



THE COURT OF APPEAL

UNAPPROVED
Court of Appeal Record Number 2020/119

Costello J.

Neutral Citation Number [2021] IECA 317

Haughton J.
Murray J.

BETWEEN

FRIENDS OF THE IRISH ENVIRONMENT CLG

**APPLICANT/
APPELLANT**

- AND -

**THE GOVERNMENT OF IRELAND, MINISTER OF HOUSING, PLANNING
AND LOCAL GOVERNMENT, IRELAND AND THE ATTORNEY GENERAL**

RESPONDENTS

JUDGMENT of Ms. Justice Costello delivered on the 26th day of November 2021

Introduction

1. On 16 February 2018, the Government of Ireland announced the launch of Project Ireland 2040. The project comprises two parts – The National Planning Framework 2040 and a ten-year National Development Plan. The latter announced €116bn worth of investment over the period it covered.
2. On 29 May 2018, the government formally reaffirmed its decision of 16 February 2018 to adopt and publish the National Planning Framework. The applicant in these proceedings challenges the validity of the decision, or decisions, to adopt both the National

Planning Framework (“the NPF”) and the National Development Plan (“the NDP”) and seeks orders of *certiorari* quashing the NPF and the NDP. It does so on the basis of alleged failures by the respondents to observe mandatory requirements of EU law in the process of adopting the NPF and the NDP.

3. By order dated 13 May 2020, the High Court (Barr J.) refused the applicant the relief sought ([2020] IEHC 225). The applicant has appealed his judgment and order to this court. The appeal was heard on 27 and 28 April and on 23 June 2021.

Overview of the relevant legislative context for the adoption of the NPF and NDP

4. When adopting the NPF and NDP, the government was required to comply with applicable legislation, including Directive 2001/42/EC of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (“the SEA Directive”) and Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (“the Habitats Directive”), and the Regulations transposing the directives into Irish law, S.I. 435/2004 the European Communities (Environmental Assessment of Certain Plans and Programmes) Regulations 2004 and S.I. 200/2011 the European Communities (Environmental Assessment of Certain Plans and Programmes) (Amendment) Regulations 2011 (“the SEA Regulations”), and S.I. 477/2011 the European Communities (Birds and Natural Habitats) Regulations 2011 (“the Habitats Regulations”). I set out the relevant provisions here so that the description of the detailed process undertaken which follows may be better understood and the issues said to arise from the alleged flaws in the process set in context.

5. The Habitats Directive places strict legal obligations on member states to ensure the protection, conservation and management of the habitats and species of conservation interest in all European sites. Article 6 obliges member states to undertake an appropriate assessment (“AA”) for any plan or project which is likely to have a significant effect on

any European site. The key provision of the Habitats Directive for present purposes is Article 6(3) which provides:-

“Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site’s conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.” (emphasis added)

6. In *Kelly v. An Bord Pleanála* [2014] IEHC 400, Finlay Geoghegan J. held that a determination that a plan or project will not affect the integrity of a European site is a jurisdictional requirement. At para. 40 she set out the requirement for a valid AA. It:-

- “(i) Must identify, in the light of the best scientific knowledge in the field, all aspects of the development project which can, by itself or in combination with other plans or projects, affect the European site in the light of its conservation objectives. This clearly requires both examination and analysis.*
- (ii) Must contain complete, precise and definitive findings and conclusions and may not have lacunae or gaps. The requirement for precise and definitive findings and conclusions appears to require analysis, evaluation and decisions. Further, the reference to findings and conclusions in a scientific context requires both findings following analysis and conclusions following an evaluation each in the light of the best scientific knowledge in the field.*

(iii) *May only include a determination that the proposed development will not adversely affect the integrity of any relevant European site where upon the basis of complete, precise and definitive findings and conclusions made the Board decides that no reasonable scientific doubt remains as to the absence of the identified potential effects.*”

This summary was approved of by the Supreme Court in *Connolly v. An Bord Pleanála* [2018] IESC 31. Any purported AA which does not satisfy these criteria will be invalid and any purported decision made in reliance thereon will have been reached without jurisdiction.

7. AA involves two mandatory steps – first, the plan or project is screened to ascertain whether AA is required. If it is determined that it is not, then no further assessment is required. If it is determined that AA is required, this must be carried out in the manner specified in *Kelly*. It is possible to have further assessment of alternative solutions, and issues of derogation may arise, though these are not relevant to the facts of this case, so I shall not discuss them further. The AA process involves the preparation and assessment of a Natura Impact Statement (“NIS”) and consultation with the public and statutory consultees prior to making an AA determination in respect of the plan or project.

8. Article 6(3) is transposed into Irish law by the Habitats Regulations. Regulation 42(16) provides:-

“(16) Notwithstanding any other provision of these Regulations, a public authority shall give consent for a plan ... or adopt a plan ... only after having determined that the plan ... shall not adversely affect the integrity of a European site.” (emphasis added)

9. The obligation in Article 6(3) to agree to a plan only after having ascertained that it will not have adverse effects on protected sites is transposed as an obligation only to agree

to a plan after having “*determined*” that it will not have such effects. The applicant alleges that the AA in this instance did not meet the test set forth in *Kelly*.

10. Regulation 42(11) provides:-

“(11) An Appropriate Assessment carried out under this Regulation shall include a determination by the public authority under this Regulation pursuant to Article 6(3) of the Habitats Directive as to whether or not a plan ... would adversely affect the integrity of a European site and the assessment shall be carried out by the public authority before a decision is taken to approve, undertake or adopt a plan ...”.

(emphasis added)

11. Thus, the assessment which includes the determination, must be carried out “*before a decision is taken*” to adopt a plan. As this too is a matter of jurisdiction, failure to comply with this requirement invalidates any consequent decision. Here, the applicant alleges that there was no AA determination prior to the purported adoption of the NPF.

12. Regulation 42(18)(a) requires the public authority to make available for inspection any determinations that it makes under the Regulations. It provides:-

“(18)(a) A public authority shall make available for inspection any determination that it makes in relation to a plan ... and provide reasons for that determination, as soon as may be after the making of the determination ... by members of the public ... and shall also make the determination ... available in electronic form.”

Thus, the public authority is required to make available, *inter alia*, for inspection by the public, the AA determination. The applicant alleges this did not occur in this case.

13. Regulation 42(1) provides that screening for AA “*shall be carried out by the public authority...*”. In Regulation 2 the term “*public authority*” is defined to include a Minister of the government, but does not expressly include the government itself. In this case, the government is the public authority which adopted the NPF and the NDP. The applicant

alleges that the government did not carry out the AA, despite the fact that the government adopted the NPF.

14. The SEA Directive seeks to provide for a high level of protection of the environment by ensuring that an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment (Article 1). Article 2 defines the plans or programmes to which the Directive applies. Article 3 mandates that an environmental assessment, in accordance with Articles 4-9, shall be carried out in respect of plans and programmes referred to in paras. (2)-(4) of Article 3 which are likely to have significant environmental effects. Article 3(8) excludes financial or budget plans or programmes from the Directive. It is therefore necessary, as a preliminary matter, to determine whether a proposed plan or programme requires to be subject to strategic environmental assessment (“SEA”).

15. Article 4(1) provides that the assessment “*shall be carried out during the preparation of the plan or programme and before its adoption ...*”. The intention is that the environmental consequences of implementing a plan or programme are assessed both during their preparation and prior to their adoption.

16. The proper interpretation of Article 5(1) is central to a major part of the applicant’s case. It provides:-

“Where an environmental assessment is required under Article 3(1), an environmental report shall be prepared in which the likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives taking into account the objectives and geographical scope of the plan or programme, are identified, described and evaluated. The information to be given for this purpose is referred to in Annex I.”

This Article reflects recital 14 which states:-

“Where an assessment is required by this Directive, an environmental report should be prepared containing relevant information as set out in this Directive, identifying, describing and evaluating the likely significant environmental effects of implementing the plan or programme, and reasonable alternatives taking into account the objectives and geographical scope of the plan or programme ...”.

17. The assessment of reasonable alternatives prior to the adoption of a plan or programme is a key requirement of the SEA Directive. The applicant contends that the respondents failed properly to assess the reasonable alternatives to the NPF.

18. The SEA Regulations defines the “*competent authority*” as “*the authority which is, or the authorities which are jointly, responsible for the preparation of a plan or programme, or modification of a plan or programme.*” Regulation 3 excludes from the provisions of the Regulations, financial or budget plans and programmes. These are not defined. A “*plan or programme*” means a plan or programme, as well as any modifications thereto:-

“which are subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared for an authority for adoption, through a legislative procedure by Parliament or Government ...”. (emphasis added)

19. Regulation 9 provides that subject to sub-article (2) (which relates to small area plans or minor modifications and is not relevant to the present appeal) an environmental assessment shall be carried out for all plans and programmes. It is to be carried out by the competent authority of the plan or programme (Regulation 9(8)). For the purposes of an environmental assessment under Regulation 9(8), an environmental report must be prepared during the preparation of the plan or programme, or modification to a plan or programme (Regulation 10). Regulation 12 provides:-

“(1) Subject to sub-article (2), an environmental report under article 10 shall identify, describe and evaluate the likely significant effects on the environment of implementing the plan or programme, or modification to a plan or programme, and reasonable alternatives taking account of the objectives and geographical scope the plan or programme, or modification to a plan or programme ...”.

20. Finally, Regulation 17 provides that the competent authority shall monitor the significant environmental effects of implementing the plan or programme. It reproduces the provisions of Article 10 of the SEA Directive.

21. Article 10 requires member states to monitor the significant environmental effects of the implementation of plans and programmes, *“in order, inter alia, to identify at an early stage unforeseen adverse effects, and to be able to undertake appropriate remedial action.”* It is open to member states to use existing monitoring arrangements with a view to avoiding duplication of monitoring. The applicant alleges that the monitoring provided under the NPF does not satisfy the requirements of Article 10.

The Facts

22. The history of the adoption of the NPF and NDP is complicated. Section 2 of the Planning and Development Act 2000 defines the National Spatial Strategy (“the NSS”) as *“the ‘National Spatial Strategy: 2002-2020’ published by the Government on 28 November 2002, or any document published by the Government which amends or replaces that Strategy”*. In October 2014, the government gave approval for the commencement of the preparation of the NPF which was to replace the NSS of 28 November 2002. Section 2 of the PDA 2000 is the legislative basis for its adoption. It is the apex development plan for the country and is intended to provide strategic context for planning and development up until 2040.

23. The evidence of Mr. Paul Hogan, Senior Planning Advisor in the Department of Housing, Planning and Local Government (“the Department”), in his affidavit of 5 March 2019, is that the NPF Roadmap was published in December 2015. He says that a copy is exhibited at Tab 1 of Exhibit PH1. However, that is a document dated July 2018 and it refers to events up to and including 29 May 2018, so it cannot be the roadmap which was published in December 2015, which accordingly appears not to have been adduced in evidence. However, nothing arises in respect of this omission.

24. In June 2016, there was preliminary stakeholder consultation on the NPF and in September 2016 preliminary public engagement on the NPF.

25. On 29 November 2016, the Department engaged RPS Consultants (“RPS”) to undertake a SEA in respect of the NPF and to screen the NPF in order to assess whether it was likely to have significant effects on any European sites within the Natura 2000 network, either alone or in combination with other plans, and thus whether it required to be the subject of an AA. RPS was also to conduct Strategic Flood Risk Appraisal (“SFRA”) of the NPF.

26. In December 2016, RPS undertook SEA screening of the intended NPF after which it was determined the SEA of the NPF would be required. The next step in the SEA process required definition of the scope and level of detail of the information to be included in the environmental report. This scoping was the focus of the SEA Scoping Report.

27. The SEA Scoping Report formed part of the official strategic environmental assessment scoping under S.I. 435 of 2004, as amended by S.I. 200 of 2011. The purpose of the document was to provide preliminary information on the proposed NPF with a view to establishing the scope, level of detail and approach required for the SEA which would follow. The intention was that the information contained in the report would enable

meaningful consultation with statutory and non-statutory consultees in relation to the proposed NPF.

28. On 2 February 2017, the Department published “Ireland 2040 Our Plan, Issues and Choices”. This paper set out the main issues and possible choices for the development of Ireland up to 2040. The Department also published the Strategic Environmental Scoping Report (“the SEA Scoping Report”). The public and statutory consultees were invited to make submissions. A transboundary consultation was undertaken with competent authorities in Northern Ireland. It appears that the applicant did not make submissions on the SEA Scoping Report. On 31 March 2017, the pre-draft NPF National Consultation Process ended.

29. On 1 April 2017, work was commenced on the preparation of the draft NPF, the SEA Environmental Report concerning SEA, AA and SFRA. The submissions of statutory and non-statutory consultees were considered in the process. On 5 May 2017, an SEA alternatives workshop was held in the Customs House, Dublin, to which all statutory consultees were invited, in addition to participants from other state and semi-state bodies and non-governmental organisations. There is no evidence that the applicant attended or sought to attend or to make submissions.

30. In August 2017, the Department recorded an AA screening determination which concluded that the NPF should be subject to AA.

31. On 26 September 2017, the Department published a draft NPF, and the SEA Environmental Report for the draft NPF, a pre-consultation Natura Impact Statement (“NIS”) and the draft SFRA. Following publication of the documents, consultation in respect of them commenced.

32. On 1 November 2017, submissions were received from the Department of Agriculture, Environment and Rural Affairs in Northern Ireland confirming that it was

satisfied with the approach to and integration of SEA, AA and SFRA. The consultation on the draft NPF and associated documents concluded on 10 November 2017. The applicant furnished submissions on the SEA. Regrettably, those submissions were not exhibited and so the substance of the submission is not clear. This is a significant omission as the respondents allege that many points now relied upon by the applicant were raised for the first time in these proceedings and not during the period of public consultation. No explanation of this failure has been forthcoming from the applicant.

33. On 11 November 2017, the Department commenced amending the draft NPF, taking into account the submissions and observations received during the consultation period, including those of the applicant. The process was iterative whereby amendments were screened and assessed by RPS with written and verbal feedback given from RPS to the Department. The process of post-consultation amendments to the four documents was completed on 14 February 2018.

34. Mr. Hogan avers that on 16 February 2018:-

“The Government considered the SEA environmental report and submissions and/or observation and/or consultations made or undertaken during the preparation of the NPF, the SEA screening and AA of changes that had been made to the draft NPF and took all these matters into account before adopting and publishing the NPF ... The Government also adopted and published the NDP, being a high-level budgetary plan associated with the NPF.”

35. Mr. Hogan was not present at the cabinet meeting of the government. He exhibits no document recording the decision of the government supporting this averment. Neither does he exhibit the final SEA Environmental Report, AA Conclusion Statement or AA determination which existed on 16 February 2018, and which could have been before the

members of the government for their consideration, as he avers, on 16 February 2018. He makes no reference to a draft SEA Statement.

36. Four documents which predated 16 February 2018 and which potentially could satisfy the obligations of the respondents arising under the Habitats Directive and the SEA Directive were adduced in evidence: the undated SEA Scoping Report, an undated draft NPF, the pre-consultation NIS and the SEA Environmental Report of the *draft* NPF.

37. The determination by the Department in 2016, that the NPF should be subject to AA, was not exhibited and clearly could not constitute a final AA determination. Neither could the SEA Scoping Report, which presupposes that there will be an AA determination. The pre-consultation NIS, by definition, cannot include the final AA determination either. This is acknowledged in para. 1.2 which states that the NIS “*will inform*” the AA determination made by the department “*at the time of adoption of the NPF*”. It also states that the AA decision “*will be published alongside the adopted NPF*”.

38. Chapter 10 of the draft NPF deals with the environmental impact of the NPF for both SEA and AA purposes. The document notes that environmental considerations have been integrated into the framework by the SEA through certain steps. It sets out the obligations of public authorities when exercising their functions under the Habitats Directive and the requirement for AA screening and assessment. There is no AA determination in respect of the NPF in the draft NPF.

39. The SEA Environmental Report exhibited was prepared in respect of the draft NPF. The SEA Environmental Report was amended to reflect the finalised NPF by the addition of an addendum to the SEA Statement, but this post-dated 16 February 2018. On 14 May 2018, the Minister referred to a draft SEA Statement dated 15 February 2018. There was no evidence that such a draft existed on that date or was considered by the government prior to its decision of 16 February 2018, and it was not exhibited. It follows that the court

cannot have regard to the alleged draft SEA Statement when assessing the issues in this case.

40. On 23 February 2018, the Department issued Circular FPS02/2018 to planning authorities and An Bord Pleanála informing them that the NPF was published on 16 February 2018 in tandem with the new 10-year NDP, jointly named “Project Ireland 2040: Building Ireland’s Future”.

41. On 16 March 2018, the applicant’s solicitors wrote requesting publication of the SEA Statement in relation to the NPF.

42. On 22 March 2018, the SEA Statement was published. This document was undated but it clearly post-dated 16 February 2018 as, on p. 2, it states that the NPF:-

“... was discussed and agreed at a special cabinet meeting after which it was launched on 16 February 2018”.

While at para. 3.6 it says that the “*NPF was agreed by Government ... on ... 16 February 2018.*”

43. While the SEA Environmental Report is primarily concerned with the SEA Directive, AA is addressed at para. 3.5 of the report of the draft NPF. It acknowledges the requirement under the Habitats Directive to assess the NPF and notes that as a precautionary approach the NPF was subject to full AA. The paragraph concludes:-

“Based on the NIS, and with reference to the scope of the NPF, the [Department] has determined that the NPF is compliant with the requirements of Article 6 of the EU Habitats Directive as transposed into Irish law. This determination will be made available for public information.”

44. No such determination by the department was ever made available and no evidence that such a determination was in fact made was adduced.

45. On 5 April 2018, the applicant's solicitors wrote in relation to the AA of the NPF. They required confirmation that the determination that the plan would not adversely affect the integrity of a European site was made before consent to adopting the NPF was granted. The solicitors called upon the Minister immediately to publish the determination and the reasons for it. In a further letter, dated 9 April 2018, the solicitors made the point that the determination was either made on or before 16 February 2018, in which case it should be readily available, or else it had not been made. There was no substantive reply to these letters.

46. On 16 April 2018, the post-consultation NIS was published. This document is part of the AA and must be considered *before* a final AA determination is reached. It does not contain the final AA determination, though at para. 9, after describing the AA process, the authors conclude that:-

“Having regard to the reasons outlined above, it can be concluded that the NPF would not adversely affect the integrity of a European site (whether individually or in combination with other plans or projects).”

It is open to the decision maker to adopt the reasoning and this conclusion when making the required final AA determination.

47. On 14 May 2018, the Minister made a written AA Determination. It is appropriate to quote this in full:-

“In the matter of Regulation 42 of the Birds and Habitats Regulations 2011

And in the matter of Article 6(3) of the Habitats Directive

Appropriate Assessment Determination

National Planning Framework

In order to comply with requirements of Article 6(3) of the EU Habitats Directive and Regulation 42 of the European Communities (Birds and Natural Habitats)

Regulations 2011 as amended (the “Birds and Habitats Regulations”) the process of Screening for Appropriate Assessment was undertaken at an early stage in the drafting of the National Planning Framework (“NPF”). The AA Screening assessed whether the NPF was likely to have significant effects on any European Sites within the Natura 2000 network, either alone or in combination with other plans and projects.

The screening for Appropriate Assessment was undertaken by ecologists at RPS on behalf of the Minister for Housing, Planning and Local Government. The screening concluded that an appropriate assessment of the NPF was required, as the Plan is not directly connected with unnecessary to the management of the sites as European sites and as it cannot be excluded, on the basis of objective information, that the Plan individually or in combination with other plans or projects, will have a significant effect on a European Site.

Therefore, adopting the precautionary principle, it was concluded that a Natura Impact Statement (NIS) should be prepared. A Natura Impact Statement was prepared by RPS on behalf of the Minister, and was made available as part of the public consultation on the (draft) National Planning Framework, published online at www.npf.ie and was also available in hard copy.

The Natura Impact Statement considered the potential for the National Planning Framework to adversely affect the integrity of any Natura 2000 site(s); with regard to their qualifying interests, associated conservations status, the structure/function of the site(s) and the overall site(s) integrity. This was done in a two stage process, initially assessing the draft NPF published in September 2017 and subsequently assessing the changes made post consultation for the NPF, published in May 2018.

An Appropriate Assessment Conclusion Statement was prepared by RPS on behalf of the Minister for Housing, Planning and Local Government.

APPROPRIATE ASSESSMENT DETERMINATION

Therefore, having regard to:

- *The Natura Impact Statement dated September 2017, which concluded that subject to mitigation, there would be no adverse effects on the integrity of any European sites as a result of implementation of the NPF;*
- *The submissions and observations from the public, public authorities and other Government Departments;*
- *The submission received from the Department of Culture, Heritage and the Gaeltacht;*
- *Assessment of the proposed modifications to the draft NPF which concluded that subject to mitigation, there would be no adverse effects on the integrity of any European sites;*
- *The post-consultation Natura Impact Statement which for the considerations and reasons stated therein concluded that there would be no adverse effects on the integrity of any European sites as a result of implementation of the NPF;*
- *The Appropriate Assessment Conclusion Statement;*
- *The draft SEA statement dated 15 February 2018.¹*
- *The high-level strategic nature of the draft NPF and of the proposed modifications to the draft NPF.*
- *The integrated protection policies included in the NPF, particularly NPO59 and NPO75;*

¹ This document was never exhibited nor referred to in evidence.

