (Sustainable urban Drainage Systems) should be applied to all hydrological engineering aspects of this proposed development. It is understood that the proposed development has been designed in accordance with the principles of Sustainable Urban Drainage (SUDs) in order to maintain the surface water run-off rates from the site at pre-development or green field levels. The underlying principle of this design is prevention of flooding rather than cure after the fact. There is no history of flooding on the site as the Trusky Stream which runs through the site runs freely without interruption from North to South.
>
> […]
>
> • Fuels, oils, greases and hydraulic fluids must be stored in bunded compounds well away from watercourses. Refuelling of machinery, etc., should be carried out in bunded areas.
>
> • Any bulk fuel storage tank should be properly bunded with a bund capacity of at least 110% of that of the fuel tank.
>
> • Stockpile areas for sand and gravel should be kept to a minimum size, well away from the drains and watercourses."

DECISION

176. The key determinant of whether a measure is an avoidance / reduction measure is its intended purpose. This can only be ascertained by reference to the predicted impact of the proposed development on a European site, and whether the measure is intended to avoid or reduce a potential impact.

177. On the facts of the present case, there is a potential hydrological connection between the application site and the European sites, via the Trusky stream. The stream enters the sea at Bearna pier, some 1.4 km to 1.5 km east of the Galway Bay SAC and SPA. Whereas the screening determination does state that any emissions into Galway Bay would be quickly dissipated by tidal currents, the determination does not rest exclusively on this factor. Rather, the inspector's screening determination, which was accepted and adopted by An Bord Pleanála, makes express reference to "best practice measures" being undertaken to minimise emissions to the Trusky stream during the construction and operation of the development. The structure of the screening determination, and the fact that the inspector thought it necessary to make reference to "best practice measures", in what is a very short determination, indicates that the inspector was relying upon the combined effect of the "best practice measures" and dissipation by tidal currents in reaching her determination.

178. The reference to "best practice measures" can only be understood as referring to the "mitigation measures" as enumerated in §6 the ecological report. There was an express obligation under Objective CCF 6 of the Bearna Plan to submit a detailed ecological report for the purposes of informing a screening exercise. The inspector was required to consider both the screening statement and the ecological report for the purposes of reaching her determination.

179. The screening determination is invalid in that it improperly relied upon these "best practice measures" in reaching the conclusion that the proposed development would not be likely to have a significant effect on the European sites. An Bord Pleanála should, instead, have proceeded to a stage 2 appropriate assessment, and required the Developer to submit a Natura Impact Statement ("NIS") in accordance with section 177U(6) of the PDA 2000. This error goes to jurisdiction, and invalidates the decision to grant planning permission. See, by analogy, *Connelly v. An Bord Pleanála* [2018] IESC 36; [2018] 2 I.L.R.M. 453.

(4). LANDOWNER CONSENT

OVERVIEW
180. The final ground of challenge advanced by the Applicants involves an allegation that the planning application was not made with the consent of the owner of part of the lands. More specifically, the Applicants contend that—in circumstances where there are separate legal proceedings in being in which one of the Applicants asserts rights over the ownership of part of the lands intended to be used as access to the site—the Developer was not entitled to make the planning application.

181. Counsel on behalf of the Applicants did not press this issue at the hearing before me, and, instead, rested on the written legal submissions.

DISCUSSION AND DECISION
182. Article 297(2)(a) of the Planning and Development Regulations 2001 (as amended) provides that where an applicant for permission is not the owner of the land concerned, the application for planning permission for "strategic housing development" shall be accompanied by the written consent of the owner. On the facts of the present case, the registered owner of the application site is a company called Burkeway Barna Ltd. This company is a wholly owned subsidiary of the company which made the planning application (Burkeway Homes Ltd.), and provided a letter of consent to the making of the planning application dated 28 March 2018. At first blush, therefore, there would appear to have been compliance with the requirements of the Planning and Development Regulations 2001. However, the Applicants contend that, as a result of a contract for sale, the first named applicant has a beneficial interest in the lands over which access to the site is to be obtained. This contention is disputed by the Developer: the contract for sale is said to reserve certain rights over the lands in sale. This dispute is the subject of separate proceedings before the Circuit Court. The question for determination in the within judicial review proceedings is whether the existence of this dispute as to ownership is sufficient to invalidate the application for planning permission. For the reasons set out below, I have concluded that it is not.

183. First, the ownership dispute appears to relate not to the application site *per se* but rather concerns the ownership of adjacent lands through which access is to be gained to the application site. On its ordinary and natural meaning, article 297(2)(a) of the Planning and Development Regulations 2001 is concerned with the ownership of the application site and not with any other lands.

184. Secondly, as of the date the planning application was made, Burkeway Barna Ltd. was the registered owner of the relevant lands. The Developer has exhibited the relevant folio in this regard. If and insofar as An Bord Pleanála is required to consider issues of title at all, the board is certainly entitled to accept the folio as evidence of title. The board is not required to go behind the registered title and to make enquiries as to who might be the *beneficial* owner.

185. Thirdly, and perhaps most importantly, it is doubtful whether An Bord Pleanála is required to interrogate issues of title at all. The purpose underlying the requirement to obtain a letter of consent from the owner of the application site under article 297(2)(a) is to guard against the making of frivolous or vexatious planning applications by persons with no interest in the lands and, accordingly, with no prospect of being able to carry out the proposed development. (See *Keane v. An Bord Pleanála* [1998] 2 I.L.R.M. 241 at pages 248 and 249). Notwithstanding the existence of separate legal proceedings arising out of the contract for sale, it is self-evident that the application for planning permission was not frivolous or vexatious in this sense.

186. For the reasons set out above, this ground of challenge is rejected.

PROPOSED ORDERS
187. I propose to make an order of *certiorari* setting aside An Bord Pleanála's decision to grant planning permission. I propose to adjourn the matter briefly to allow the parties to consider this judgment. On the adjourned date, I will hear counsel on the issue of costs, and on whether the matter should be remitted to An Bord Pleanála pursuant to Order 84, rule 26.

188. If any party wishes to exercise their statutory right to seek leave to appeal to the Court of Appeal pursuant to section 50A(7) of the PDA 2000, the draft points of law should be circulated to the other parties and to the court in advance of the adjourned date. A date for the hearing of any application for leave to appeal will then be fixed.