- *The fact that all plans and projects informed by the NPF would be subject to Stage 1 Screening and Stage 2 Appropriate Assessment as required pursuant to the provisions of the Planning and Development Act 2000, as amended and/or the Birds and Natural Habitats Regulations 2011, as amended;*
- *The continued application of the AA process to subsequent planning tiers, beginning with RSEs (Regional Spatial and Economic Strategies)*

The Minister for Housing, Planning and Local Government, having carefully considered all of the foregoing, and in particular, the Appropriate Assessment Conclusion Statement, and having regard to the advice of his officials, agrees with and adopts the reasoning and conclusion set out in the said Appropriate Assessment Conclusion Statement.

The Minister hereby DETERMINES pursuant to Regulation 42 of the Birds and Habitats Regulations and for the purposes of Article 6(3) of the Habitats Directive that the adoption and publication of the NPF as a replacement of the “National Spatial Strategy” for the purposes of section 2 of the PDA 2000 will not either individually or in combination with any other plan or project adversely affect the integrity of any European site (as defined).

REASONS FOR DETERMINATION

The reason for the said determination as set out in the Appropriate Assessment Conclusion Statement, the reasoning and conclusions of which have been adopted in full by the Minister. The said Appropriate Assessment Conclusion Statement is to be published together with this determination.

Minister for Housing, Planning and Local Government

14 May 2018” (emphasis added).

48. On the same day, the applicant was granted leave to apply for judicial review of the NPF and the NDP. The motion seeking judicial review issued on 16 May 2018, seeking an order of *certiorari* quashing the decision of the respondents to adopt the NPF and the NDP, and various related reliefs.

49. On 29 May 2018, the government made a further decision in relation to the NPF. The decision was not exhibited by the respondents. It was furnished by the Chief State Solicitor's Office to the applicant's solicitors, following a request for discovery, by letter dated 10 May 2019 which Mr. Lowes, a director of the applicant, exhibited in his affidavit of 28 May 2019. No objection was taken to this indirect means of placing this central piece of evidence before the court.

50. Unlike the decision of the 16 February 2018, a formal note of the decision was prepared. It provides:-

“(1) Approved, in the context of enabling implementation of the National Planning Framework (NPF) as part of the roll-out of Project Ireland 2040, in broad terms the purpose, nature, eligibility/assessment criteria and timings proposed in relation to the new €2bn. Urban Regeneration and Development Fund (URDF) and its coherence with the corresponding €1bn. Rural Fund, to be overseen by the Minister for Rural and Community Development, as well as the other NDP-related funds;

(2) Agreed

(i) to consider the post-consultation Natura Impact Statement prepared in respect of the finalised National Planning Framework;

(ii) to adopt the Appropriate Assessment Determination made by the Minister for Housing, Planning and Local Government as Competent Authority, for the purposes of Article 6.3 of the Habitats Directive; and

(iii) to formally reaffirm the previous Government decision of 16 February 2018 to adopt and publish the National Planning Framework as a strategy intended to replace the National Spatial Strategy, for the purposes of section 2 of the Planning and Development Act 2000, as amended; and

(3) noted the progress being made in developing complementary Regional Spatial and Economic Strategies (RSESs) to embed the NPF principles and objectives at regional and local levels.”

51. On 26 June 2018, the Department published the AA Conclusion Statement, the Post-Consultation NIS and the written AA Determination made by the Minister on 14 May 2018.

52. On 3 July 2018, the Department issued Circular FPS04/2018 to planning authorities concerning the Implementation Roadmap for the NPF. This circular updates planning authorities following on from circular FPS 02/2018 of 23 February 2018 (which related to the decision of 16 February 2018) and notes that, further to briefing sessions held with local authority planning teams during March, the Roadmap addresses a number of important issues that emerged subsequent to the publication of the NPF. A further Circular FPS06/2018 issued on 30 July 2018 to planning authorities stating that on 29 May 2018 the government reaffirmed its previous decision to adopt and publish the NPF. Also on 30 July 2018, the Department published notices in newspapers of the reaffirming decision to adopt and publish the NPF, and its associated documents, and to publish the NDP.

53. In light of the decision of the 29 May 2018, which post-dated the order of the High Court of 14 May 2018 granting the applicant leave to seek judicial review, the applicant sought to amend its statement of grounds. On 23 November 2018, the applicant filed its

amended statement of grounds and on 5 March 2019 the respondents filed their statement of opposition.

54. The NDP was adopted by the government on 16 February 2018. It is common case that it was not subjected to either SEA or AA, either individually or in conjunction with the NPF. The respondents consider it to be a budgetary plan and therefore exempt from the obligation to subject it to SEA. As a budgetary plan, it was not considered to come within the scope of the Habitats Directive and, accordingly, it was believed not to be necessary to subject it to either screening for AA or to AA.

The applicant's case

55. The NPF identifies the national planning spatial development and environmental context for the next twenty years. It is described as:-

“[T]he overarching policy and planning framework for the social, economic and cultural development of our country.

...

It is a national document that will guide at a high-level strategic planning and development for the country over the next 20+ years, so that as the population grows, that growth is sustainable (in economic, social and environmental terms).

Finalisation of the NPF alongside the ten-year National Development Plan will put together one plan to guide strategic development and infrastructure investment at national level.

The NPF with the National Development Plan will also set the context for each of Ireland's three regional assemblies to develop their Regional Spatial and Economic Strategies taking account and coordinating local authority County and City

Development Plans in a manner that will ensure national, regional and local plans align.”

56. The applicant alleges that the NPF has not been adequately assessed for the purposes of either the Habitats Directive or the SEA Directive.

57. The applicant says that the respondents have not discharged their obligations pursuant to the Habitats Directive; that the environmental report accompanying the NPF includes a statement that, in the view of the Department, the NPF is “*compliant*” with the requirements of the Habitats Directive. The applicant says this statement is not sufficient for the purposes of the Habitats Directive and that the respondent Minister was under an obligation to conduct an AA, and not to agree to adopt the NPF unless he had first ascertained that it would not adversely affect the integrity of any European site. In the alternative, it says that it was open to the respondent Minister to conclude that the adoption of the NPF would adversely affect European sites and to proceed to agree to it on the basis of overriding public interest for the purposes of Article 6(4) of the Habitats Directive. However, the respondent Minister did neither of these things and simply recorded the view of the Department on compliance. In the circumstances, the applicant says that the Minister was not entitled/had no jurisdiction to adopt the NPF without there having been compliance with the requirements of the Habitats Directive as set out in the decision of *Kelly v. An Bord Pleanála* ([2014] IEHC 400).

58. Secondly, the applicant says that the respondents were under an obligation to publish the AA determination pursuant to Regulation 42(18)(a) of the Habitat Regulations. It says this did not occur.

59. Third, it said that the AA determination must be made by the authority which adopts the plan. In this case, the government adopted the NPF, but the government did not make the AA determination.

60. Fourth, it said it was not open to the respondents to mend their hand by the decision of 29 May 2018; there was no provision for “reaffirming” the decision of February 2018 and, on its face, the decision of 29 May 2018 did not purport to adopt the NPF.

61. Accordingly, it argues that the NPF was purportedly adopted in breach of the requirements of the Habitats Directive and ought to be quashed.

62. In relation to the SEA Directive, the applicant says that the Environmental Report and the SEA Statement do not discharge the requirements of the SEA Directive in six significant ways. First, the SEA Environmental Report does not identify, describe and evaluate adequately, at all, the likely significant effects on the environment of implementing the NPF and *reasonable alternatives*. It is the applicant’s case that the brief descriptions of the alternatives do not identify, describe or evaluate the likely significant effects on the environment of those alternatives.

63. Secondly, neither the SEA Environmental Report nor the SEA Statement provide any, or any adequate reasons for the selection of the preferred option over the other options, according to the applicant.

64. Thirdly, the applicant says that the SEA Environmental Report does not adequately or at all identify, describe and evaluate the likely significant effects on the environment of the implementation of the preferred option.

65. Fourthly, the applicant says that the SEA Environmental Report does not provide for any or any adequate monitoring of the implementation of the NPF, *inter alia*, to identify at an early stage unforeseen adverse effects, and to be able to undertake appropriate remedial action. It says that the deficiency is particularly acute in respect of climate change. The applicant asserts that the monitoring that is provided does not constitute monitoring of the significant environmental effects of the implementation of the preferred option and that it provides no mechanism by which the monitoring will be overseen, or will be capable of

identifying at an early stage unforeseen adverse effects, or any mechanism by which appropriate remedial action can or will be taken.

66. Fifthly, the applicant says that the SEA process does not consider the likely significant effects on the environment of the NPF and the NDP together, despite the fact that they were launched together and are closely interlinked and interdependent and therefore constitute a single plan for the purposes of the SEA Directive. The foreword to the NPF describes Project Ireland 2040 as comprising two companion documents (the NPF and the NDP) as “*one vision for one country*”. The applicant says that in failing to undertake an environmental assessment for both constituent elements of the plan, the objective of the SEA Directive has not been achieved and has been deliberately circumvented.

67. Sixthly, the applicant says that even if the NPF and the NDP are not a single plan for the purposes of the SEA Directive, the respondents were still under an obligation to consider the cumulative environmental effects of the two plans pursuant to Annex I of the SEA Directive and this has not occurred.

68. Separately, the applicant also challenges the adoption of the NDP. It says that it is a plan or programme for the purposes of the SEA Directive and should have been subject to assessment pursuant to the SEA Directive or, in the alternative, should have been subject to screening for the purposes of the SEA Directive. No such assessment or screening assessment was conducted in relation to the NDP. The applicant says that the NDP is not exempt from assessment under the SEA Directive pursuant to Article 3(8) because, while it does contain budgetary elements, the applicant says it is not a financial or budget plan or programme within the meaning of the article. The applicant says that the respondents were obliged to subject the NDP to screening for the purposes of the SEA Directive, pursuant to Articles 3(4) and (5), but failed to do so. Therefore, the NDP also ought to be quashed.

The trial judge's overview of the NPF and the NDP

69. The trial judge described the NPF and the NDP as follows:-

“5. The NPF is a high level policy document. It is a macro spatial strategy which maps out general development goals for the country for the period up to 2040. It was brought about due to a number of stark projections that were provided as a result of research conducted by the Economic and Social Research Institute in its paper “Prospects for Irish Regions and Counties: Scenarios and Implications”, published in December 2017. The ESRI predicts that the population of Ireland will increase by approximately one million people, or by 20% over 2016 levels, to almost 5.7 million people by 2040. They estimate that the population aged over 65 will more than double to 1.3 million, or to 23% of the total, whilst those aged under 15 will decrease by around 10%, with numbers remaining at just below one million in 2040. The population growth will give rise to a need for at least an additional half a million new homes by 2040. The ESRI also projected the need for an additional 660,000 jobs to 2040. They stated that in line with international trends, the ongoing shift to a knowledge economy and the growing role of services will continue to change the nature of work, sustaining demand for a more highly skilled and educated workforce. New ways of working, new trade partners and new relationships between producers and consumers will continue to transform the business landscape.

6. To cater for the future growth and development of both the population and the economy, a set of ten National Strategic Outcomes were identified, as follows:

Compact Growth – which provides that urban development will wherever possible be on infill and brownfield sites within the envelope of existing built-up areas;

Enhanced Regional Accessibility – which provides that due to the more compact approach to urban development requirements there is a need for enhanced

connectivity between centres of population of scale; Strengthened Rural Economies and Communities – through the 2017 Action Plan for Rural Development, there is provision for resource schemes and policies to drive the development and diversification of the rural economy, such as the national broadband scheme; High Quality International Connectivity – as an island, provision is made for enhanced connectivity between this country and our nearest neighbour the UK and our other trading partners in the EU and further afield; Sustainable Mobility – this provides for a well-functioning integrated public transport system, thereby enhancing competitiveness, sustaining economic progress and enabling sustainable mobility choices for citizens; A Strong Economy supported by enterprise, innovation and skills – a competitive, innovative and resilient regional enterprise base is seen as essential to providing jobs and employment opportunities for people to live and prosper in the country; Enhanced Amenities and Heritage – attractive places include a combination of factors, including vitality and diversity of uses, ease of access to amenities and services supported by integrated transport systems and green modes of movement such as pedestrian and cycling facilities; Transition to Sustainable Energy – this provides that new energy systems and transmission grids will be necessary for a more distributed, more renewables focussed energy generation system, harnessing both the considerable on-shore and off-shore potential from energy sources such as wind, wave and solar and connecting the richest sources of that energy; Sustainable Management of Water, Waste and other environmental resources – investment in water infrastructure is seen as critical to the implementation of the NDP. The NPF provides that the current water services strategic plan by Irish Water will be updated in the light of the policies in the NPF addressing the requirements of future development, while also addressing environmental requirements such as obligations

under the EU Water Framework Directive mandated River Basin Management Plan; Access to Quality Child Care, Education and Health Services – the framework provides that child care, education and health systems will need to plan ahead in order to meet the implications of an additional one million people by 2040.

7. *Ultimately, the respondents chose an option known as Option 2 – Regional Effectiveness and Settlement Diversity, as the option which would best suit the needs of the country in attaining the National Strategic Outcomes, while at the same time taking account of the projected growth in population. For planning purposes, the country is divided into three regional assemblies; being the East and Midlands Regional Assembly, made up of Dublin and surrounding counties, the Southern Regional Assembly made up of the southern counties in the country and the North Western Regional Assembly made up of the counties along the western seaboard and the on the northwest coast. The chosen option provided for the following: (i) the level of growth in the NWRA and the SRA combined would be equal to that of the EMRA; (ii) focus the highest quantum of growth and rates of growth in five cities and a number of regionally important large towns through a tailored approach to settlement growth targets; (iii) deliver at least 40% of all new homes nationally on infill or brownfield sites within the built-up envelope of existing urban settlements; and (iv) provide some critical infrastructure in advance of planned growth to kick start development and provide other infrastructure sequentially on a phased basis in tandem. Under this plan the level of growth in the areas outside the Dublin and eastern area would be the same as in the EMRA. The main growth would be in the five cities of Dublin, Cork, Waterford, Galway and Limerick, but there is also provision for targeted development of other urban sites in areas not serviced by the cities, such as Athlone in the midlands and Sligo in the northwest. There is also*

specific provision for growth and development of the two corridors between Drogheda, Dundalk and Newry and between Letterkenny and Derry.

8. *The NPF also contains a number of National Policy Objectives, which are designed to guide the regional assemblies when drawing up the Regional Spatial and Economic Strategies and the local authorities when drawing up the relevant City and County Development Plans. These are general objectives which have to be adhered to by the lower tier planning authorities when drawing up their plans. For example, NPO3a states “Deliver at least 40% of all new homes nationally, within the built-up footprint of existing settlements”. NPO3b provides that at least 50% of all new homes that are targeted in the five cities should be within their existing built-up footprints. NPO3c provides that 30% of all new homes that are targeted in settlements other than the five cities and their suburbs, should be provided within existing built-up footprints. NPO6 provides “Regenerate and rejuvenate cities, towns and villages of all types and scale as environmental assets, that can accommodate changing roles and functions, increased residential population and employment activity and enhanced levels of amenity and design quality, in order to sustainably influence and support their surrounding areas”. To that end, the NPF provides that a new body, the National Regeneration and Development Agency, will be established with a government mandate to work with local authorities, relevant departments and agencies and the OPW in identifying an initial tranche of publically owned or controlled lands in key locations and with both a city and wider regional and rural focus, with potential for master planning and repurposing for strategic development purposes aligned to the NPF. This is provided for in NPO12.*

9. *There are also a number of National Policy Objectives dealing with realising a sustainable future for development in the country. NPO52 provides “The planning*

system will be responsive to our national environmental challenges and ensure that development occurs within environmental limits, having regard to the requirements of all relevant environmental legislation and the sustainable management of our natural capital”. NPO55 provides “Promote renewal energy use and regeneration at appropriate locations within the built and natural environment to meet national objectives towards achieving a low carbon economy by 2050”. NPO59 contains provisions in relation to enhancing the conservation status and improving the management of protected areas and protected species. Finally, NPO75 provides for the assessment of environmental impact of development by ensuring that all plans, projects and activities requiring consent arising from the NPF are subject to the relevant environmental assessment requirements including SEA, EIA and AA as appropriate.

...

11. The NDP sets out how funding will be made available for certain projects which are considered essential to achievement of the national strategic outcomes identified in the NPF. The NDP operates for a ten-year period from 2018 to 2027. It sets out the level of investment of almost €116bn which will underpin the NPF and drive its implementation over that period. To that end, it identifies a number of projects for which funding may be made available to help achieve each of the national strategic outcomes. These projects must come within the strategic investment priorities that are identified under each of the NSOs.

12. The plans provide that the NDP and the NPF are closely integrated one with the other. It is noted that the government was committed to the delivery of the NPF as a blueprint for spatial planning in Ireland to 2040. The document provides that in setting out a strategic framework for public capital investment, the NDP will support

its delivery over the next ten years. The NDP provides that transitioning to a low-carbon and climate resilient society and achieving sustainable mobility are vital strategic outcomes identified in the NPF. It was with that rationale in mind that climate action has been identified as a strategic investment priority.

13. In chapter 5 of the NDP it provides that the NSO's represent the overarching priorities which the NPF was designed to achieve. A background to and rationale for each of the NSO's is set out in the NPF. The fundamental mission and purpose of the NDP set out the new configuration for public capital investment over the next ten years to secure the realisation of each of the NSOs. It was stated that that would improve the way public capital investment was planned and coordinated in a modern and growing society, leading to improved public services and quality of life. The NDP goes on to show how each of the projects that are identified as possibly qualifying for public funding, have been so identified because they are seen to be integral to the achievement of the NSOs set out in the NPF.”

The decision of the High Court

70. Having described in outline the two plans, the trial judge first dealt with the allegation that the purported adoption of the NPF and the NDP by the government on 16 February 2018 was void and was in breach of European law because no determination had been made by the government as part of the AA, as required by Article 6(3) of the Habitats Directive. It was also alleged that there had been a failure to comply with the obligations set out in Regulations 42(11) and (16) of the Habitats Regulations which transposed the Habitats Directive into Irish law. The trial judge carefully assessed the arguments of the applicant and the respondents and he set out his conclusions as follows:-

“35. The criteria for a valid AA have been clearly set out in the Kelly and Connolly decisions. It is clear from these decisions that it is necessary for a determination to be

reached in order for there to be a valid AA as required under the Directive and the regulations.

36. I am satisfied that in reality the necessary determination had been made by the Minister in advance of the Government meeting held on 16th February, 2018. Such position is clear from the content of the NIS carried out by RPS and more particularly by the content of the SEA statement in section 3.5 thereof. While the Irish regulations provide that such determination must be made in writing, due to the fact that it must be made available to the public, the regulations do not say when the determination must be reduced to writing. Regulation 42(18) (a) of the 2011 regulations makes it clear that the public authority must make available for inspection any determination that it makes in relation to a plan or project and provide reasons for that determination “as soon as may be after the making of the determination or giving the notice, as appropriate”. Thus, it is clearly envisaged that the determination and the reasons for making the determination can be reduced to writing after the date on which it is made.”

71. He held that it was “clear” that there was no written determination made by the Minister prior to the cabinet meeting held on 16 February 2018 and that the written determination was made on 14 May 2018. In that decision, Barr J. held that the Minister had reached the necessary determination that the plan would not adversely affect a European site and he set out clearly the documentation which contained the reasons for reaching that decision. The trial judge was satisfied that it was appropriate for the Minister to be the person who made the determination under the Habitats Regulations. He held that this accorded with the provisions of Regulation 42 which required that the AA was to be carried out by the relevant “public authority”. Regulation 2 defined a public authority as including a Minister of government. At para. 39 he said:-

“... Furthermore, as the Minister is a member of the Government, a determination made by the Minister is effectively a determination made by the Government.”

72. On this basis, he was satisfied that the government validly adopted the NPF and the NDP at its meeting on 16 February 2018; they were adopting not only the plans, *“but also the determination made by the Minister on their behalf in advance of adopting the plans.”* He continued:-

“... Even if I am wrong in that, I am satisfied that the court must adopt a realistic and logical approach to the issue of compliance with the necessary legal requirements in this case. It is abundantly clear that by the time the so-called reaffirmation decision was taken on 29th May, 2018, the necessary determination was in place in writing.”

73. He was satisfied that the reaffirmation decision was, in effect, a re-adoption of the relevant plans and that, even if the NPF and the NDP had not been validly adopted on 16 February 2018, they were validly adopted by reason of the decision taken at the meeting of the government on 29 May 2018 and thus, they were *“even at the latest”* validly adopted by the government on that date.

74. The trial judge then considered the arguments of the applicant based on the SEA Directive. Article 5(1) of the SEA Directive provides:-

“Where an environmental assessment is required under Article 3(1), an environmental report shall be prepared in which the likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme, are identified, described and evaluated. The information to be given for this purpose is referred to in Annex I.”

75. The applicant argued that there was no adequate consideration given to the alternatives in the report as, to be adequate within the meaning of Article 5(1), such

consideration must be at a level comparable to that applied to the preferred option. In this case, the respondents expressly found that there were five options which could be regarded as reasonable alternatives (in addition to counting the “*business as usual*” option). Once the respondents selected five reasonable options, the applicant argued that the reasonable alternatives had to be assessed at the same level and on the same basis as the preferred option in order to facilitate a proper comparison between them.

76. The trial judge was not satisfied that the wording of Article 5 of the SEA Directive mandated a comparable level of assessment of the reasonable alternatives and the preferred option. He accepted the argument of the respondents that when one looks at the legislation as a whole, it is clear that the requirement to carry out a full SEA only relates to the plan which it is proposed to adopt. He held that Annex I(h) of the SEA Directive makes clear that an outline of the reasons for selecting the alternatives dealt with and a description of how the assessment was undertaken, including any difficulties (such as technical difficulties or lack of know-how) encountered in complying the required information was what was required to be included in the environmental report. He declined to follow decisions cited to him from courts in England and Wales and held that the Guidance Document issued by the EU Commission (the Implementation of Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment (2003)) was not binding on the court. He was of the view that it “*appears to deal with projects or plans that are far more concrete in nature, rather than being guidance relevant to a high level policy document such as the NPF*”. He was of the view that the wording of Article 5(1) of the Directive allowed the court to have regard to the fact that the NPF is a high-level strategic policy document which does not give permission for any particular project or land use. He concluded that the assessment carried out in the Environmental Report was a reasonable and logical interpretation of the obligation on the government; that the

Environmental Report looked at a number of options including the option of “*business as usual*”; and that the document set out clear reasons why, at a strategic level, the preferred option was chosen over the other reasonable alternatives. He held that the reasons given were logical and understandable and that he was satisfied that “*sufficient information was given in relation to reasonable alternatives and there was sufficient assessment thereof, to enable members of the public and other stakeholders to comment in a meaningful way on the draft NPF and the Environmental Report accompanying it.*”

77. Barr J. rejected the argument that the manner in which the reasonable options were set out with an assessment matrix merely ascribing “+”, “-” and “0” to each of the headings to indicate either a positive impact, a negative impact or a zero impact was either entirely incomprehensible and/or inadequate. He accepted the point made by Mr. Hogan in his affidavits that one had to read the matrices in the context of the narrative that accompanies them and the trial judge was satisfied that when both were read together there was a reasonable and comprehensive assessment that is understandable and logical of each of the reasonable alternatives.

78. At paras. 70-87 of his judgment, the trial judge addressed the argument that the respondents failed to comply with the provisions of Regulation 17 of the SEA Regulations, in relation to monitoring of the effects of the NPF. Regulation 17 provides that the “competent authority” shall monitor the significant environmental effects of implementation of the plan or programme in order, *inter alia*, to identify at an early stage unforeseen adverse effects and to be able to undertake appropriate remedial action and, for this purpose, existing monitoring arrangements may be used, if appropriate, with a view to avoiding duplication of monitoring. It was submitted by the applicant that the NPF includes no adequate provision for monitoring of the significant environmental effects of the implementation of the NPF and/or had no adequate provision for the identification at an

early stage of unforeseen adverse effects, or appropriate remedial action to be taken in reference thereto.

79. The trial judge said he must look at the SEA Statement and the NPF as a whole to determine if the obligation relating to monitoring had been complied with. He noted that the NPF provides for the establishment of the Office of the Planning Regulator (the OPR) which will monitor the overall implementation of the NPF itself; the SEA Statement provides that the monitoring of the various objectives will be carried out by the Department and that its job would be to coordinate the monitoring that is carried out by other bodies within their particular fields of expertise. The trial judge held that this was specifically provided for in the Directive and the Regulations and that, when one looks at the contents of Table 7.1 of the SEA Statement, it is clear that in respect of each of the objectives identified in the first column there are targets set out for that objective in the second column, together with indications for assessing the achievement of the objective in the third column. The fourth column identifies each of the entities that will be responsible for monitoring the achievement of the particular targets. He held it was “*entirely reasonable*” that the SEA Statement should make provision for an overall monitoring position to be held by the Department relying on the expertise and experience of the bodies which have specific jurisdiction over the monitoring of various aspects, such as air quality, water quality, etc. He noted that provision was made that the Department would coordinate the monitoring of the various areas set out in Table 7.1 and will take action if unforeseen adverse effects emerge.

80. He emphasised that individual projects will require planning permission which will be subject to assessment by the relevant planning authorities, and the relevant assessments will be carried out of individual projects at that level, and that this would incorporate the views of statutory bodies, such as the EPA, in relation to water quality, air quality and

other such matters. In the circumstances, he was satisfied that the monitoring provided for in Chapter 7 of the SEA Statement and, in particular, the monitoring provisions outlined in Table 7.1 was sufficient to comply with the obligations in respect of the monitoring imposed upon the respondents by the Directive and the Regulations.

81. The trial judge then addressed the applicant's argument that the SEA Statement fails to assess the effects of the NPF on climate change and the contention that there had been inadequate consideration of the submissions of the applicant prior to the adoption, or purported adoption, of the NPF and NDP. He rejected the complaints of the applicant under each of these heads of challenge.

82. Finally, the trial judge addressed the applicant's allegation that the respondents failed to carry out an SEA or an AA of the NDP. The applicant submitted that the NDP should have been assessed for the purposes of the SEA Directive because the NDP was an infrastructure and spatial planning document designed to "*drive Ireland's economic environmental and social progress over the next decade*". It identified priority areas for spatial planning and development and included initiatives designed to promote regional and rural connectivity. It shared precisely the same priority National Strategic Outcomes ("NSOs") as the NPF. It identified specific projects and set a framework for future development consents of the projects. The NDP essentially comprised the infrastructure investment strategy for the NPF, while the NPF was the spatial development strategy for the NDP. It had been submitted by the applicant that both documents were inseparable and were effectively two sides of the same coin. It was also submitted that, given the degree of integration and interdependency between the plans, they constituted a single plan or programme for the purposes of the SEA Directive and therefore the respondents were obliged to subject both elements to assessment.

83. The trial judge rejected the argument that the NDP was a plan or programme within the definition of a plan or programme in the SEA Directive. In particular, he held it did not define the criteria and detailed rules for the development of land or for consent in relation to particular projects. The trial judge was satisfied that it was a budgetary plan which provided that certain designated projects are compatible with the NSOs set out in the NPF and the NDP, and as such may be considered appropriate for public funding.

84. The trial judge held that the NDP was a financial or budgetary plan which falls within the exception to SEA provided for in Article 3(8) of the SEA Directive. The court accepted and followed the decision of Smyth J. in *Kavanagh v. Ireland [2007] IEHC 296* in respect of the previous NDP and made a similar finding in relation to the NDP in the current case.

85. Accordingly, the court held that the applicant had not made out an entitlement to any of the reliefs sought in the statement of grounds and therefore dismissed the application for judicial review.

The issues in this appeal

86. The applicant identified five issues in its written submissions it said arose from the judgment of Barr J. These are:

- (1) Whether the AA of the NPF and the NDP was lawful; whether the required AA determination was taken prior to adoption of the NPF and NDP;
- (2) Whether the SEA is flawed because the Environmental Report did not give comparable consideration to the “*reasonable alternatives*” as to the preferred option;
- (3) Whether the SEA is flawed because the SEA Statement does not comply with the requirement concerning “*monitoring*”;

- (4) Whether the SEA is flawed because of the failure to assess the effects on climate change of implementation of the plans;
- (5) Whether the NDP should have been assessed under the Directives.

87. In addition, the applicant alleged that the SEA was flawed because the reasons for selecting the preferred option were opaque, as the assessment matrix adopted in the SEA Environmental Report was (as it described it) entirely incomprehensible.

88. In the respondents' notice, the respondents cross-appealed the decision of the trial judge to permit the applicant to argue that the decision to adopt the NPF failed to satisfy the requirements of the SEA Directive because the preferred option and the reasonable alternatives were not subject to a comparable level of assessment, in circumstances where the point had not been pleaded adequately, or at all, and there had been no application to amend the statement of grounds to include this argument. In addition, during the course of argument, counsel for the respondents raised the issue whether or not the NPF came within the scope of the SEA Directive at all, and this too is an issue in the appeal.

89. Finally, the applicant raised an issue concerning the respondents' alleged want of candour in their (lack of) response to the applicant prior to the issuing of the proceedings and in their opposition to the applicant's case.

Preliminary Issue

90. It is appropriate to deal first with the question whether the NPF is within the scope of the SEA Directive at all. If it is not, then most of the arguments of the applicant fall away. This point emerged during submissions to the court when debating the legislative basis for the adoption of the plan. The SEA Directive applies to plans or programmes within the meaning of the Directive. Article 2 provides that "*plans and programmes*" means plans and programmes "*which are subject to preparation and/or adoption by an authority at national ... level or which are prepared by an authority for adoption, through a legislative*

procedure by ... government, and which are required by legislative ... provisions.” The NPF replaces the NSS which is defined in s. 2 of the PDA 2000 as amended. It was submitted that this did not bring the NPF within the meaning of the definition of plans and programmes to which the SEA Directive applied.

91. Although noting that the issue was in the first instance raised by the court, it is my view that the contention that the NPF does not fall within the SEA Directive may be shortly rejected. The SEA Scoping Report advised that SEA should be applied, and this was accepted by the Department and subsequently the Minister and the government. The process proceeded on the basis that the NPF was subject to the requirements of the SEA Directive. The issue was not pleaded in the statement of opposition. There is no reference to this point in the respondents’ notice and there is no cross-appeal in relation to the judgment of the High Court on this point. Indeed, as the issue was not raised in the High Court, it is not raised in the judgment.

92. The court is not required to decide this issue as a matter of EU law because if an SEA of the NPF is not in fact required, what has occurred merely results in “*over enforcement*”. It is not a case where it could be said that there could be any threat to the environment through failure to enforce EU environmental law such that the court is obliged to decide the issue. Therefore, there is no requirement for the court to consider this point further.

Issue One: Appropriate Assessment

AA – 16 February 2018

93. It is common case that the NDP was not subject to AA. I will consider the implications, if any, of this when considering the arguments about the NDP. At this point, I shall confine the analysis to the NPF.

94. A valid AA is an essential pre-condition to the lawful adoption of the NPF in accordance with the provisions of Article 6(3) of the Habitats Directive and Regulation 42 of the Habitats Regulations. Absent a valid determination that a plan or project will not adversely affect the integrity of a European site, the decision maker lacks jurisdiction to take a decision to approve, undertake or adopt a plan or project (see, *Kelly v. An Bord Pleanála* and *Connolly v. An Bord Pleanála*). The draft NPF was screened for AA and it was deemed that it should be subject to AA. No issue was taken with the screening process or decision.

95. The AA determination must be made prior to the decision to adopt the plan (Article 6 (3) and Regulation 42). On 16 February 2018, the government purported to adopt the NPF. It could only do so if there was a prior valid AA determination satisfying the requirements of Article 6(3) and Regulation 42. The trial judge acknowledged that a determination for the purposes of the Habitats Directive is a necessary prerequisite to a valid AA and that it must satisfy the criteria set out in *Kelly*. He held that there had been a determination by the Minister in advance of 16 February 2018 and he referred to the pre-consultation NIS. He accepted that the determination must be in writing but held that it does not have to be reduced to writing prior to taking the decision to adopt or authorise a plan or project based upon the positive AA determination. He did not explain how an unwritten AA determination could satisfy the *Kelly* criteria, as he acknowledged that was mandatory. He held as a fact that there was no written determination by the Minister prior to 16 February 2018 and he was satisfied that the determination of 14 May 2018 constituted a determination and reflected a decision which had been made by the Minister prior to 16 February 2018. He held that the determination must be made by a public authority under the Habitats Regulations and noted that the definition of a public authority in the Regulations included a minister of government but did not include the government itself.

Nonetheless he held that the Minister's determination was "*effectively*" a determination by the government.

96. In my opinion, the trial judge made a number of errors in reaching these conclusions and in holding, as a result, that the decision of the government on 16 February 2018, to adopt the NPF, satisfied the requirements of the Habitats Directive and the Regulations. Firstly, and most importantly, the only evidence of the adoption of the NPF on that date is the affidavit of Mr. Hogan. He is the Senior Planning Advisor in the Department. He was not present at the special cabinet meeting on 16 February 2018. His statement as to what occurred at that meeting and, in particular, the matters said to have been considered by the government and taken into account before adopting and publishing the NPF are inadmissible hearsay.

97. Order 40, r. 8 of the RSC provides that:-

"Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, and shall state his means of knowledge thereof, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted."

Mr. Hogan's two affidavits were not sworn in interlocutory motions; rather they are relied upon for the determination on the merits of the issues in the proceedings. It is abundantly clear therefore that this evidence was inadmissible, and the trial judge erred in rejecting the applicant's objections to the admissibility of his evidence. That being so, there is no evidence of alleged compliance by the respondents with the mandatory requirements of the Habitats Directive, and on this ground alone the applicant was entitled to the relief it sought.

98. Furthermore, no document has been exhibited on behalf of the respondents purporting to record the AA determination which must be made prior to the adoption of the

NPF. The documents relied upon do not contain the AA determination, as I have set out at paras. 35-37. The documents certainly do not contain a decision which meets the requirements set out in *Kelly*. The respondents rely upon two sentences in para. 3.5 of the SEA Environmental Report in respect of the draft NPF as satisfying this requirement. The report states that:-

“Based on the NIS, and with reference to the scope of the NPF, the [Department] has determined that the NPF is compliant with the requirements of Article 6 of the EU Habitats Directive as transposed into Irish law. This determination will be made available for public information”

99. This is insufficient to satisfy the requirements set out in *Kelly* and no such determination, if it was reached prior to 16 February 2018, was made available for public information and inspection, despite the express requests of the solicitors for the applicant for same. The finding of the trial judge that *“in reality the necessary determination had been made by the Minister in advance of the Government meeting on 16 February 2018”* is unsupported by the evidence and therefore cannot stand. There was no evidence that the Minister made any unwritten AA determination in advance of 16 February 2018 and the trial judge found as a fact that he made none in writing prior to that date. Therefore, the issue whether it could subsequently be reduced to writing could not, even if correct, lead to the conclusion that the decision of 16 February 2018 was valid, as was argued by the respondents

100. The respondents submitted that a decision maker could comply with the requirements of the Habitats Directive and the Regulations by making a determination which was not reduced to writing prior to adopting the plan or reaching the decision and then, subsequently, the decision maker could reduce the unwritten AA determination to writing. The trial judge accepted the submissions of the respondents to the effect that Regulation

42(18)(a) permits the determination, and the reasons for making the determination, to be reduced to writing after the date on which it is made. The Regulation provides:-

“(18)(a) A public authority shall make available for inspection any determination that it makes in relation to a plan ... and provide reasons for that determination, as soon as may be after the making of the determination ... by members of the public ... and shall also make the determination ... available in electronic form.”

101. I agree with the submission of the applicant that the determination to be made available for inspection under Regulation 42(18)(a) is the determination that has been made, *i.e.* the determination which must be carried out before the decision is taken to adopt the plan. A determination which is not in writing is not amenable to inspection. There is nothing in the provisions of Regulation 42(18)(a) which suggests that a written determination may be made *ex post facto* and then published. Furthermore, the nature of the assessment, as explained in *Kelly*, requires that the determination be in writing. As this is a matter of jurisdiction, there must be clarity as to the “*complete, precise and definitive findings and conclusions*” which do not have any “*lacunae or gaps*” which supports the conclusion that “*no reasonable scientific doubt remains*”. This is not possible if the determination is not in writing.

102. The AA determination is a substantive requirement going to the jurisdiction of the decision maker to reach the decision in question. It is essential as a matter of proper administrative procedures that such determination be reduced to writing before, or at the very least, simultaneously with, the adoption of the plan or the making of the relevant decision. It certainly cannot be produced *ex post facto*. To permit such a process would be to circumvent the requirements of the Directive and therefore to defeat its purpose. It is completely contrary to the normal requirements of administrative procedures and law.

103. In my judgment, the trial judge erred in holding that there was an AA determination by the Minister prior to 16 February 2018, albeit an unwritten one. There was no evidence of such a determination, as I have explained. In addition, I do not accept that the determination of the Minister (assuming there to have been one) was “*effectively*” a determination by the government. There was no admissible evidence that the government “*were adopting not only the [NPF and the NDP], but also the determination made by the Minister on their behalf in advance of adopting the plans.*” It was not open to the trial judge on the facts in evidence before him to reach this conclusion.

104. For these reasons, in my view, the trial judge erred when he rejected the applicant’s claim to an order of *certiorari* quashing the decision to adopt the NPF on 16 February 2018.

AA – 29 May 2018

105. On 14 May 2018, the Minister determined, pursuant to Regulation 42 of the Habitats Regulations and for the purposes of Article 6(3) of the Habitats Directive, “*that the adoption and publication of the NPF as a replacement of the ‘National Spatial Strategy’ for the purposes of section 2 of the [PDA 2000] will not either individually or in combination with any other plan or project adversely affect the integrity of any European Site (as defined)*”.

106. The reasons for his determination “*are set out in the Appropriate Assessment Conclusion Statement, the reasoning and conclusions of which have been adopted in full by the Minister.*” The Appropriate Assessment Conclusion Statement was published together with his determination. These two documents constitute admissible evidence of an AA determination in respect of the NPF by the Minister on 14 May 2018.

107. On 29 May 2018, the government agreed “*to adopt the Appropriate Assessment Determination made by the Minister...for the purposes of Article 6.3 of the Habitats*

Directive". The record of this decision of the government was exhibited by Mr. Tony Lowes, a director of the applicant. The document was furnished to the applicant's solicitors by the CSSO following a request for discovery and thus may be regarded as a document furnished on discovery. While documents furnished on discovery are not thereby proved in evidence, this is a formal record of the decision reached by the government and it would be inappropriate in the context of the case, and the debate concerning the validity of this decision, for this court to reject the document on the basis that it was not formally placed in evidence by the secretary to the government, or some other person who was present at the cabinet meeting when the decision was reached. No objection was taken by any party to the admissibility of this record of the decision of the government and I am prepared to treat it as admissible evidence of the decision taken by the government in these proceedings.

108. In my opinion, there is evidence of an AA determination by the Minister which was formally adopted by the government prior to its decision of 29 May 2018.

109. The applicant submitted that the decision of the government of 29 May 2018 to "*reaffirm*" the previous decision to adopt and publish the NPF did not constitute a valid adoption of the NPF. This submission was based on the wording of the decision of 29 May 2018 and the contention that only the public authority that was adopting the plan could make the AA determination in respect of the proposed plan. The applicant stressed that while the government adopted the plan, it was not a public authority within the meaning of the Habitats Regulations and therefore it could not make the necessary determination under those Regulations.

110. The Minister was competent to make the AA determination as he is a public authority as defined in the Habitats Regulations. But, the Minister was not the public authority who adopted the NPF: the NPF was adopted by the government. The

government adopted the Minister's determination, as competent authority, for the purposes of Article 6(3) of the Habitats Directive by its decision of 29 May 2018. Thus, as a matter of fact, the government ascertained that the NPF would not adversely affect the integrity of a European site prior to adopting the NPF on 29 May 2018.

111. The question then is whether the fact that the government is not defined as a public authority within the meaning of the Habitats Regulations creates a difficulty; specifically, does it mean that the government has no power to make an AA determination and, in turn, if it lacks that power, does it follow, that it lacks the power to adopt a plan or project subject to the Habitats Directive? Article 6(3) of the Directive refers to the competent national authorities. These are not defined, and it is a matter therefore for each member state to determine "*the competent national authority*" in question. The government is a national authority which is competent to adopt the NPF in succession to the NSS.

Certainly, it cannot be said to be excluded from the parameters of the Habitats Directive. It is common case that the Habitats Directive applies to the adoption of the NPF by the government. However, the logical consequence of a strict literal construction of the definition of public authority in the Habitats Regulations is that it cannot lawfully adopt the NPF because it cannot make an AA determination in accordance with those Regulations.

112. The applicant suggested that, in the context of a plan being adopted by the government which requires AA, the Habitats Directive requires the definition of "*public authority*" in the Habitats Regulations to be widened to include the government. It submits that this solution succeeds in giving effect to the Directive and is to be preferred and the alternative is to disapply the Habitats Regulations entirely, a position never adopted by the respondents or the trial judge.

113. While there are legal authorities in which the government has been sued without objection, it has "*a less complete legal personality than its individual members, as*

Ministers, possess” (Kelly and ors. *The Irish Constitution* (5th ed., Bloomsbury Professional, 2018, at para. 5.1.06)). Pursuant to Article 28.1 of the Constitution, the noun has “*a precise and technical meaning, equivalent to ‘Cabinet’ in other systems*” (Casey, *Constitutional Law in Ireland* (3rd ed., Round Hall, 2000, p. 153)). Functionally, the government is, consequent upon that constitutional description, a committee of Ministers, bearing collective responsibility for all the Departments of State which are administered by individual members of the government (Article 28.4.2 of the Constitution). While noting that it has been held that the government cannot be generally equated to a “*Government Department*” for the purposes of a statute using that term (*Comyn v. Attorney General* [1950] I.R. 142) this appears to have been in contradistinction to “*a Ministry*” of which the Cabinet was “*its committee*” (p. 155). Either way, in the case of the provisions in issue here, which must be afforded a functional and purposive construction in accordance with EU law, I am firmly of the view that no sensible construction of a provision such as the Habitats Regulations could lead to the conclusion that while a Minister of the government is a ‘*public authority*’ for its purposes, the collective of Ministers comprising the government, is not. Thus, notwithstanding the omission of the government from the definition of public authority, it is possible to construe the Habitats Regulations as including the government as a public authority based on the provisions of the Interpretation Act 2015. This is the appropriate interpretation of these Habitats Regulations, as they are the means whereby the Habitats Directive is transposed into Irish law and, accordingly, they should be given a purposive interpretation. Such an interpretation brings the adoption of the NPF by the government within the scope of the Habitats Regulations and ensures that the application of the Directive is not (accidentally) avoided by an inadequate transposition of the Directive by the Habitats Regulations.

114. Excessive formalism in the context of the Habitats Directive is inconsistent with the spirit and purpose of EU environmental law. In the context of the EIA Directive, in Case C-128/09 *Boxus v. Région wallonne*, Advocate General Sharpston stated that:-

“... [t]he EIA Directive is not about formalism. It is concerned with providing effective EIAs for all major projects; and, in its amended form, with ensuring adequate public participation in the decision-making process.”

115. In Cases C-43/18 *CFE SA v. Région de Bruxelles-Capitale* and C-321/18 *Terre wallone ASBL v. Région wallonne*, Advocate General Kokott was of the view that designation of European sites ought to have been the subject of an Environmental Assessment under the SEA Directive but nonetheless held, at para. 104 that:-

“...it will have to be examined in any case whether or not the requirements of the SEA Directive were nevertheless complied with...”

116. She had regard to the purpose of the SEA Directive and emphasised that what was important was examining the substance of what was done, rather than quashing decisions on the basis of formulistic non-compliance with any EU environmental assessment requirement.

117. The rejection of formalism has been followed in the High Court. In *Ó’Grianna v. An Bord Pleanála (No. 2)* [2017] IEHC 7, McGovern J. stated:-

“I entirely agree with the opinion of Advocate General Sharpston in Antoine Boxus and Ors. v. Région wallonne where she stated that the E.I.A. Directive is not about formalism but is concerned with providing effective E.I.A.s for all major projects and with ensuring adequate public participation in the decision making process. The principle of effectiveness is not a mandate for construing the Directive in the most onerous manner possible. This involves the courts being astute to ensure the objectives of the Directive are met but not in an overly pedantic way.”

118. In *Kelly v. An Bord Pleanála* [2019] IEHC 84, Barniville J. agreed with the dicta of McGovern J. rejecting “*an excessive degree of formalism*” in favour of looking at the substance of an AA Screening Report and the details of the Inspector’s Report. I accept that the approach of the High Court to the EIA Directive and the Habitats Directive was correct and I adopt it here.

119. It follows that the proper interpretation of “*public authority*” in the Habitats Regulations includes the government and thus the government had competence under the Regulations to make the AA determination prior to adopting the NPF on 29 May 2018. This ground of objection to the validity of the decision of 29 May 2018 must be rejected.

120. Separately, the applicant argues that the decision of 29 May 2018 is not a decision to *adopt* the NPF as it is expressly a decision to “*reaffirm the previous Government decision of 16 February 2018 to adopt and publish the [NPF]*”. It submits that, as the decision of 16 February 2018 is void, the reaffirmation of a void decision is likewise void.

121. The decision on 29 May 2018 to “*reaffirm*” the NPF adopted by the government on 16 February 2018 is to be seen in the context of what occurred post-16 February 2018. The very fact that the matter was put back on the government agenda for a further decision indicates that it is in fact a fresh decision. The applicant’s argument is overly technical and devoid of merit. As the application of EU law is at issue, this court should look at the substance of the decision. The trial judge was correct to treat the decision of 29 May 2018 as a fresh, standalone decision to make an AA determination and to adopt the NPF. This is so, regardless of the fact that the decision of the 16 February 2018 is invalid. In my judgment, for the purposes of the Habitats Directive, the government validly adopted the NPF by its decision of 29 May 2018. The fact that in subsequent circulars or press statements, or indeed submissions to court, alternate or indeed conflicting positions were adopted does not alter this conclusion. These subsequent statements on behalf of the

government and the respondents do not impact the correct interpretation of the actions of the Minister and the government up to and including 29 May 2018.

122. Therefore, in my judgment, the trial judge was correct to hold that the decision of the government to reaffirm the decision of 16 February 2018 adopting the NPF constituted a valid decision, for the purposes of the Habitats Directive and the Habitats Regulations, to adopt the NPF from that date.

Issue Two: The SEA Directive – comparable assessment of the reasonable alternatives

Is it open to the applicant to advance the argument?

123. The applicant submitted that the SEA Directive obliges decision makers to conduct comparable assessments of the preferred plan or programme and the reasonable alternatives. It says that this did not occur and, accordingly, there was a failure to comply with the requirements of the SEA Directive and therefore the decision to adopt the NPF should be quashed. The respondents objected to the applicant raising this point in its submissions. They argued that it was not pleaded in the statement of grounds, that leave to seek judicial review was not granted in respect of this point, that it was introduced into the case too late, and without leave to amend the statement of grounds, and that the trial judge erred in rejecting their objection to any consideration of the arguments advanced. They cross-appealed on this point.

124. In the statement of grounds, the applicant pleads in para. 7 that there was no *adequate* environmental assessment of the likely significant effects of implementing the NPF. Referring to the SEA Environmental Report, at paras. 9-12, it pleads:-

“9. The Environmental Report goes on to consider alternatives and the assessment of the preferred scenario. The various alternatives are identified at Chapter 7 of the Environmental Report in which five alternatives are identified. These are each

briefly described, and a tabular format appended where, for each environmental issue, each alternative is given either a 0/-/+ or in many cases a combination of these. These are intended to indicate potential neutral, negative and positive effects of the alternatives. There is no explanation of how these assessments were made or how or for what reason these values were assigned or the qualitative or quantitative basis for their inclusion. There is no indication as to whether or not, or to what degree, the targets (identified in Chapter 6 for each environmental issue) are expected to be achieved by each alternative under consideration (singly (sic) or in combination). These targets are not referred to in the alternatives or assessment sections and only reappear when monitoring is being discussed. In those circumstances there is no adequate description or evaluation of the likely significant environmental effects of each of the alternatives identified in the Environmental Report.

10. It is the applicant's case that the respondents failed to consider, adequately or at all, the reasonable alternatives to the option selected, failed to identify, describe or evaluate adequately or at all the likely significant environmental effects of the alternatives and failed to specify any or any adequate reasons for its preferred option over options 1, 3, 4 and 5.

11. In paragraph 7.3 the respondents simply state a preference for "Option 2 – Regional Effectiveness & Settlement Diversity" on the basis that it is the alternative allegedly most likely to achieve these strategic environmental objectives in relation to public transport, higher densities in city areas and focusing managed growth in supported settlements. However, no objective qualitative or quantitative basis is provided for this selection and it is simply baldly stated without further explanation.

12. Subsequently in Chapter 8 of the Environmental Report there is what is described as an assessment of the preferred scenario i.e. the proposed approach actually adopted in the [NPF]. As with the consideration of alternatives, there is no reference to the targets specified in Chapter 3 and no assessment of the degree to which the preferred scenario will or will not lead to the targets being met. The assessment of the preferred scenario appears to be limited to short discursive sections.”

125. In the respondents’ notice, they complain that the applicant’s submission at the public consultation stage in respect of the draft NPF, dated 10 November 2017, did not raise the alleged failure in the SEA of the NPF to consider or assess reasonable alternatives and, to that extent, they assert that the applicant cannot now raise this argument in these proceedings. The respondents deny the allegation that there was no adequate description or evaluation of the likely significant environmental effects of implementing the various alternatives identified in the SEA Environmental Report. They plead that the SEA Environmental Report adequately described the qualitative assessment carried out by the respondents. In relation to the assessment of the reasonable alternatives, at para. 40, they plead:-

“... Chapter 7 of the SEA Environmental Report outlines in some detail the various alternatives considered and the reason that the preferred option ...was chosen. ... For this, six strategy alternatives (Option 1-6) were developed which were strategic in nature and within the competence of the respondents. The qualitative assessment was carried out on each option comparing the likely impacts against the SEOs. Therefore, a qualitative assessment based on expert judgment was carried out on the alternatives, contrary to the applicant’s claim.”

126. Leave to seek judicial review was granted on 14 May 2018 and the statement of grounds were amended on 23 November 2018. Nearly two years after the proceedings commenced, the applicant delivered its written submissions dated 10 February 2020. For the first time, the applicant made the case that it was a requirement of the SEA Directive that all reasonable alternatives must be subjected to assessment comparable to that of the preferred option. It submitted that the European Commission Implementation Guidelines for the Directive (2003), at para. 5.12, makes no distinction between the assessment requirements for the draft plan or programme and for the alternatives, and the alternatives must be identified, described and evaluated in a comparable way. They say that the requirements in Article 5(2) and Annex I of the Directive, concerning the scope and level of detail for the information in the Environmental Report, apply to the assessment of alternatives as well.

127. The applicant said that this is reflected in the Irish Guidelines published by the Department of the Environment, Heritage and Local Government (2004) and they relied upon decisions of the courts of England and Wales which, according to the applicant, interpreted the Directive (and the transposing regulations) in these terms. In particular, it referred to the cases of *Save Historic Newmarket Ltd. v. Forest Heath District Council* [2011] EWHC 606 and *Calverton Parish Council v. Nottingham City Council* [2015] EWHC 1078.

128. The respondents filed replying submissions dated 6 March 2020 and they addressed this new point raised for the first time in paras. 39 and 40 of their submissions. They addressed the Commission's Guidance on the implementation of the Directive and referred to a further English case, *R (The Friends of the Earth, England, Wales and Northern Ireland) v. The Welsh Ministers* [2015] EWHC 776.

129. The respondents argued that the applicant had failed to comply with the requirements of O. 84, r. 20(3) of the Rules of the Superior Courts by not pleading its case with appropriate particularity. But this was in respect of the claim relating to climate change and allegations of interference with personal constitutional rights; it was not in respect of the plea of comparable assessment of reasonable alternatives.

130. The hearing took place from 10-13 March and on 20 March 2020, and the parties elaborated their respective arguments on comparable assessment of the reasonable alternatives in oral submissions. This occurred one month after the respondents had notice of this refinement – or amendment – of the arguments of the applicant. The respondents objected to the applicant raising this argument at all, and at para. 62 of his judgment the trial judge found that there was no substance to the objection. He accepted that *“this aspect of the case in the statement of grounds may not entirely cover the argument put forward”* but he referred to the fact that the respondents were afforded the opportunity to file supplemental submissions on any additional aspects that had been raised by the applicant in the course of its submissions or in its oral reply to the respondents’ case. The respondents filed further submissions on 27 March 2020. They dealt with the issue of the assessment of reasonable alternatives over seven pages and, accordingly, the trial judge held that the respondents had had an adequate opportunity to address this aspect of the case.

131. The respondents cross-appealed this finding on the basis that the applicant had not been given leave to advance the new argument and, in accordance with O. 84, r. 20 RSC, it was confined to those grounds upon which leave had been granted.

132. In support of their cross-appeal, the respondents relied upon the decision of the Supreme Court in *AP v. DPP* [2011] 1 I.R. 729. Murray C.J. at p. 732, para. 5, said that it was essential that an applicant for judicial review *“sets out clearly and precisely each and*

every ground upon which such relief is sought". At p. 793, para. 43, Hardiman J. referred to *"the absolute necessity for a precise defining of the grounds on which relief is sought"*. Order 84, r. 20(3) requires an applicant to *"state precisely each such ground, giving particulars where appropriate, and identify in respect of each ground the facts or matters relied upon as supporting that ground."*

133. In *F.B. v. Minister for Justice and Equality* [2020] IECA 89, Collins J., speaking for the court, allowed the appeal on the basis that the High Court quashed a decision of the Minister on a ground which was not pleaded and thus in respect of which leave was not granted, but also because it was not advanced in the High Court and therefore the respondents had no opportunity to address the issue.

134. The respondents also relied upon the decision in *Rushe v. An Bord Pleanála* [2020] IEHC 122 (Barniville J.) which emphasised the particular importance of precise pleadings in cases raising complex issues under EU Directives *"such as the Habitats Directive and the EIA Directive"*. Barniville J. referred to the fact that a particular point was neither pleaded nor addressed in written submissions in advance of the hearing. At para. 113 of his judgment he held:-

"... It is especially important in those types of cases, involving such complex issues, that the applicant's case is clearly and precisely pleaded in order that the parties opposing the application (whether they be the respondents or the notice parties or both) are clearly aware prior to the hearing of the application for judicial review of what precisely the case is. Such precision is also required, as Murray C.J. pointed out in AP, to ensure that there is no doubt, ambiguity or confusion as to what the applicant's case is before the High Court, in the context of any appeal from the judgment of that Court to the Court of Appeal or the Supreme Court. It is not appropriate that a case brought on a particular basis, in which reliefs are sought on

stated grounds is, when the case comes on for hearing, transformed into one in which different or additional grounds are sought to be advanced in support of the reliefs sought or new and additional reliefs are sought. Such a course would be unfair on the parties opposing the application for judicial review and on the court.”

135. The respondents submitted that the applicant raised this point for the first time in oral submissions in March 2020, more than two years after the decision of 16 February 2018, and twenty months after leave to seek judicial review was granted, and accordingly, was well outside the three-month time limit for raising such a point. It argued that at the oral hearing the case was transformed into one in which different or additional grounds were sought to be advanced in support of the reliefs sought, without obtaining the leave of the court and that this was in breach of the rules, unfair on the respondents and set at nought the principle of legal certainty which *“demands that time-limits for raising grounds of challenge against such a plan [as the NPF] be properly observed.”*

136. In reply to this point, the applicant referred to *Halpin v. An Bord Pleanála* [2019] IEHC 352. In that case, objection was taken to arguments being advanced by the applicant which went beyond the claim as actually pleaded in the statement of grounds. Simons J. accepted that the applicant was not entitled to rely on general pleas to advance a specific and detailed complaint which had not been pleaded contrary to O. 84, r. 20(3). He accepted the unreported decision of the High Court in *McEntee v. An Bord Pleanála* (Moriarity J., High Court, 10 July 2015). Simons J. summarised the observations of Moriarity J. in para. 62:-

“... The judge went on to say that – in determining whether an argument had been properly pleaded – the court should adopt a ‘fair and reasonable’ reading of, and conduct a thorough and objective examination of, the statement of grounds.”

137. Simons J. applied the fair and reasonable test to the Statement of Grounds in the case before him and concluded that the case as pleaded was broad enough to encompass the argument advanced at the hearing. At para. 66 he held:-

“In interpreting the Statement of Grounds, some regard must be had to the fact that the argument advanced by the applicant would – if well founded – result in a finding that An Bord Pleanála had not properly complied with an important piece of European environmental legislation, namely the Seveso III Directive. The applicant should not be shut out from even making this argument by an overly strict reading of the Statement of Grounds.”

138. In this case, the applicant raises an important argument in relation to the application of the SEA Directive and the issue whether it has been properly complied with in the adoption of the NPF, which sits at the apex of all plans for development within the state and which is to govern development decisions throughout the state for the next 20 years. While I accept that the issue whether the reasonable alternatives *were assessed to a comparable extent* as the preferred option was not expressly pleaded in the statement of grounds – and therefore not the subject of an order for leave to seek judicial review – a related argument – namely the *adequacy* of the assessment of the reasonable alternatives – was clearly part of the case from the beginning, and the ground to which objection is now taken was clearly raised in written submission a month before the case came to trial. The respondents had the opportunity to respond in their written submissions of 6 March 2020, in oral submissions and in their supplemental written submissions. On balance, I am satisfied that the impugned pleading is not of the generic nature which was criticised in the authorities relied upon by the respondents and, while it undoubtedly would have been preferable if an application for leave to amend the statement of grounds had been brought, I agree with the observations of Simons J. in *Halpin*; it would not be appropriate, on a

pleading point, to prevent the applicant from advancing an argument in relation to the application of a significant EU environmental provision where the respondents have pointed to no prejudice in meeting the point in question. In this regard, I note that there was no application to file a supplemental affidavit by the respondents upon receipt of the written submissions on 10 February 2020, nor was there any suggestion that there was any relevant evidence which they could have adduced had the point been expressly pleaded in the statement of grounds, nor was it suggested that it was a ground upon which the applicant would not have been granted leave to seek judicial review had it been raised when leave was initially sought.

139. For these reasons, I would reject the cross-appeal and agree with the trial judge that the applicant should not be prevented from advancing the argument in relation to comparable assessment in this case.

Is comparable assessment of reasonable alternatives a requirement of the SEA Directive?

140. The applicant's case is based upon the provisions of Article 5(1) of the SEA Directive. I repeat the provision here:-

“1. Where an environmental assessment is required under Article 3(1), an environmental report shall be prepared in which the likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme, are identified, described and evaluated. The information to be given for this purpose is referred to in Annex I.”

141. The decision maker is given considerable latitude in setting the objectives of the plan or programme, and thus in determining the reasonable alternatives which meet the objectives so set. However, once an option is identified as a reasonable alternative, it

comes within the scope of Article 5(1). It is common case that five reasonable alternatives were identified in the SEA Environmental Report. Each of these, together with the “*business as usual*” option, were required to be identified, described and evaluated. The environmental assessment was set out in the SEA Environmental Report of the draft NPF which was published on 26 September 2017. This was published to facilitate public consultation in respect of the preferred option and the reasonable alternatives. Thereafter, once the NPF was finalised, the SEA Conclusion Statement was prepared at the end of the public consultation phase and reflected the conclusion of the process. The applicant says that proper public consultation requires the assessment of the reasonable alternatives at a level of detail comparable to that of the preferred option identified in the report. It says that this did not occur and accordingly there has been a failure to comply with the requirements of Article 5(1) of the SEA Directive.

142. The respondents’ position is that the alternatives were assessed on a comparable basis to the preferred option in Chapter 7 of the SEA Environmental Report. The fact that the preferred option was further developed in Chapter 8 does not detract from this. They submit that the level of detail of the SEA Environmental Report is a matter for the decision maker. The respondents say that the SEA Directive does not require alternatives to be subjected to “*full SEA assessment*” as was carried out of the preferred option in Chapter 8. In other words, if Chapter 8 had been omitted from the SEA Environmental Report, the applicant could have had no complaint, as all options were treated alike in Chapter 7.

143. The application of the Directive is addressed in the Commission Guidance Document. The Commission notes that prior to the adoption of the SEA Directive major projects likely to have an impact on the environment were assessed under the EIA Directive at a time when options for significant change were often limited. For example, the site of the project or the choice of alternatives may already have been taken in the

context of plans for a whole sector or geographical area. The SEA Directive “*plugs this gap*” by requiring the environmental effects of a broad range of plans and programmes to be assessed at a time when the plans are actually being developed, and in due course adopted. At para. 5.6 the Commission states:-

“Article 5(1) gives the basic requirements for the environmental report. The tasks of the report are to identify, describe and evaluate the likely significant effects on the environment of the plan or programme and its reasonable alternatives. Annex I gives further provisions on which information must be provided concerning these effects. The studying of alternatives is an important element of the assessment and the Directive calls for a more comprehensive assessment of them than does the EIA Directive.”

144. Under the heading “*Alternatives*” the document provides:-

“5.11. The obligation to identify, describe and evaluate reasonable alternatives must be read in the context of the objective of the Directive which is to ensure that the effects of implementing plans and programmes are taken into account during their preparation and before their adoption.

5.12. In requiring the likely significant environmental effects of reasonable alternatives to be identified, described and evaluated, the Directive makes no distinction between the assessment requirements for the draft plan or programme and for the alternatives. The essential thing is that the likely significant effects of the plan or programme and the alternatives are identified, described and evaluated in a comparable way. The requirements in Article 5(2) concerning scope and level of detail for the information in the report apply to the assessment of alternatives as well. It is essential that the authority or parliament responsible for the adoption of

the plan or programme as well as the authorities and the public consulted, are presented with an accurate picture of what reasonable alternatives there are and why they are not considered to be the best option. The information referred to in Annex I should thus be provided for the alternatives chosen. This includes for example the information for Annex I(b) on the likely evolution of the current state of the environment without the implementation of the alternatives. That evolution could be another one than that related to the plan or programme in cases when it concerns different areas or aspects.” (emphasis added)

145. In noting that the Directive makes no distinction between the assessment requirements for the draft plan or programme and for the reasonable alternatives, the Commission contrasts Article 5(1) of the SEA Directive with Article 5(3) and Annex IV of the EIA Directive which require the developer to provide an *outline* of the main alternatives studied and an indication of the main reasons for the developer’s choice, taking into account the environmental effects.

146. The Commission Guidance Document is not binding on the court, as was observed by the trial judge in para. 65. However, that does not mean that the court should not engage with the reasoning set out and explain why, if this be the case, the court disagrees with the opinion of the Commission. The trial judge simply observed that the guidance appeared to deal with projects or plans that were “*far more concrete in nature*” than a high-level policy document such as the NPF. With respect to the trial judge, there is nothing in the SEA Directive which suggests that different criteria apply to different plans or programmes. On the contrary, once a plan or programme comes within the scope of the SEA Directive, then, regardless of whether it is more or less concrete or of a higher or lower level of policy, it is subject to environmental assessment in accordance with the terms of the Directive and, in particular, the process of adopting the plan or programme

must, *inter alia*, comply with the requirements of Article 5(1). In my judgment, the trial judge erred in his dismissal of the Commission's guidance on the assessment of the reasonable alternatives to the preferred option. It is a persuasive authority to which all courts are required to have regard and his reasons for rejecting it are, in my view, misplaced.

147. The respondents' case is that the consideration of alternatives required by Article 5(1) is referable "*to the extent to which options had been developed at the time a selection was made.*"

148. The respondents observe that thereafter the chosen option was developed in further detail and subject to further assessment of its likely environmental effects in Chapter 8 of the SEA Environmental Report. They submit that this is consistent with the terms of the Directive itself. Article 1 sets out the objective as being:-

"... to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development, by ensuring that, in accordance with this Directive, an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment." (emphasis added)

149. The respondents say that this shows that SEA is only required of the actual plan or programme to be adopted. They submit that this is reinforced by the terms of Article 3(1), the scope of the Directive:-

"An environmental assessment, in accordance with Articles 4 to 9, shall be carried out for plans and programmes referred to in paragraphs 2 to 4 which are likely to have significant environmental effects."

Article 4(1), “*general obligations*”, refers only to an environmental assessment of the actual plan or programme.

150. The respondents reject the reading of Article 5(1) advanced by the applicant (and the Commission). They say it fails to have due regard to the comma in the middle of the provision, which they say has the effect that the Environmental Report must identify, describe and evaluate “*reasonable alternatives taking into account the objectives and geographical scope of the plan or programme*”, not that it must identify, describe and evaluate the “*likely significant environmental effects of implementing*” those reasonable alternatives. Therefore, the required contents of the SEA Environmental Report does not give the “*reasonable alternatives*” full parity with the plan being proposed and assessed.

151. The respondents say this approach is consistent with Annex I of the SEA Directive, which sets out the information required to be included in the report for the purposes of Article 5(1). Alternatives are dealt with as a discreet item at (h):-

“(h) an outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken including any difficulties (such as technical deficiencies or lack of know-how) encountered in compiling the required information.”

152. I accept that an iterative process is permissible and that a plan or programme may evolve in stages. It is possible to assess the preferred option and the reasonable alternatives (if there are any which meet the objectives of the decision maker) and to select a preferred option which will then be further developed and assessed. The draft NPF was published, including Chapter 7, and the public was invited to make observations and comments on the draft plan. But, the SEA Environmental Report in the draft NPF also included Chapter 8, which further developed the assessment of the preferred option. It did not occur “thereafter”. It was selected as the preferred option prior to receipt of

submissions from the public, though after some consultation had taken place with statutory consultees and others.

153. The parties referred the court to a number of authorities from England and Wales which, while not binding on this court, do assist in the analysis of the obligations imposed by the Directive on a plan making authority. The first of these was *Save Historic Newmarket Limited v. Forest Heath District Council* [2011] EWHC 606 (Admin). The claimants sought to quash a plan known as The Forest Heath Core Strategy which was adopted by the first defendant on the grounds, *inter alia*, that there was an alleged failure to comply with the requirements of the SEA Directive. At para. 17, Collins J. stated:-

“It is clear from the terms of Article 5 of the Directive and the guidance from the Commission that the authority responsible for the adoption of the plan or programme as well as the authorities and public consulted must be presented with an accurate picture of what reasonable alternatives there are and why they are not considered to be the best option (See Commission Guidance Paragraphs 5.11 to 5.14).”

It is worth noting that he accepted the Commission’s guidance on Article 5(1). He continued, having acknowledged that the environmental assessment and the draft plan must operate together:-

“... that does not mean that when the draft plan finally decided on by the authority and the accompanying environmental assessment are put out to consultation before the necessary examination is held there cannot have been during the iterative process a prior ruling out of alternatives. But this is subject to the important proviso that reasons have been given for the rejection of the alternatives, that those reasons are still valid if there has been any change in the proposals in the draft plan or any other material change of circumstances and that the consultees are able, whether by

reference to the part of the earlier assessment giving the reasons or by summary of those reasons or, if necessary, by repeating them, to know from the assessment accompanying the draft plan what those reasons are.”

Collins J. assessed the SEA Environmental Report prepared in that case and held that it failed to comply with the requirements of the Directive because “*nowhere does it identify or evaluate reasonable alternatives or explain why they are rejected in favour of what is proposed.*”

154. The next case in time was *Ashdown Forest Economic Development LLP v. Secretary of State for Communities and Local Government and Others* [2014] EWHC 406 (Admin).

Mr. Justice Sales held that the SEA Directive:-

“... is of a procedural nature (recital (9)) and the procedures which it requires involve consultation with authorities with relevant environmental responsibilities and the public, with a view to them being able to contribute to the assessment of alternatives (recitals (15) and (17); Articles 5 and 6). The relevant aspect of the obligation in Article 5 is to identify and then evaluate “reasonable alternatives” to the plan in question.” (emphasis added)

He cited the passage I have quoted above from *Save Historic Newmarket* and observed in para. 96 of the judgment that:-

“... It may be that a series of stages of examination leads to a preferred option for which alone a full strategic assessment is done, and in that case outline reasons for the selection of the alternatives dealt with at the various stages and for not pursuing particular alternatives to the preferred option are required to be given”.

At para. 97 he stated:-

“A plan-making authority has an obligation under the SEA Directive to conduct an equal examination of alternatives which it regards as reasonable alternatives to its

preferred option (interpreting the Directive in a purposive way, as indicated by the Commission in its guidance: see Heard v Broadland DC at [71]). The court will be alert to scrutinise its choices regarding reasonable alternatives to ensure that it is not seeking to avoid that obligation by saying that there are no reasonable alternatives or by improperly limiting the range of such alternatives which is identified. However, the Directive does not require the authority to embark on an artificial exercise of selecting as putative “reasonable alternatives,” for full strategic assessment alongside its preferred option, alternatives which can clearly be seen, at an earlier stage of the iterative process in the course of working up a strategic plan and for good planning reasons, as not in reality being viable candidates for adoption.” (emphasis added)

155. Thus, Sales J. acknowledges that there may be stages of assessment and that some options may be discarded as a result. He makes a distinction between the outline reasons which are required to be given when a plan-making authority concludes that an option is not a reasonable alternative on the one hand, and the assessment of alternatives which it deems to be reasonable alternatives on the other hand. In the latter situation, he held that a purposive construction of the Directive and the Commission’s guidance oblige the plan-making authority to conduct an equal examination of the alternatives to the preferred option. The obligation to adopt a purposive interpretation of the Directive applies equally to this court and I prefer the purposive interpretation of Sales J. to that articulated by the respondents. He acknowledges that it may be that there are no reasonable alternatives to the preferred option which alone may be subject to full strategic environmental assessment.

156. The decision was reversed by the Court of Appeal on a different point and the observations of Sales J., discussed above, were neither rejected nor qualified. Specifically,

the Court of Appeal did not reject the finding that a plan-making authority is required to conduct an equal examination of reasonable alternatives to its preferred option.

157. The next case was a decision of Hickinbottom J. in *R (Friends of the Earth England, Wales and Northern Ireland Limited) v. The Welsh Ministers* [2015] EWHC 776 (Admin). The claimant alleged that the defendant, in the process of adopting a plan called the “M4 Corridor Around Newport” Plan, had failed properly to identify, describe and evaluate all reasonable alternatives on a comparable basis to the plan. The claimant argued that the SEA Directive requires assessment of the significant environmental effects of not only the preferred option, but of all *potential viable alternatives*. It submitted that the Minister took the vital decision to put the highway across protected sites without any environmental assessment and thereby foreclosed the possibility of adopting a plan that did not involve such a highway and thus, the SEA Directive’s objective of integrating environmental considerations into the preparation and adoption of plans was frustrated. At para. 12 Hickinbottom J. held:-

“The SEA Directive is expressly procedural in nature (see recital (9)). It does not impose any substantive duties on the relevant authority: it rather seeks to improve the quality of decision-making for development by requiring the authority to assess the potential environmental effects of a particular plan or programme before its adoption. Its aim is to ensure that future planning decisions are not constrained by earlier strategic decisions; so that article 5 of the SEA Directive requires that the likely significant environmental effects of a plan or programme “and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme are identified, described and evaluated”. Those options must be the subject of public consultation in the form of a report with the draft plan or programme (article 6); and, before the adoption of the plan or programme, the

results of that consultation must be taken into account by the relevant authority (article 8). The environmental evaluation of those alternatives must be on a comparable basis to the evaluation of the preferred option.” (emphasis added)

158. He referred to the need for a purposive and broad approach to the interpretation of the SEA Directive and quoted Article 1 which set out the objective of the Directive. At para. 75 he held:-

“I pause there to note that, although the ultimate object of the Directive is the protection of the environment, it seeks to fulfil that very high level object in a discrete way, namely by ensuring that relevant plans and programmes are subjected to an environmental assessment thus improving decision-making. It imposes purely procedural requirements. Of course, to ensure effectiveness, that environmental assessment must be performed during the preparation of the plan or programme, and before its adoption (article 4(1)); but it imposes no substantive obligations with regard to the decision itself, e.g. to choose the option that will cause the least environmental harm.”

159. He noted that neither the SEA Directive nor the regulations transposing the Directive into the law of England and Wales define “reasonable alternatives”. He set out the principles he derived from the Directive and a number of English authorities, including *Save Historic Newmarket and Ashdown Forest*, in para. 88 of his judgment:-

“(i) The authority's focus will be on the substantive plan, which will seek to attain particular policy objectives. The EIA Directive ensures that any particular project is subjected to an appropriate environmental assessment. The SEA Directive ensures that potentially environmentally-preferable options that will or may attain those policy objectives are not discarded as a result of earlier strategic decisions in

respect of plans of which the development forms part. It does so by imposing process obligations upon the authority prior to the adoption of a particular plan.

(ii) The focus of the SEA process is therefore upon a particular plan – i.e. the authority's preferred plan – although that may have various options within it. A plan will be “preferred” because, in the judgment of the authority, it best meets the objectives it seeks to attain. In the sorts of plan falling within the scope of the SEA Directive, the objectives will be policy-based and almost certainly multi-stranded, reflecting different policies that are sought to be pursued. Those policies may well not all pull in the same direction. The choice of objectives, and the weight to be given to each, are essentially a matter for the authority subject to (a) a particular factor being afforded particular enhanced weight by statute or policy, and (b) challenge on conventional public law grounds.

(iii) In addition to the preferred plan, “reasonable alternatives” have to be identified, described and evaluated in the SEA Report; because, without this, there cannot be a proper environmental evaluation of the preferred plan.

(iv) “Reasonable alternatives” does not include all possible alternatives: the use of the word “reasonable” clearly and necessarily imports an evaluative judgment as to which alternatives should be included. That evaluation is a matter primarily for the decision-making authority, subject to challenge only on conventional public law grounds.

*(v) Article 5(1) refers to **“reasonable alternatives taking into account the objectives... of the plan or programme...”** (emphasis in the original).*

“Reasonableness” in this context is informed by the objectives sought to be achieved. An option which does not achieve the objectives, even if it can properly be called an “alternative” to the preferred plan, is not a “reasonable alternative”. An option

which will, or sensibly may, achieve the objectives is a “reasonable alternative”. The SEA Directive admits to the possibility of there being no such alternatives in a particular case: if only one option is assessed as meeting the objectives, there will be no “reasonable alternatives” to it.

(vi) The question of whether an option will achieve the objectives is also essentially a matter for the evaluative judgment of the authority, subject of course to challenge on conventional public law grounds. If the authority rationally determines that a particular option will not meet the objectives, that option is not a reasonable alternative and it does not have to be included in the SEA Report or process.

(vii) However, as a result of the consultation which forms part of that process, new information may be forthcoming that might transform an option that was previously judged as meeting the objectives into one that is judged not to do so, and vice versa. In respect of a complex plan, after SEA consultation, it is likely that the authority will need to reassess, not only whether the preferred option is still preferred as best meeting the objectives, but whether any options that were reasonable alternatives have ceased to be such and (more importantly in practice) whether any option previously regarded as not meeting the objectives might be regarded as doing so now. That may be especially important where the process is iterative, i.e. a process whereby options are reduced in number following repeated appraisals of increased rigour. As time passes, a review of the objectives might also be necessary, which also might result in a reassessment of the “reasonable alternatives”. But, once an option is discarded as not being a reasonable alternative, the authority does not have to consider it further, unless there is a material change in circumstances such as those I have described.

(viii) Although the SEA Directive is focused on the preferred plan, it makes no distinction between the assessment requirements for that plan (including all options within it) and any reasonable alternatives to that plan. The potential significant effects of that plan, and any reasonable alternatives, have to be identified, described and evaluated in a comparable way.

(ix) Particularly where the relevant plan sets a framework for future projects (e.g. a core planning strategy), it may be appropriate and indeed helpful to have an SEA process that is iterative. If so, the appraisal has to evaluate the extant options at each stage in a comparable way. As part of an iterative SEA process, options which may be capable of achieving the objectives may be discarded on the way; but such options cannot be discarded without being subjected to an SEA Directive-compliant assessment.

(x) *Although an SEA process that is iterative may be particularly appropriate for some framework-setting plans and programmes, it is by no means mandatory. The authority may adopt a non-SEA process to identify those options which meet the objectives. That non-SEA process may itself be iterative.*

(xi) *The objectives an authority sets for plans caught by the SEA Directive are likely to be particularly broad and high level, as well as multiple and varied. An assessment as to whether the objectives would be “met” by a particular option is therefore peculiarly evaluative; but an option will meet the objectives if, although it may not be (in the authority's judgment) the option that best meets the objectives overall (i.e. the preferred option), it is an option which is capable of sufficiently meeting the objectives such that that option could viably be adopted and implemented. That, again, is an evaluative judgment by the authority, which will only be challengeable on conventional public law grounds. However, whilst allowing the*

authority a due margin of discretion, the court will scrutinise the authority's choice of alternatives considered in the SEA process to ensure that it is not seeking to avoid its obligation to evaluate reasonable alternatives by improperly restricting the range options it has identified as such.

(xii) The authority has an obligation to give outline reasons for selecting (i) its preferred option over the reasonable alternatives, and (ii) the alternatives “dealt with” in the SEA process. Alternatives “dealt with” include both (i) reasonable alternatives (which must be dealt with in the SEA process) and (ii) other alternatives (which need not, but may, be dealt with in that process). The reasons that are required are merely “outline”. The authority need only give the main reasons, so that consultees and other interested parties are aware of why reasonable alternatives were chosen as such (including, in appropriate cases, why other options were not chosen as reasonable alternatives) – and, similarly, why the preferred option was chosen as such.” (emphasis added, save where it is specified to be in the original)

160. Points (viii) and (ix) are of particular relevance to the argument in this case. These points are derived from the terms of the SEA Directive, Article 5(1), and not from the UK Regulations transposing the Directive into national law. In my judgment, they reflect, correctly, the obligations arising from the SEA Directive and thus applicable in all member states.

161. At para. 99, Hickinbottom J. cited with approval the decision of Ouseley J. in *Heard v. Broadland District Council* [2012] EWHC 344 (Admin) to the effect that:-

“(i) an iterative SEA process is allowed, but the SEA Directive requires an equal examination of all alternatives reasonably selected for examination at a particular stage, whether preferred or not (see [71]);

- (ii) *the Directive requires reasons to be given for the selection of an option as preferred (or sole) option (see [69] – [70]); and*
- (iii) *outline reasons can be given by reference to earlier documents, if those documents contained the required information (see [62]).” (emphasis added)*

162. The court recognised that there are two distinct obligations under the Directive: (1) to assess the reasonable alternatives and the preferred option in a comparable manner, and (2) to give outline reasons for the selection of an option as a preferred option/rejecting the reasonable alternatives. The two obligations must not be elided or conflated. The issue in *Friends of the Earth* concerned the identification of reasonable alternatives, a matter which is not in contention in these proceedings, rather than the assessment of the reasonable alternatives, and so the decision is not of assistance in relation to this issue.

163. The final authority to which reference was made was *Calverton Parish Council v. Nottingham City Council & Ors.* [2015] EWHC 1078 (Admin). The claimant alleged that the defendants had failed to satisfy the requirements of the SEA Regulations which transposed the SEA Directive into English law. Regulation 12 of the (UK) SEA Regulations provides:-

“Preparation of Environmental Report

12.(1) Where an environmental assessment is required by any provision of Part 2 of these Regulations, the responsible authority shall prepare, or secure the preparation of, an environmental report in accordance with paragraphs (2) and (3) of this Regulation.

- (2) *The report shall identify, describe and evaluate the likely significant effects on the environment of—*
 - (a) *implementing the plan or programme; and*

(b) *reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme.*”

164. It is thus an express requirement of Regulation 12 that the environmental report identifies, describes and evaluates the likely significant effects on the environment of the reasonable alternatives as well as the preferred plan or programme. The respondents in this case emphasised this point and therefore argued that the decision was of little precedential value and should not be followed.

165. Jay J. identified six propositions from *Save Historic Newmarket* and *Heard* as follows:-

- “(1) *It is necessary to consider reasonable alternatives, and to report on those alternatives and the reasons for their rejection;*
- (2) *While options may be rejected as the Plan moves through various stages, and do not necessarily fall to be examined at each stage, a description of what alternatives were examined and why has to be available for consideration in the environmental report;*
- (3) *It is permissible for the environmental report to refer back to earlier documents, so long as the reasons in the earlier documents remain sound;*
- (4) *The earlier documents must be organised and presented in such a way that it may readily be ascertained, without any paper chase being required, what options were considered and why they had been rejected;*
- (5) *The reasons for rejecting earlier options must be summarised in the final report to meet the requirements of the SEA Directive;*
- (6) *Alternatives must be subjected to the same level of analysis as the preferred option.*” (emphasis added)

166. The respondents in this case argued that Point (6) must be understood in light of the express provisions of Regulation 12 and submit that it does not reflect the requirement of Article 5(1) of the SEA Directive or the SEA Regulations transposing the Directive into Irish law. They submitted that while Regulation 12 requires this assessment, it does not follow that the SEA Directive imposes the same obligation. The argument does not address the fact that Sales and Hickinbottom JJ. each reached the same conclusion based upon their interpretation of the SEA Directive, and not by reference to Regulation 12. *Calverton Parish Council* is not authority for the proposition that the reasonable alternatives must be subject to full strategic assessment.

167. In my opinion, the purposive interpretation of Article 5(1), the guidance from the Commission and the decisions of the High Court in England and Wales in *Ashdown Forest* and *Friends of the Earth* all support the view that the assessment of the reasonable alternatives to the preferred plan or programme must be on a comparable basis to the preferred plan or programme at the particular stage in an iterative process before a selection is made.

168. The real difficulty posed by this case is whether Chapter 7 of the SEA Environment Report satisfies this obligation. Does it identify, describe and evaluate the six options in a manner which complies with the SEA Directive?

169. Articles 5(2) and 5(3) of the SEA Directive provide:-

“(2) The environmental report prepared pursuant to paragraph 1 shall include the information that may reasonably be required taking into account current knowledge and methods of assessment, the contents and level of detail in the plan or programme, its stage in the decision-making process and the extent to which certain matters are more appropriately addressed at different levels in that process in order to avoid duplication of the assessment.

(3) Relevant information available on environmental effects of the plans and programmes and obtained at other levels of decision-making or through other Community legislation may be used for providing the information referred to in Annex I.” (emphasis added)

170. The information to be given in the report is “referred to” in Annex I. This provides:-

“The information to be provided under Article 5(1), subject to Article 5(2) and (3), is the following:

(a) an outline of the contents, main objectives of the plan or programme and relationship with other relevant plans and programmes;

(b) the relevant aspects of the current state of the environment and the likely evolution thereof without implementation of the plan or programme;

(c) the environmental characteristics of areas likely to be significantly affected;

(d) any existing environmental problems which are relevant to the plan or programme including, in particular, those relating to any areas of a particular environmental importance, such as areas designated pursuant to Directives 79/409/EEC and 92/43/EEC;

(e) the environmental protection objectives, established at international, Community or Member State level, which are relevant to the plan or programme and the way those objectives and any environmental considerations have been taken into account during its preparation;

(f) the likely significant effects² on the environment, including on issues such as biodiversity, population, human health, fauna, flora, soil, water, air, climatic factors,

² These effects should include secondary, cumulative, synergistic, short, medium and long-term permanent and temporary, positive and negative effects.

material assets, cultural heritage including architectural and archaeological heritage, landscape and the interrelationship between the above factors;

(g) the measures envisaged to prevent, reduce and as fully as possible offset any significant adverse effects on the environment of implementing the plan or programme;

(h) an outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken including any difficulties (such as technical deficiencies or lack of know-how) encountered in compiling the required information;

(i) a description of the measures envisaged concerning monitoring in accordance with Article 10;

(j) a non-technical summary of the information provided under the above headings.

171. The information to be provided is that which “*may reasonably be required*”. It is a question of degree as to the level of detail which must be provided. The Commission Guidance document notes at para. 5.16:-

“The reference to ‘contents and level of detail in the plan or programme’ is a recognition that, in the environmental report for a broad-brush plan or programme, very detailed information and analysis may not be necessary, (for example, a plan or programme at the top of a hierarchy which descends from the general to the particular); whereas much more detail would be expected for a plan or programme that itself contained a higher level of detail.”

All that is absolutely required by the Directive is that the information be that identified in Annex I.

172. In assessing whether any particular report identifies, describes and evaluates the likely significant environmental effects, as required by Article 5(1), one must have regard

to the nature of the plan in question. The NPF is a very high-level document. It is at the top of the hierarchy of development plans in the state. It establishes the spatial and planning framework for Ireland until 2040. The degree to which the likely significant effects on the environment of such a plan can be identified, described and evaluated is limited given the nature and timespan of the plan in question.

173. Article 5(2) requires that the report “*includes the information that may reasonably be required*” and it specifically recognised that very detailed information and analysis may not be necessary for a plan at the top of the hierarchy which descends from the general to the particular. The Commission’s guidance also recognises that very detailed information and analysis may not be necessary in respect of such a plan.

The SEA Environmental Report

174. The SEA Environmental Report is a detailed document – 250 pages long, inclusive of appendices. The non-technical summary states that the purpose of the report is, *inter alia*, to identify, describe and evaluate the likely significant effects of the draft NPF and its reasonable alternatives, and to provide an early opportunity for the statutory authorities and the public to offer views on any aspect of the environmental report, and accompanying NPF documentation, through consultation. It notes that fifteen years after the launch of the NSS, some of the key ambitions in the NSS have not been realised, with development-driven planning and sprawl continuing to be prevalent. The purpose of the draft NPF is to provide a focal point for spatial plans throughout the planning hierarchy and is a long-term strategy for the next twenty years. The authors, RPS, note that as part of the SEA Scoping, statutory consultees were consulted and, taking into consideration feedback from the consultees, a broad assessment of the potential for the plan to influence the environment was carried out. All of the environmental topics listed in the SEA Directive were scoped in for the assessment of the plan. In addition, a workshop was undertaken in May 2017

with a wide group of stakeholders following the publication of the Department's "Issues and Choices Paper" and the SEA Scoping Report.

175. RPS note that the NPF is a national plan and as such the assessment is focussed at a national strategic level and this is mirrored in the level of detail presented for the baseline description in the main Environmental Report. Four key challenges to the environment and their relevance to the NPF are identified:-

- “- Valuing and Protecting our Natural Environment*
- Building a Resource-Efficient, Low Carbon Economy*
- Implementing Environmental Legislation*
- Putting the Environment at the Centre of Our Decision Making.”*

This then leads to seven key actions for Ireland on the state of the environment.

176. Three types of objectives were considered as part of the SEA; (1) the objectives of the plan, (2) the wider environmental objectives such as environmental protection objectives at a national, European and international level, and (3) the strategic environmental objectives (SEOs), which were devised to test the effects of the draft NPF on the wider environment. At p.12 of the Report the authors state:-

“The assessment is an objectives-led assessment which involves comparing the proposed alternatives against defined SEA Environmental Objectives for each of the identified issue areas. The selected SEOs for this SEA are set out in Table 6. These environmental objectives are based on the current understanding of the key environmental issues having regard to the environmental protection objectives outlined in Chapter 6, of the Environmental Report. ... The objectives have been updated prior to the assessment based on feedback from statutory consultees and the public on the draft objectives.”

177. The environmental components, referred to as SEOs, are set out in Table 6 which encompass all of the *likely significant effects on the environment* listed in Annex I(f) of the SEA Directive which the SEA is required to identify, describe and evaluate under Article 5(1):-

Environmental Component	Strategic Environmental Objective
Objective 1 - Population and Human Health	<i>To create an environment where every individual and sector of society can play their part in achieving a more healthy Ireland.</i>
Objective 2 - Biodiversity Flora and Fauna	<i>To preserve, protect, maintain and, where appropriate, enhance the terrestrial, aquatic and soil biodiversity, particularly EU designated sites and protected species.</i>
Objective 3 - Soils	<i>Protect soils against pollution, and prevent degradation of the soil resource.</i>
Objective 4 - Water	<i>Ensure that the status of water bodies is protected, maintained and improved in line with the requirements of the WFD and MSFD.</i>
Objective 5 - Air Quality	<i>To avoid, prevent or reduce harmful effects on human health and the environment as a whole resulting from emissions to air. Maintain and promote continuing improvement in air quality through the reduction of emissions and promotion of renewable energy and energy efficiency.</i>
Objective 6 - Climatic Factors	<i>To minimise emissions of greenhouse gasses.</i>
Objective 7 - Material Assets	<i>Consolidate growth and limit urban sprawl. Optimise existing infrastructure and provide new infrastructure to match population distribution proposals in the draft NPF.</i>
Objective 8 - Archaeology, Architecture and Cultural Heritage	<i>Protect places, features, buildings and landscapes of cultural, archaeological or architectural heritage.</i>
Objective 9 - Landscape	<i>To provide a consistent framework for identification, assessment, protection, management and planning of landscapes having regard to the European Landscape Convention.</i>

178. Chapter 3 deals with environmental assessment in greater detail. RPS explain that SEA is at a strategic level and therefore it is not possible for the baseline environment to be described and assessed in as much detail as could be done for a project-level environmental impact assessment; “[i]nstead, SEA uses a system of objectives, targets and indicators to rationalise information for the purposes of assessment.” The authors explain that the report uses broad themes, based on environmental topics listed in the SEA Directive, specifically in Annex I(f), to group large environmental data sets such as human health, cultural heritage and climate. It assigned to each of these themes at least one high-level SEO that specifies a desired direction for change, e.g. reduce CO₂ emissions, against which

future impacts of the NPF can be measured. These high-level SEOs are then paired with specific targets. The progress towards achieving these specific targets is monitored using environmental indicators, which are measures of identified variables over time. The environmental assessment includes a combination of qualitative and quantitative assessment and expert judgment.

179. This explanation of the approach is particularly important in light of the criticisms of the assessment in Chapter 7 by the applicant which makes no reference to this part of the report. In particular, it was not the intent of the authors that an SEO assigned to one of the nine broad environmental topics would achieve detailed measurable outcomes in respect of these topics, save in the broadest terms, given the high-level of the plan. The objective was to measure a *“direction for change”*.

180. In Table 3.2, the RPS asks, in relation to SEA of each environmental element, *‘Is it Quantifiable?’*, and the answers demonstrate the problems that they faced due to the high-level of the plan. For instance, in respect of ‘Biodiversity, Flora and Fauna’, RPS state:–

“National and regional datasets are available for aspects relating to biodiversity, flora and fauna. Given the scale of the NPF, the assessment has considered all nature conservation sites, including European sites protected under national legislation, National Parks, Refuges for Fauna etc. It is noted that there is generally an absence of location-specific information therefore assessment is focussed on qualitative however some quantification is possible.”

At para. 3.3.5, RPS sets out the difficulties which were encountered including, a lack of quantitative data for some topics (e.g. health, regional, carbon emissions data), a lack of digitised data in some topic areas (e.g. landscape) and, that *“quantitative assessment is made very difficult due to the very strategic level of the policy objectives proposed”*.

Chapter 5 deals with relevant aspects of the current state of the environment in

considerable detail, focussing on the pressures and problems in relation to biodiversity, flora and fauna; population and human health; soils, geology and hydrogeology; water; air quality and climatic factors; material assets (road and rail infrastructure, airports and seaports, water supply, wastewater treatment, communications infrastructure, energy supply and security and landfills, mines and quarries); cultural heritage, and; landscape.

181. This information feeds into Chapter 6 which deals with environmental protection objectives and the SEA Framework. Having referred to the high-level nature of the assessment and the adoption of SEOs, the authors elaborate that the overall purpose of environmental indicators in the SEA is to provide a way of measuring the environmental effect of implementing the NPF. The indicators are also used to track the progress in achieving the targets set in the SEA as well as the framework itself. At para. 6.1.2 they state:-

“The proposed targets and indicators have been selected bearing in mind the availability of data and the feasibility of making direct links between any changes in the environment and the implementation of the plan. For this reason, where possible targets and indicators have been based on existing published targets such as Healthy Ireland, Healthy Services Executives Implementation Plan 2012-2025, which set national objectives, targets and indicators to measure Ireland’s progress in protecting human health.”

182. There is then a Table 6.1 which sets out the nine SEOs identified in Table 6, and sets out proposed targets, and indicators for achievement of those targets.

183. It is in this context that Chapter 7 assesses reasonable alternatives. The authors set out the obligation to consider alternatives and the desirability of doing so as early as possible in the course of preparing a plan. They say that early discussion of possible alternatives was undertaken during the scoping stage of the NPF, and that given the nature

of the NPF, alternatives were focussed at the strategic level. In the approach set out in para. 7.2, a key challenge identified is to “*explore macro spatial alternatives that can accommodate [the] projected [population] growth in the most optimal and sustainable manner that would achieve Ireland’s economic, social and environmental requirements*”.

They identified the key challenges as including the regional disparity between regions; the dispersed nature of growth weakening the role of settlements as key drivers for growth, both across the regions and more localised area, contributing to structural weakness of rural areas; the hollowing out of settlements and high levels of vacancy, due to building on the edges, reinforcing issues of congestion and private car use, and the dominance of greenfield development over reuse and out-of-town retailing/commerce; and dispersal which has led to infrastructure deficits and a mismatch between the pace of growth and the pace of infrastructure deployment to service needs, with increasing costs to services.

184. To address the challenges of accommodating and planning for this growth and driving it in a sustainable way, a number of macro spatial alternatives were examined which were considered to be reasonable, realistic, viable and implementable. These were developed around four “*pillars*”. Pillar 1 related to regional distribution scenarios (how the regions will grow over the next twenty to twenty-five years); Pillar 2 related to concentration-dispersal scenarios (where future growth will be concentrated); Pillar 3 related to compactness-sprawl scenarios (how densely this growth will be concentrated); and Pillar 4 related to temporal infrastructure scenarios (the timing and delivery of services and infrastructure). Under each pillar four different alternatives are considered.

185. Under Pillar 1, regional distribution scenarios, four options are considered: regional parity, regional rebalance, regional acceleration and regional dominance. Having discussed the four options, the preferred solution and the reason for choosing regional parity is set out. In relation to Pillar 2, concentration-dispersal scenarios, the four headings

are city concentration, regional concentration, regional dispersal and national dispersal. Again, the options are discussed and the preferred solution and the reason for choosing regional concentration as the preferred macro spatial option is set out. As regards Pillar 3, compactness-sprawl scenario, the four options explored are compact growth, contained growth, reduced sprawl and sprawled growth. The preferred solution was contained growth and reduced sprawl and the reasons for this choice were set out. Finally, in relation to Pillar 4, temporal infrastructure scenarios, the four scenarios explored were front-loading provision, sequential provision, tandem provision and market-led provision. The preferred solution and reason for choosing were sequential provision on the basis it would best contribute to national objectives for national and regional development.

186. This section of the report reduced the four options under the four pillars to two options under each of the four pillars. The assessment of these macro spatial growth alternatives under the four pillars represented the strategic questions which “*have driven the direction of the plan*”. Following on from that analysis, six strategic alternatives were developed which integrated the preferred pillars into more focussed, real world alternatives. Thus, it is important to consider the assessment of the six alternatives in the context of the analysis of the four pillars which precedes them and feeds into the selection of the reasonable alternatives. In particular, the preceding analysis should be considered as it compliments and clarifies the reasons for ultimately selecting the preferred option.

187. The six strategic alternatives thus identified were each subjected to an objectives-led assessment, “*reflecting on the SEA sensitivities*”. It was a qualitative assessment of each of the options which compared the likely impacts against the SEOs outlined in Chapter 6 to establish which alternatives meet the SEOs and which, if any, contradict them. This underscores the importance of considering Chapter 6 when considering whether the assessment of alternatives satisfies the requirements of the SEA Directive.

188. The Report states at para. 7.2.2 that:-

“The assessment carried out was primarily qualitative in nature based on expert judgment. For the purposes of these assessments, plus (+) indicates a potential positive impact, minus (-) indicates potential negative impact, plus/minus (+/-) indicates that both positive and negative impacts are likely or that in the absence of further detail the impact is unclear, and a neutral or no impact is indicated by a zero (0)”.

189. The assessment does not purport to give a quantitative evaluation of the potential impact of any particular option. It only purports to indicate a potential positive or potential negative or mixed impact, as the case may be.

190. The assessments in respect of each of the six alternatives were carried out in respect of the nine topics³ required to be addressed under the SEA Directive.

191. Option 1 is Compacted Concentration and includes four criteria:-

- “(i) The level of growth in the [North West Regional Area] and the [Southern Regional Area] combined would equal that of the [East and Midland Regional Area];*
- (ii) Focus the highest quantum of growth and rates of growth in five cities through a tailored approach to settlement growth targets;*
- (iii) Deliver at least 50% of all new homes in the five cities on infill or brownfield sites within the built-up envelope of existing urban settlements (and at least 30% in all other settlements); and*
- (iv) Provide some critical infrastructure in advance of planned growth to kick start development and provide other infrastructure sequentially and on a phased basis in tandem.”*

³ BFF – Biodiversity, Flora and Fauna; PHH – Population and Human Health; S – Soils; W – Water; AQ – Air Quality; CF – Climatic Factors; MA – Material Assets; CH – Cultural Heritage; L – Landscape.

192. There is a table in respect of the nine topics assigning a +, – ,+/- or 0 score to each topic. This is followed by a narrative which accompanies the table. The option has positive impacts for some of the indicators, as the growth would be focussed on regional parity and is principally focussed in existing urban envelopes and not on greenfield sites. It recognises and preserves the economic drivers of the Dublin/Eastern Midlands Area while also promoting and facilitating growth in the two other regions.

193. It discusses the fact that the focus of growth in five cities has potential for both positive and negative effects. It observes that the provision of some critical infrastructure prior to the development is directly positive for population and human health and material assets as it ensures that services such as transport, water and waste water provisions are put in place prior to occupancy of residential development. There could be indirect positive impacts on biodiversity flora and fauna and water if the infrastructure provision was to include wastewater treatment facilities. The high density of people within the cities could provide financial justification for public transport services, thus increasing urban mobility and reducing the need for the private motor car. This could have indirect positive effects on air quality and climatic factors through the reduction in emissions.

194. Option 2 (ultimately the preferred option) is Regional Effectiveness and Settlement Diversity. It includes the following four criteria:-

- “(i) The level of growth in the NWRA and SRA combined would be equal to that of the EMRA;*
- (ii) Focus the highest quantum of growth and rates of growth in five cities and a number of regionally important large towns through a tailored approach to settlement growth targets;*
- (iii) Delivery at least 40% of all new homes nationally on infill or brownfield sites within the built up envelope of existing urban settlements; and*

- (iv) *Provide some critical infrastructure in advance of planned growth to kick start development and provide other infrastructure sequentially and on a phased basis in tandem.”*

195. The table in respect of Option 2 gives the same qualitative assessment for the nine assessed topics. The narrative accompanying this option states as follows:-

“Option 2 is similar to Option 1 with a focus on regional parity, development of five city areas, use of infill and brownfield as part of the solution alongside provision of advanced critical infrastructure. However, this option also sees a role for a number of regionally important large towns through a tailored approach to settlement growth targets. This variation reflects the social and community structure which has historically developed in Ireland and the importance of a supporting network of large towns to drive the regional and rural economy outside the functional influence of cities. Ireland has many rural areas with significant cultural ties to the land and needs effective regional and rural drivers to ensure that urban and rural development needs are met.” (emphasis added)

196. Option 3 is Regional Effectiveness and Settlement Consistency. The four criteria are:-

- “(1) The level of growth in the NWRA and SRA combined would be equal to that of the EMRA;*
- (ii) Focus the highest quantum of growth in five cities and a number of regionally important large towns, with equal rates of growth across all settlements;*
- (iii) Deliver at least 40% of all new homes nationally on infill or brownfield sites within the built up envelope of existing urban settlements; and*

- (iv) *Provide some critical infrastructure in advance of planned growth to kick start development and provide other infrastructure sequentially and on a phased basis in tandem.*”

197. The table in respect of Option 3 is then set out and followed by the narrative discussing the option. Having noted the similarities between Option 2 and large parts of Option 1, the authors say that the variation in Option 3 is a stipulation around the rates of growth. An equal rate of growth across the settlements is proposed. While no direct impacts are anticipated from the addition of the growth rate, there is potential for indirect effects. The authors note that a greater spread of resources across a large number of settlements dilutes the potential to provide coherent solutions in terms of services, as there is often a lack of critical mass to justify the cost-benefits. This can indirectly impact on population and human health and material assets if the services are below standard or lack competition. The option does not consider the “*carrying capacity of environmental limits*” of the settlements in any way so if the growth rates of a settlement exceed the available capacity of wastewater or other vital services, this can have knock-on negative impacts on population and human health, soil, biodiversity, flora and fauna and material assets. The authors note that the option recognises the need for the delivery of infrastructure in tandem but says that this may not be possible with such a dispersed approach to growth rates.

198. Option 4 is Regional Dominance and Settlement Diversity and includes the following four criteria:-

- “(i) *Growth in EMRA is less than that of the NWRA and SRA combined;*
- (ii) *Focus the highest quantum of growth and rates of growth in cities and a number of regionally important large towns in NWRA and SRA and lower than national growth rates in Dublin City and regionally important large towns, through a tailored approach to settlement growth target;*

- (iii) *Deliver at least 40% of all new homes nationally on infill or brownfield sites within the built-up envelope of existing urban settlement; and*
- (iv) *Provide some critical infrastructure in advance of planned growth to kick start development and provide other infrastructure sequentially and on a phased basis in tandem.”*

199. There is then the standard table and narrative in respect of this option. This is clearly different to Options 1 to 3 in that it seeks to limit growth in the EMRA while focussing growth in the other two regions. The authors observe that limiting growth in the EMRA in the manner proposed may have unintended negative consequences particularly for population and human health and material assets, where existing established sectors may not continue to invest in Ireland if their needs are not met in key strategic locations, such as Dublin. This could remove a viable sector from further investment in any of the three regions.

200. Option 5 is Regional Dominance and Settlement Consistency and includes the following four criteria:-

- “(i) Growth in EMRA is less than that of the NWRA and SRA combined;*
- (ii) Focus the highest quantum of growth and rates of growth equally in cities and a number of regionally important large towns in NWRA and SRA and lower than national growth rates in Dublin city and regionally important large towns in EMRA;*
- (iii) Deliver at least 50% of all new homes in the cities and a number of regionally important large towns on infill or brownfield sites within the built-up envelope of existing urban settlements in the [NWRA] and SRA and at least 30% in the EMRA; and*

- (iv) *Provide some critical infrastructure in advance of planned growth to kick start development and provide other infrastructure sequentially and on a phased basis in tandem.*”

201. The table and the narrative then appear. The authors note that Option 5 is broadly similar to Option 4 but sees an equal share in growth rates in cities and a number of regionally important large towns in each region. As with Option 3, a greater spread of resources across a large number of settlements dilutes the potential to provide coherent solutions in terms of services as there is often a lack of critical mass to justify the costs-benefit. There is the same difficulty in relation to the failure to consider the carrying capacity of environmental limits of settlements as in Option 3, and likewise the possibility that it may not be possible to deliver infrastructure in tandem with such a dispersed approach to growth rates.

202. Option 6 is Business as Usual, and this is assessed on the basis of four assumptions:-

- “(i) The majority of growth takes place in the EMRA;*
- (ii) Focus growth in existing gateways and hubs as designated in the National Spatial Strategy;*
- (iii) No national specification between greenfield and brownfield/infill delivery targets for new housing; and*
- (iv) Infrastructure delays or deficit of infrastructure to support planned growth.”*

203. The table in respect of this option is then presented. It is striking in that every entry is either 0 or –. The narrative then explains the disadvantages of business as usual.

204. The tables presented in Options 3, 4 and 5 are identical. Each of the criteria is assessed as +/--. On the other hand, Options 1 and 2 show the same outcomes: +/- for six criteria and + for air quality, climatic factors and material assets.

205. In section 7.3 of Chapter 7, the preferred alternative and the reasons for choosing it are set out. The authors say that the plan team “*has had regard to the wider policies and strategies of the Government, stakeholder feedback on the issue paper ... and the strategic environmental objectives identified in Chapter 6.*” In considering the broad direction for the framework, the macro spatial growth approach was considered and the preferred approach was characterised as one displaying: regional parity for the EMRA, NWRA and SRA; regional concentration towards cities and some regionally important larger settlements; a focus on contained growth and reduced sprawl by targeting infill and brownfield lands in existing built-up areas; and sequential provision of infrastructure with some critical infrastructure in place to promote investment. The authors stated that “*this high level direction is considered to best reflect the most sustainable approach to growth patterns.*”

206. It dismisses business as usual as not considered to be a viable alternative. It notes that all of Options 1-5 note the need for sequential provision of infrastructure with some critical infrastructure in place to promote investment. Thus, there is no distinction between the options in relation to this matter. The same applies to the need for infill or brownfield development of between 30-50%. The principal differences identified in Options 1-5 relate to the regional and settlement strategy approach:-

“In this regard the preferred option is considered to be Option 2 ... [t]his alternative is likely to achieve the maximum overall gain in relation to the SEOs in terms of maximising use of public transport thereby reducing transport related emissions, in tandem with facilitating higher densities in city areas, and focussed management growth in supporting settlements, thereby improving regional connectivity and services outside of the cities.”

207. This conclusion must be read, in particular, in light of the narrative in respect of Option 2 which I have highlighted and which addresses the importance of a supporting network of large towns to drive the regional and rural economy outside the functional influence of cities.

208. In my judgment, it is clear that each of the six options have been analysed in an identical fashion. To that extent the requirements of the Directive have been met. The applicant complains that the tables or matrices are incomprehensible and therefore fail to satisfy the obligation to give reasons or adequately assess the reasonable alternatives, but that complaint does not address the question whether the treatment of the preferred option and the reasonable alternatives have been assessed on a comparable basis.

209. In my judgment, the treatment of the options in Chapter 7 amounts to comparable assessment of the preferred option and the reasonable alternatives. The next question is whether the information is that which is “reasonably required” and thus, whether the obligation on a plan making authority imposed by Article 5(1), to identify, describe and evaluate the likely significant effects on the environment of implementing either the plan or the reasonable alternatives, has been satisfied. This in turn raises the question of the margin of discretion to be afforded to the decision maker in this regard. I agree with the judgment of Hickinbottom J. that this is quintessentially an evaluative judgment for the plan making authority and it may only be reviewed by this court on conventional public law grounds. In my opinion, the applicant has not shown that there has been a breach of EU law in this aspect of the case, and thus the challenge can only be on *O’Keefe* principles of irrationality/unreasonableness ([1993] 1 I.R. 39). This was not the basis for the applicant’s challenge to the SEA conducted in this case. I would reject its appeal that the respondents failed to conduct an SEA of the NPF in compliance with Article 5(1) because

they failed to subject the reasonable alternatives identified in the plan to an assessment that was comparable to that of the preferred option.

210. Separately, the question arises whether the inclusion of a more detailed assessment of the preferred option, as occurred in Chapter 8, impacts on the court's assessment of the adequacy of the assessment in Chapter 7. Undoubtedly, the assessment of the preferred option in Chapter 8 is in far greater detail. If it is legitimate to compare the assessment of the preferred option in Chapter 8 with the assessment of all of the options, including the preferred option and the reasonable alternatives in Chapter 7, then it could fairly be said that there was not a comparable assessment of the reasonable alternatives with the preferred option, but I do not believe that this is the correct approach to adopt, nor is it consistent with the authorities discussed above.

211. Sales J. recognised the possibility *“that a series of stages of examination leads to a preferred option for which alone a full strategic assessment is done, and in that case outline reasons for the selection of the alternatives dealt with at the various stages and for not pursuing particular alternatives to the preferred option are required to be given.”*

Thus, a process where the preferred option and the reasonable alternatives are subject to comparable assessment and the preferred option alone is subject to *“full strategic assessment”* complies with the obligations arising from the SEA Directive. It is also authority for the proposition that the assessment required of the reasonable alternatives is not a full strategic assessment. This is consistent with the judgment of Collins J. who held that the requirement was to provide an *“accurate picture of what reasonable alternatives there are”*. The SEA Directive merely requires that before the authority adopts the plan or programme, it takes account of the results of consultation (Article 8); it does not state that the consultation must occur before the authority selects a preferred option (or indeed rules out some options as not being reasonable alternatives). Thus, the applicant's criticism that

the respondents had already selected a preferred option when the SEA Environmental Report was published, and the public was invited to make submissions, is not relevant to the issue whether the respondents complied with the requirements of the Directive, and the criticism is misplaced. The authority retains the option – and the obligation if necessary – to reconsider or refine its preferred options prior to adopting the plan or programme, in light of the results of the consultation. In my judgment, the fact that the preferred option was subject to full strategic assessment in Chapter 8 of the SEA Environmental Report does not detract from the fact that in the preceding chapters, and in particular Chapter 7, the preferred option and the reasonable alternatives were assessed in accordance with the requirements of Article 5(1) in a comparable way. As Advocate General Kokott stated, the issue is whether *in substance* there was assessment of the plan and the reasonable alternatives which satisfied the objectives of the Directive. In my judgment, the answer to that question is, there was.

212. The applicant also alleged that there was a failure to explain why the preferred option was selected, and the reasonable alternatives rejected, as required by the SEA Directive. In particular, it said that the matrices in Chapter 7 were incomprehensible; that in some instances the different options received the same “score” and the narrative did not add any reasons. Thus, there was no, or no adequate, explanation why the preferred option was preferred to the reasonable alternatives, as required by the SEA Directive.

213. The assessment of the alternatives is quintessentially a matter for the discretion of the decision maker. The court will not interfere with a planning judgment reached by a plan making authority weighing-up often competing, and possibly conflicting, objectives, once it is shown that the authority considered the matters to which it is required to have regard, and did not consider those to which it ought not to have regard, and gives reasons for its decision. This limitation is well-established in decisions of the High Court such as *Kenny*

v. An Bord Pleanála (No. 1) [2001] 1 I.R. 565 (McKechnie J. at para. 19), *Ratheniska Timahoe and Spink (RTS) Substation Action Group & Anor. v. An Bord Pleanála* [2015] IEHC 18 (Haughton J. at paras. 73-76), *Aherne v. An Bord Pleanála* [2015] IEHC 606 (Noonan J. at para. 19-21), *Kelly v. An Bord Pleanála* [2019] IEHC 84 (Barniville J. at paras. 109, 110 and 166) and *M28 Steering Group v. An Bord Pleanála* [2019] IEHC 929 (MacGrath J. at para. 177).

214. Furthermore, as discussed in the context of the Habitats Directive, the court must look at the substance of whether there has been compliance with the requirements of the SEA Directive and not engage in an excessively formalistic approach to the obligations imposed. The observations of McGovern J. in *Ó'Grianna* in the context of the EIA Directive apply with equal force to the SEA Directive. The applicant's argument that the SEA Environmental Report does not give reasons as required by the SEA Directive must be assessed in light of these principles.

215. In my judgment, the trial judge held correctly that one must not read the matrices in isolation but in conjunction with the accompanying narrative text. He held that "*a reasonable and comprehensive assessment that is understandable and logical of each of the reasonable alternatives*" is to be found. The respondents say that the Environmental Report ought to be properly read as a whole and, when so read, it clearly outlines the process that led to the selection of the option ultimately preferred; and it identifies, describes and evaluates the reasonable alternatives and explains why the chosen option was preferred. I entirely agree. The focus of the applicant is far too narrow. It ignores the pages I discussed above in Chapters 3 and 6, as well as the first part of Chapter 7 of the report. These make clear the analysis and the reasons for approaching the formulation of the plan in the manner selected.

216. The fact that different options may achieve the same assessment in respect of the strategic environmental objectives identified in the matrices does not mean that there has been a failure to identify, describe or evaluate the effects of each of the reasonable alternatives. It is equally possible to conclude that, in respect of such a high-level plan, the outcomes will be the same in respect of similar options. It follows that the fact that some of the alternatives have the same projected effects on the environment, does not lead to the conclusion that the assessment is irrational or that it does not meet the *O'Keefe* standard of review. The applicant's submissions on this point do not sufficiently acknowledge either the similarities between the alternatives or the explanation of the tables as identifying the potential positive or negative or mixed impacts of the high-level strategic options on the nine topics.

217. The applicant complains that essentially the only explanation for the values +, – or +/- assigned to each category is a qualitative assessment based on expert judgment. In my view, in light of the assessment undertaken and in the context of the explanation and analysis which preceded this statement, this is permitted by the Directive, which is not prescriptive as to how the assessment is to be conducted once the reasonable alternatives are identified, described and evaluated. For the reasons I have set out, I am satisfied that this occurred in this case. Once the information that was reasonably required to conduct the assessment was provide, as it was in this case, it is not for the court to engage with a merits-based assessment as to whether there ought to have been a more detailed evaluation than that actually undertaken.

218. For these reasons, I would reject this second ground of appeal.

Issue Three: Monitoring

219. Monitoring of the significant environmental effects of the implementation of plans and programmes is required by Article 10 of the SEA Directive. It provides:-

“(1) Member States shall monitor the significant environmental effects of the implementation of plans and programmes in order, inter alia, to identify at an early stage unforeseen adverse effects, and to be able to undertake appropriate remedial action.

(2) In order to comply with paragraph 1, existing monitoring arrangements may be used if appropriate, with a view to avoiding duplication of monitoring.”

220. Article 10 has been transposed by Article 17 of the SEA Regulations which provides:-

“17. The competent authority shall monitor the significant environmental effects of implementation of the plan or programme, or modification to a plan or programme in order, inter alia, to identify at an early stage unforeseen adverse effects and to be able to undertake appropriate remedial action and, for this purpose, existing monitoring arrangements may be used, if appropriate, with a view to avoiding duplication of monitoring.”

221. The applicant accepts that this correctly transposes Article 10 of the SEA Directive.

222. As is pointed out in the Commission Guidance document, the Directive does not define monitoring and Article 10 does not contain any technical requirements about the methods to be used for monitoring. At para. 8.4, the Commission expresses the view that:-

“The methods chosen should be those which are available and best fitted in each case to seeing whether the assumptions made in the environmental assessment correspond with the environmental effects which occur when the plan or programme is implemented, and to identifying at an early stage unforeseen adverse effects resulting from the implementation of the plan or programme. It is clear that monitoring is embedded in the context of the environmental assessment and does not require scientific research activities. Also the character (e.g. quantitative or

qualitative) and detail of the environmental information necessary for monitoring depend on the character and detail of the plan or programme and its predicted environmental effects.” (emphasis added)

223. At para. 8.8, the Commission observes that Article 10 appears not necessarily to require that the significant environmental effects are monitored directly.

224. Article 10(1) requires that the member states shall monitor the significant environmental effects of the implementation of plans or programmes, but does not require that the monitoring shall be carried out by the authority adopting the plan or programme. One monitoring arrangement may cover several plans or programmes so long as sufficient information about the environmental effects of the individual plans or programmes is provided and the purposes and obligations of the Directive are fulfilled (para. 8.10 of Commission Guidance).

225. One of the purposes of monitoring identified in Article 10 is to identify unforeseen adverse effects of implementing the plan or programme. In the Commission’s view, “unforeseen adverse effects” is to be interpreted as referring to shortcomings of the prognostic statements in the environmental report (*e.g.* regarding the predicted intensity of an environmental effect) or unforeseen effects resulting from changes of circumstances, which have led to certain assumptions in the environmental assessment being partly or wholly invalidated (para. 8.12).

226. At para. 8.13, the Commission identifies another purpose of monitoring as being to enable the planning authority to undertake appropriate remedial action if monitoring reveals adverse effects on the environment which have not been considered in the environmental assessment. It points out that the Directive does not, however, necessarily require member states to modify a plan or programme as a result of monitoring. The Commission observes, importantly, that this is consistent with the general approach of

environmental assessment, *“which facilitates an informed decision, but does not create substantive environmental standards for plans or programmes.”*

227. Mitigation and monitoring are addressed in Chapter 9 of the SEA Environmental Report in respect of the draft NPF. The monitoring programme was developed based on the indicators selected:-

“... to track progress towards achieving strategic environmental objectives (SEOs) and reaching targets, enabling positive and negative impacts on the environment to be measured. The environmental indicators have been developed to show changes that would, as far as possible, be attributable to implementation of the draft NPF.”

228. At para. 9.2, the authors explain that, where possible, indicators have been chosen based on the availability of the necessary information *“and the degree to which the data will allow the target to be linked directly with the implementation of the draft NPF.”* In table 9.4, the nine strategic objectives in the NPF, which reflect the categories of information in Annex I of the SEA Directive, are set out. In respect of each strategic objective there is a target, an indicator and a data source. Table 9.4 presents the Environmental Monitoring Programme to track progress towards achieving SEOs and reaching targets, and includes the sources of the relevant information. The majority of information which has been identified as being required is already being actively collected under other plans and programmes, but not all of it has been gathered and reported on at a national level. The chapter then goes on to consider mitigation measures and recommendations.

229. The SEA Statement, which accompanies the NPF as adopted, addresses measures to monitor significant environmental effects of the implementation of the NPF in chapter 7. It sets out the obligation under Article 10 and says that coordination of monitoring of the

NPF will be carried out by the Department as the competent authority for the plan.

Paragraph 7.3 sets out the sources of information for monitoring:-

“Monitoring will focus on aspects of the environment that are likely to be significantly impacted by the NPF. Where possible, indicators have been chosen based on the availability of the necessary information and the degree to which the data will allow the target to be linked directly with the implementation of the NPF.”

Table 7.1 presents the environmental monitoring and reporting programme to track progress towards achieving the strategic environmental targets, and includes sources of relevant information.” (emphasis added)

230. Table 7.1 largely reproduces Table 9.4, save for Objective 6, climatic factors, which I consider further below.

231. The applicant complains that the SEA Statement contains no actual monitoring of the significant environmental effects of implementing the NPF, that it gives no details of how monitoring will occur, who will do it, when it will be done, how it will be used and how any identified unforeseen adverse environmental effects will be addressed. It says that the statement does not provide for any specific monitoring to be carried out by any designated body to measure effects against quantifiable criteria. It submits that the monitoring fulfils none of the legislative criteria other than to identify the Department as the coordinating body and, accordingly, was not adequate for the purposes of Article 10 of the SEA Directive.

232. The respondents say that the applicant is inviting the court to conduct a merits-based assessment of the adequacy of the information, which is inappropriate in an application for judicial review. They say that the obligation is to carry out monitoring, as opposed to an obligation to set out the monitoring measures that will be undertaken in any particular document or place. The respondents submit that the monitoring required can only be

carried out as and when the NPF is being implemented but that the applicant's challenge is based simply on the contents of the relevant documents adopted, not on any alleged actual failure to carry out monitoring during the subsequent implementation of the NPF. In this case, the respondents submit the applicant's challenge is premature.

233. In addition, the respondents point out that the NPF provides for the establishment of the Office of the Planning Regulator (the OPR) in s. 10.1, which relates to governance and oversight of the NPF. The Planning and Development (Amendment) Act 2018 established the OPR and confers on the OPR extensive powers for the purposes of ensuring that regional strategies, development plans and local area plans adopted are consistent with the NPF.

234. The respondents say that the SEA Directive does not require the level of specificity and granular detail which the applicant submits ought to have been set out in the SEA Statement.

235. The SEA Directive does not prescribe the exact arrangements for monitoring the significant environmental effects of the plan or programme, or for the frequency of the monitoring, its methodology or the bodies in charge of monitoring. The monitoring obligation in Article 10 must be assessed by reference to the particular plan or programme. The NPF is a very high-level plan. No project is authorised under the plan. The effects of implementing the NPF will all be indirect. The NPF is implemented through the formation of Regional Spatial Strategies, Development Plans, Local Area Plans and other sector specific plans such as the Healthy Ireland Implementation Plan 2016-2019, the National Clean Air Strategy and the National Mitigation Plan (since replaced by the Climate Action Plan 2021). Some effects, such as SEOs 8 and 9 (Archaeology, Architecture and Cultural Heritage and Landscape), can only really be dealt with at project level. As the Commission's guidance makes clear, Article 10 does not mandate that significant

environmental effects are monitored directly. It notes that the character and detail of the environmental information necessary for monitoring will depend on the character and detail of the plan or programme and its predicted environmental effects. In this case, the applicant has not identified any possible environmental effect which could arise from the implementation of the NPF which is not being monitored. Rather, it argues that the monitoring set out cannot monitor the unforeseen effects of implementing the NPF without regard to the strategic nature of the entire plan. Given the high-level of the plan, it is quite difficult to see how there could be the necessary causal link between the implementation of the plan and a significant adverse effect on the environment which requires to be monitored in order that appropriate remedial steps may be taken. Monitoring which is capable of revealing unforeseen adverse environmental effects is far more likely to occur in respect of lower level plans or in respect of individual projects.

236. Furthermore, I believe there is much to be said for the respondents' submission that the allegation is premature in that the obligation is to monitor the significant environmental effects of *implementing* the plan. The important role to be played by the OPR has been completely overlooked by the applicant in its case. This is a significant omission as the OPR will have an independent monitoring role advising the Minister, the government and the Oireachtas on implementation of the NPF under the statutory planning process through new Regional Spatial and Economic Strategies (RSEs), local authority planning processes and the decisions of An Bord Pleanála, and using a new set of indicators to be developed to assist effective monitoring. Thus, the monitoring of the implementation of the NPF is not solely that set out in the SEA Statement, it will also involve monitoring by the OPR. The trial judge noted this and held in para. 85 of his judgment that it was entirely reasonable that the SEA Statement should make provision for an overall monitoring position to be held by the Department relying on the expertise and experience of the bodies which have

specific jurisdiction over the monitoring of various aspects, such as air quality, water quality etc., with the Department coordinating the monitoring of the various areas set out in Table 7.1. He noted that there was provision that the Department “*will take action if unforeseen adverse effects emerge*”. Given the nature of the plan and the unforeseen effects referred to, it is simply not possible to identify any remedial steps which could/might be taken.

237. In addition, at para. 86, the trial judge referred to the fact that individual projects will require planning permission which will be subject to assessment by the relevant planning authorities and the relevant assessments will be conducted in respect of each individual project at that level, which will incorporate the views of statutory bodies such as the EPA in relation to water quality, air quality and other such matters.

238. In these circumstances, I am not satisfied that the applicant has established that there was a failure by the respondents to comply with the requirement in Article 10(1) or Regulation 17 of the SEA Regulations to monitor the significant environmental effects of implementing the NPF. I agree with the decision of the trial judge on this point. I am not satisfied, on the facts in this case, that an issue arises which requires this court to make a preliminary reference to the CJEU pursuant to Article 267 of TFEU, as was requested by the applicant.

Issue Four: Failure to assess the effects of the NPF on climate change

239. Article 5(1) and Annex I(f) of the SEA Directive requires that the SEA Environmental Report identifies, describes and evaluates the likely significant effects on the environment, including “*climatic factors*” of implementing the plan or programme. The applicant notes that the SEA Environmental Report contains an extensive section on the inadequacy of the national response to greenhouse gas emissions and addresses current

emissions projections and the effect of the National Mitigation Plan⁴. While there are many references to climate change in the SEA Environmental Report, the applicant says that, nonetheless, it fails to engage with the key issue: the likely effect on climate change of implementing the NPF.

240. In its written submissions, the applicant refers to the respondents' evidence that 20% of the development which would occur "*under the auspices of the NPF*" would be on a near zero emissions basis. At para. 167 of the submission it argues:-

*"It may be that the NPF will not affect 80% of the built environment and that it will, therefore, have very little effect on climatic factors. What is required by law is that the Environmental Report **actually say so**. It is important to bear in mind that the Environmental Report is the document put out for public consultation. It should state plainly what the effect of the preferred option (and reasonable alternatives) on climate factors would be, so that the views of the public on this crucial issue can be given."* (emphasis as in original)

241. The applicant argues that the legal requirement is accordingly not met; this is a legal point and not a challenge on the merits.

242. The respondents say that the SEA Environmental Report deals extensively with the existing baseline in terms of air quality and climate, including greenhouse gas emissions, under para. 5.2.5, pp. 85-90. In Chapter 8, the likely significant effects of the implementation of the preferred option on the relevant environmental factors, including climate and climate change are addressed in detail by reference to each national policy objective in the NPF. They submit that this establishes that the report deals with a matter which is required to be addressed under the SEA Directive by Article 5(1) and Annex I. They submit, "*[i]n accordance with almost two decades of consistent and established*

⁴ Since quashed by the Supreme Court and replaced by the Climate Action Plan 2021.

authority” that “*that concludes the matter*”, citing McKechnie J. in *Kenny v. An Bord Pleanála (No. 1)* [2001] 1 I.R. 565 where he held that:-

“19. Once the statutory requirements have been satisfied I should not concern myself with the qualitative nature of the Environmental Impact Study or the debate on it had before the inspector. These are not matters of concern to this court.”

243. Since the NPF was first formulated the worldwide interest in climate change, grounded in growing scientific consensus and spurred on by protest movement from the younger generations, has led to even greater focus and intensity in the setting of higher environmental protection targets at international level. It is quite likely that the environmental standards/data related to climate change that informed the formulation of the NPF have been or will be surpassed over time. However, the NPF itself is at a high level, and its treatment of climatic factors is not fixed in stone. Its approach – particularly the integration of standards/targets into the planning system - allows for modernisation and change, and for higher standards to be incorporated into the planning system over the course its 20 year life cycle, such that it will be open to planning authorities and those responsible for regulating harmful emissions to incorporate higher standards into development permissions at local or regional level.

244. The issue of climate change is addressed in the NPF. At p. 147 of the NPF under “Transition to Sustainable Energy” and “Green Energy”, the first national strategic outcome is “*[d]eliver 40% of our electricity needs from renewable sources by 2020 with a strategic aim to increase renewable deployment in line with EU targets and national policy objectives out to 2030 and beyond.*” Thus, the NPF commits the state to responding to EU and national changes in standards or targets in respect of renewable energy and is not inextricably bound to those fixed in 2018 based on data available at that time.

245. National Policy Objectives 54 and 55 are also relevant to this discussion. NPO 54 is to reduce our carbon footprint by *“integrating climate action into the planning system in support of national targets for climate policy mitigation and adaptation objectives, as well as targets for greenhouse gas emissions reductions”*. NPO 55 is to *“[p]romote renewable energy use and generation at appropriate locations within the built and natural environment to meet national objectives towards achieving a low carbon economy by 2050”*. This allows climate action and national targets to evolve over time. Most importantly, they are to be integrated into the planning system and thus to impact future planning decisions.

246. The fundamental policy position of transitioning to a competitive, low-carbon, climate resilient and environmentally sustainable economy by 2050 is stated clearly on p. 87 of the SEA Environmental Report:-

“The European Council, in the context of necessary reductions according to the IPCC by developed countries as a group, reconfirmed in February 2011 the EU objective of reducing [greenhouse gas] emissions by 80-95% by 2050 compared to 1990 levels. To ensure that Ireland can effectively and equitably contribute to the EU objective of reducing [greenhouse gases] by 80-95% and for the purpose of compliance with EU law, it has been necessary to develop a low-carbon development strategy for the period to 2050.

The National Policy Position on climate action sets a fundamental national objective to achieve the transition to a competitive, low-carbon, climate-resilient and environmentally sustainable economy by 2050”.

It is in this context that the applicant’s challenge to the NPF is to be assessed.

247. I am satisfied that the submissions of the respondents are correct and that the substance of the submission of the applicant invites the court to engage with the merits of

the issue. It is established law that once the statutory requirements have been satisfied – in this case, the decision maker has considered the relevant matters – that “*concludes the matter*”. The adequacy of the assessment of the matters is not a matter for this court.

248. Furthermore, the approach of the applicant is one of excessive formalism, which has been condemned by Advocate General Kokott, and rejected in England and Wales and in the High Court here. The challenge to the NPF on the basis of an alleged failure to assess the effects of the implementation of the NPF on climate change was correctly rejected by the trial judge, in my opinion, and I would refuse the appeal on this ground.

Issue Five: The National Development Plan

249. The applicant said that the NDP should have been subjected to assessment under the SEA Directive and the Habitats Directive because the NDP is so intimately connected with the NPF that the two simply cannot be disentangled. Once it was accepted, as it was, that the NPF is a plan which requires SEA and AA, then the same necessarily must apply to the NDP. Wrongly, according to the applicant, it was not so assessed.

250. On appeal, the applicant no longer maintained the argument that the NDP as a standalone plan required assessment under the SEA Directive and the Habitats Directive. Its position was that because the NPF required to be subject to AA and SEA, and the NDP is so intertwined with the NPF, the NDP necessarily required to be subject to AA and SEA also.

251. The respondents rejected the fundamental premise that the NDP is inextricably linked with the NPF. They submitted that, on its own terms, it is a “*capital plan*”, “*a budget and financial plan*”, prepared by the Department of Finance, Public Expenditure and Reform, which sets out investment priorities that will underpin the implementation of the NPF:-

“The National Development Plan, as a budget and financial plan, is not part of the physical planning process.” (para. 1.12 of the NDP)

252. The respondents said that the plans are complimentary because the NPF sets out the strategy, policies and objectives for the development of land in the state whereas the NDP deals with the capital funding for the implementation of that national *“framework”*. The investment enables the implementation of the strategy.

253. The applicant’s case on this point succeeds or fails on its argument that the NDP is, as a matter of law, part of the NPF. Pursuant to the definitions in Article 2, the SEA Directive applies to plans or programmes which are *“required by legislative, regulatory or administrative provisions”*. While the CJEU held in *Inter-Environmental Bruxelles ASBL v. Région de Bruxelles-Capitale* (Case C-567/10) that plans which are not required to be adopted but whose adoption, where it occurred, was covered by legislation come within the definition, this does not assist the applicant, as the NDP was neither required to be adopted pursuant to any statutory provisions nor was the procedure for its adoption prescribed by national law. Therefore, it is not a plan or programme within the meaning of the SEA Directive. If it is not a plan or programme as defined, then the Directive does not apply to its adoption.

254. The point is reinforced by Article 3(8) which expressly excludes *“financial or budget plans”* from the scope of the SEA Directive.

255. The NDP identifies major infrastructure works which will be funded, such as specific roads, Metrolink in Dublin, expanding the DART, a second runway in Dublin Airport and so forth, but this does not make it a development plan or programme rather than a financial or budgetary plan. Nowhere in the NDP are rules or criteria for the development of land to be found: they are all in the NPF. Thus, there is no question of any matter requiring assessment under the SEA Directive which has not been assessed. Each individual project

if and when it comes to be developed, will be subject to EIA and the application for development consent will be assessed in the light of the relevant development plans, including the NPF. While the NDP makes strategic choices around certain projects and certain types of projects – for example, focussing on roads rather than on rail – it does so in the context of the NPF and the framework established by the NPF. But I am not persuaded that the fact that a budgetary plan identifies particular projects which are regarded as compatible with the NPF means that, as a result, the budgetary plan requires to be assessed under the SEA Directive and the Habitats Directive in conjunction with the NPF when previously it required no such assessment.

256. Unlike the NPF, the NDP is not a plan which has been adopted pursuant to any law, nor is it required by any regulatory or administrative requirement. The NPF replaced the NSS in s. 2 of the PDA 2000 (as amended). A further legislative step would be required if the government wish to alter the provisions of the NPF. No such constraints apply to the NDP. It is open to any government to alter the budgetary priorities, either that it previously adopted or that its predecessor adopted at an earlier stage, and to adopt a new NDP. This has in fact occurred between the hearing of this appeal and the delivery of this judgment. The fact that infrastructure set out in the NDP may be, or even is, required to facilitate the full implementation of the NPF does not thereby render the NDP a constituent element of the NPF.

257. In *Kavanagh v. Ireland* the status of the National Development Plan of January 2007 was considered. Smyth J. held as follows:-

“Unlike previous Development Plans, which were required by EU regulations to drawdown EU structural funds, the 2007 NDP is not required by any legislative, regulatory or administrative requirement. The NDP is essentially a financial plan or framework setting out what the Government sees as the investment priorities for the

next seven years, and how resources can be invested amongst different investment priorities. It is not designed or intended to set any kind of framework for granting or refusing of permissions for the carrying out of projects or to have any influence on the physical planning process (even if planning authorities or An Bord Pleanála may note it or do have regard to it i.e. the NDP) in their decisions. I am satisfied and find as a fact that it is essentially a financial or budgetary plan and even if, as is the case, a project of national significance is mentioned in the NDP such is for administrative purposes as indicative of the type of project that would be financed out of a particular financial “envelope”.

...

I am satisfied and find as a matter of fact that the NDP was and is not intended to set a framework for development consent or planning permission but in the application or determinations of those empowered by law to so determine on some occasions the NDP may be noted and may or may not weigh in favour or against such consent or permission which fundamentally would have to rest on strict planning grounds and reasons.”

The applicant did not address this authority in submissions to the court or advance any reason why the trial judge erred in following it.

258. In my judgment, the NDP is a free-standing budgetary plan which sets out investment priorities which are compatible with the objectives of the NPF, but which may never be constructed. If the NPF were replaced, the NDP would not be impacted – any particular project identified would still require planning and other necessary permissions before it could be developed. It follows that the NDP is not an integral part of the NPF or the other side of the coin, in counsel’s phrase. Articles 2 and 3(8) of the SEA Directive

and *Kavanagh* lead to the conclusion that it did not require to be assessed pursuant to the provisions of the SEA Directive.

259. Likewise, it was not required to be subjected to AA under the Habitats Directive.

Any project identified in the NDP will require planning permission and, at that stage, will be subject to AA. The trial judge found that the NDP was not required to be subject to AA and I agree with his decision on this point.

260. For these reasons, I would reject this ground of appeal.

Duty of candour

261. The applicant complained that the respondents had acted with a lack of candour in their dealings with the applicant and it was submitted that they had breached a duty of candour owed to the court as identified by the High Court in *Murtagh v. Judge Kilrane* [2017] IEHC 384.

262. In *O'Neill v. Governor of Castlerea Prison* [2004] 1 I.R. 298 Keane C.J. held at p. 316 of the report that:-

“The argument on behalf of the applicants, that in judicial review proceedings a respondent should disclose to the court all the materials in its possession which were relevant to the decision sought to be impugned, is well-founded, although it would doubtless not require the respondents to disclose material in respect of which in a discovery process they would be entitled to claim privilege.”

263. In *Murtagh v. Judge Kilrane*, Barrett J. considered a number of English authorities which had been decided both before and since the decision of the Chief Justice in *O'Neill*. He also relied on Fordham's Judicial Review Handbook (a British textbook) and adduced nine principles from these authorities as follows:-

“(1) In judicial review proceedings a respondent should disclose to the court all the materials in its possession which are relevant to the decision sought to be impugned;

this duty does not require the respondents to disclose material in respect of which in a discovery process they would be entitled to claim privilege. (O'Neill).

(2) Save as referred to in O'Neill, there is no duty of general disclosure in judicial review proceedings. There is, however, a very high duty on public authority respondents to assist the court with full and accurate explanations of all the facts relevant to the issue/s the court must decide. (Quark).

(3) The said duty (often referred to as a 'duty of candour') springs in part from the fact that the modern development of judicial review has created a new relationship between the courts and public bodies, being one of partnership based on the common aim of maintaining the highest standards of public administration. (Huddleston).

(4) The object of a public body in judicial review proceedings is not to win litigation at all costs but to assist the court in reaching the correct result and thereby to improve standards in public administration. (AHK (2015)).

(5) Proceedings for judicial review should not be conducted in the same manner as hard-fought commercial litigation. A respondent authority owes a duty to the court to cooperate and to make candid disclosure, by way of affidavit, of the relevant facts and (so far as they are not apparent from contemporaneous documents which have been disclosed) the reasoning behind the decision challenged in the judicial review proceedings. (Belize Alliance).

(6) The notion that it is not for a public body to make out an applicant's case for him is only partially correct. It is for the applicant to satisfy the court of his entitlement to judicial review and it is for the respondent to resist his application, if it considers it unjustified. But it is a process which falls to be conducted with all the cards face upwards on the table and the vast majority of the cards will start in the public body's hands. (Huddleston).

(7) Put shortly, the duty of candour which rests on a respondent in judicial review proceedings to make full and fair disclosure of relevant material embraces (1) due diligence in investigating what material is available, (2) disclosure which is relevant or assists the claimant, including on some as yet un-pleaded ground, and (possibly) (3) disclosure at the permission stage if permission is resisted (‘possibly’ because point (3) is not at issue in the within application) (Fordham).

(8) The purpose of disclosure is to explain the full facts and reasoning underlying the decision challenged, and to disclose relevant documents, unless, in the particular circumstances of the case, other factors, including those which may fall short of public interest immunity, may exclude their disclosure (Bancourt, AHK (2012)).

(9) The duty of candour is largely self-policing (which is why, in the neighbouring jurisdiction, anxious concern is understandably expressed if and when it transpires that public bodies have failed properly to discharge the duty arising). (Fordham).”

264. The extent of a duty of candour owed by a respondent in judicial review proceedings was not the subject of any detailed debate or submissions in the hearing before this court. For this reason, I refrain from commenting on whether the principles thus set out represent the position under Irish law, save for those principles which derive from the decision of the Supreme Court in *O’Neill* (Principle 1 and part of Principle 2). I expressly refrain from endorsing the nine principles as representing the law in this jurisdiction. The matter should await another case in which the issues are fully debated.

265. However, it is appropriate to observe that there were aspects of the conduct of the respondents in this matter, both before and during the litigation, which leaves a lot to be desired. In the first instance, the respondents’ solicitors failed to reply to the legitimate queries raised in the letter of 5 April 2018, save to say that the correspondence had been referred to the relevant section in the Department and that they would revert as soon as

possible. In fact, neither the Department nor the solicitors did revert. Likewise, there was no reply to the letter of 9 April 2018. No explanation for this failure was put forward to explain or justify this behaviour.

266. It seems clear to me that the response of the respondents to the issue posed in the correspondence concerning AA and the AA determination to be made before the NPF was adopted, was to act to rectify, if possible, any frailties in the decisions previously taken. First, the Minister adopted a written AA determination dated 14 May 2018 (coincidentally the date upon which the applicant was granted leave to seek judicial review in these proceedings). Thereafter, on 29 May 2018 the government decided to adopt the AA Determination made by the Minister as competent authority for the purposes of Article 6(3) of the Habitats Directive and formally to reaffirm the previous government decision of 16 February 2018 to adopt and publish the NPF as a strategy intended to replace the NSS for the purposes of s. 2 of the PDA 2000, as amended.

267. While it is, of course, appropriate for a public authority to correct errors in the process whereby formal decisions were taken if this is possible, the respondents did not accept that the decision of the 16 February 2018 was flawed, despite the AA determination of 14 May and the decision of 29 May 2018. In effect, the respondents have sought to have it both ways, to maintain the validity of the process leading to the decision to adopt the NPF and the NDP on 16 February 2018, while also relying on the validity of the decision of 29 May 2018. To my mind, this was not tenable.

268. Furthermore, the affidavits filed on behalf of the respondents failed to address or clarify many significant issues which ought to have been addressed with the result that both the High Court and this court were left somewhat in the dark on crucial points. This, of course, is aside from the difficulty as to the identity of the deponent which I have

discussed earlier. Nothing I state at this part of the judgment should be taken as any personal criticism of Mr. Hogan.

269. There was no document recording the decision of the government on 16 February 2018 adduced in evidence. It was never clarified whether such a document was ever drawn up or whether it was simply not produced to the court. This problem became acute as Mr. Hogan gave (inadmissible) evidence as to what was considered by the government prior to reaching this decision, although there were no minutes of what occurred in cabinet placed in evidence before the court.

270. Of even greater concern, the record of the decision of 29 May 2018 was not even exhibited by any deponent on behalf of the respondents. It was furnished to the solicitors for the applicant, as I have said, and it was the applicant's deponent who exhibited the document, not the respondents. At the very least, this was careless.

271. Once objection was taken to Mr. Hogan's hearsay evidence, no explanation was ever presented to the court as to why an affidavit could not be sworn by the secretary to the cabinet.

272. In addition, there was a lack of clarity as to when particular documents came into existence, which was exacerbated by reason of the fact that most documents were not dated. There was a reference to and reliance upon a draft SEA Statement dated 15 February 2018 which was, in fact, never proved or adduced in evidence.

273. All in all, there was a distinct lack of clarity as to what had actually occurred when it was incumbent on the respondents to bring clarity to all of these issues. In summary, while I accept that litigation, including judicial review proceedings, is adversarial, nonetheless, public authority respondents to judicial review proceedings ought to bring greater clarity and candour to their response to the proceedings than occurred in this case.

274. It is also appropriate to comment on the conduct of the applicant, particularly as it has criticised the conduct of the respondents. As I have set out, there was extensive consultation since 2016 with the public, in addition to statutory consultees and other stakeholders, prior to the final adoption of the NPF and the NDP. The various documents were all published and made available online. The applicant has not suggested that it was not afforded sufficient opportunity to consider the documents or to comment on them.

275. The applicant made a submission on 10 November 2017, but it made no reference to crucial issues which were central to the appeal. It did not object to the SEA Environmental Report on the basis that it failed to assess the reasonable alternatives in a comparable manner to the preferred option, though that was a major plank of its case on appeal, and it did not assert that the NDP was required to be subject to AA and SEA on the grounds that it was an integral part of the NPF, which was the key argument advanced to this court to quash the NDP.

276. This approach was unfair to the respondents, at the very least, and inimical to good decision making. One of the objectives of public consultation is to permit the public to highlight defects in the process they believe have occurred before a final decision is taken so that any such defects may be corrected and the risk of inadvertently reaching an invalid decision thereby avoided. It is incumbent upon a party who chooses to participate in a consultative process (as on one who files objections or observations in a planning process) to raise any points at the earliest possible time in the process. This is conducive to good administration and ought to reduce the number of legal challenges to administrative decisions. This court cannot endorse a practice where a point is raised for the first time in proceedings challenging a final decision which was not, *but which could have been*, raised before a decision was reached.

277. This is precisely what occurred in this case and it was not appropriate, even where the application for judicial review is brought within the time limits established in the Rules of the Superior Courts. If the applicant wished to raise either of these points it had ample opportunity to do so. The factual basis for the argument it advanced in these proceedings was clear from the SEA Environmental Report. It has never suggested that it was not in a position to argue these issues in its submission of November 2017, nor given any explanation why this was not done. A party may not reserve or withhold submissions which could and ought to be made during a public consultation prior to the adoption of a decision to the hearing of a challenge to the validity of the decision. Such conduct may be relevant to the exercise of the discretion of the court where an applicant succeeds in its argument but does not arise for consideration in these proceedings.

Conclusion

278. The NPF was required to be subject to AA pursuant to the Habitats Directive and SEA under the SEA Directive. There was no AA determination for the purposes of the Habitats Directive prior to the adoption by the government of the NPF on 16 February 2018 and, accordingly, that decision was invalid and ought to be quashed.

279. The Minister made an AA determination on 14 May 2018 which satisfied the requirements of the Habitats Directive. The government was the public authority adopting the NPF and it was required to reach an AA determination prior to adopting the plan. The government was a public authority within the meaning of the Habitats Regulations and thus was empowered under domestic law to make the AA determination necessary for the adoption of the NPF. On 29 May 2018, the government adopted the Minister's AA Determination prior to deciding to reaffirm the decision of 16 February 2018 to adopt the NPF. This was a new decision to adopt the NPF and it complied with the requirements of the Habitats Directive.

280. The NPF was screened for SEA and it was determined that the NPF was a plan which should be subject to strategic assessment under the SEA Directive. Article 5(1) of the SEA Directive requires that the likely significant environmental effects of the preferred option and the reasonable alternatives are identified, described and evaluated in a comparable way. The six options, comprising the preferred option and five reasonable alternatives, were assessed in an identical manner in Chapter 7 of the SEA Environmental Report and the reasons for preferring Option 2 were set out. There was no failure to assess the reasonable alternatives in a comparable fashion.

281. The level of detail to be provided is that which is “reasonably required”. What is reasonably required must be assessed by reference to the plan or programme in question: less detail may be required when assessing a high-level plan such as the NPF. The assessment of what is required involves the exercise of evaluative judgment which is primarily a matter for the decision maker. The court will only interfere with a decision of this nature on conventional public law grounds. No such grounds were made out by the applicant.

282. The criticism of the evaluation of the options in Chapter 7 was misconceived. It failed to give due weight to the detailed discussion, analysis and explanations in Chapters 3, 6 and the first part of Chapter 7, and focused unduly on what was the culmination section of a very lengthy, detailed document.

283. The fact that the preferred option was subject to further strategic assessment in Chapter 8 does not alter the validity of the process of assessment of the reasonable alternatives.

284. The SEA Environmental Report and the SEA Statement comply with the requirement in Article 10 of the SEA Directive to monitor the unforeseen adverse effects of the implementation of the NPF on the environment.

285. The effects of the NPF on climate change were assessed in the SEA Environmental Report. The applicant has not shown that such assessment was irrational and thus, the adequacy of the assessment is not a matter for this court.

286. The NDP is not a plan or programme to which the SEA Directive or the Habitats Directive applied; it is a budgetary plan and thus, expressly excluded from the provisions of the SEA Directive. It is not so related to the NPF that it is an integral part of the NPF and thus, subject to the same assessment obligations as the NPF.

287. Accordingly, I would quash the decision of 16 February 2018 of the government to adopt the NPF, but otherwise I would refuse the appeal and affirm the decision of the High Court.

288. There is no question of the interpretation of EU law which requires clarification by the CJEU and which is necessary to the resolution of this case, accordingly, I would refuse the request to refer any issue raised to the CJEU for a preliminary reference under Article 267 of TFEU.

289. Haughton and Murray JJ. have indicated their agreement with this judgment.

290. This judgment is being delivered electronically. The case will be listed for a short hearing on the form of the order and the costs of the appeal. Short written submissions on costs, of no more than 1,500 words should be furnished to the court and exchanged between the parties two days in advance of the hearing, the date of which will be notified to the parties.