THE HIGH COURT
JUDICIAL REVIEW

[2022] IEHC 5
[2021 No. 419 JR]

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTIONS 50, 50A AND 50B OF THE PLANNING AND DEVELOPMENT ACT 2000, AS AMENDED

BETWEEN

DUBLIN CITY COUNCIL

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

JUDGMENT of Humphreys J. delivered on Friday the 7th day of January, 2022

1. In this judicial review, Dublin City Council challenges the refusal by An Bord Pleanála to approve an amendment to a planning scheme for North Lotts and Grand Canal Dock Strategic Development Zone (SDZ).

2. The parties are agreed that there should be an order for *certiorari*, and for remittal of the matter back to the board. In effect, everything in the order is agreed - apart from a couple of words, namely the date immediately prior to which the remittal should be effective. The options are either 16th September, 2019 (the board's position) or 16th March, 2021 (the council's position). That ostensibly modest question is the issue for determination here.

3. Rather than plunge straight into the facts, the complex background to the present case makes it necessary to set out the statutory scheme first. Having done so, the most salient factual points should emerge more clearly.

4. The procedure for approval of amendments to a planning scheme is set out in s. 170A of the Planning and Development Act 2000, and involves eight distinct steps as follows (although not always necessarily in exactly the following order).

Step 1 - application for amendment

5. Subsection (1) of s. 170A allows the planning authority to apply to the board for approval of an amendment to a planning scheme. That may be preceded by a non-statutory consultation process.

Step 2 - decision as to whether a material change is involved

6. Subsection (2) provides that where an application under sub-s. (1) has been made, the board shall decide whether the making of the amendment would constitute the making of "a material change to the planning scheme."

7. We can leave aside for present purposes what happens if the board decides that the change is of a minor nature (see sub-s. (4)(a)) as this did not arise here.

Step 3 - decision as to whether s. 169 should be applied

8. Subsection (3) provides that, where certain criteria are not satisfied by the amendment, then the board must require the planning authority to pursue the amended scheme under s. 169 of the 2000 Act (which relates to procedures for the adoption of a scheme in the first place) rather than s. 170A (which relates to amendments). It should be noted under this

heading that what I am calling step 3 does not necessarily have to be taken at this point in the process and could be postponed to the final decision: see sub-s. (4)(b).

Step 4 - determination as to whether there are significant effects on the environment or on a European site.

9. Subsection (5) provides that before making a determination under the relevant provision of the section, the board shall establish whether the amendment or any alternative amendment the board is considering is such that it would be likely to have significant effects on the environment for the purposes of directive 2001/42/EC relating to strategic environmental assessment (SEA) or on a European site under the habitats directive 92/43/EEC and "for that purpose, the Board shall have reached a final decision as to what is the extent and character of any alternative amendment, the making of which it is also considering."

10. One thing that is clear from subsection (5) is that the extent and character of any alternative amendment the making of which the board is considering is final and not reversible because that is what the subsection says.

Step 5 - in the event of there being significant effects on the environment or a European site, a requirement to conduct a full SEA or AA

11. Subsection (6)(b) provides that if the board determines that the making of the amendment or any alternative amendment that it is considering is likely to have significant effects on the environment or a European site then it "shall require the planning authority to undertake a strategic environmental assessment or an appropriate assessment or both". If that is not the case, the board would proceed with the process (sub-s. (6)(a)).

Step 6 - requirement for public notice of the amendment

12. Subsection (7) provides that, before making a determination under the relevant provision of the section, the board shall require the planning authority to inform the Minister and the prescribed authorities of the proposed amendment and publish notice of the amendment in one or more newspapers circulating in the area. Every such notice shall state the reasons for the amendment and the opportunity for written submissions and crucially "that a copy of the proposed amendment, along with any assessment undertaken according to *subsection (6)(b),* may be inspected at a stated place or places and at stated times during a stated period of not less than 4 weeks".

13. An absolutely critical point in the sequence is, as the council's submission correctly states, that "[t]he statutory scheme requires the Board's AA and SEA Screening determination to be made before the statutory public consultation process under s. 170A(7)-(9) – as, if appropriate assessment (AA) and/or SEA is required, the AA and/SEA documents prepared by the Council inform the content of the public consultation notice and subsequent Council report." This clearly follows from the reference to sub-s. (6)(b) above. It does not totally help that the subsections within s. 170A are drafted otherwise than in the chronological sequence of the steps involved. A chronological flow would generally be a preferable form of drafting. But when looked at closely the sequence is clear for these purposes.

Step 7 - the council report

14. Under sub-s. (8), following the close of the time for public submissions, the planning authority must prepare a report for the board on foot of that process. Sub-section (9) provides that the report shall address the issues raised and give a response of the planning authority and shall also "include, where and if required for the purposes of subsection (6)(b), either or both – (i) the environmental report and strategic environmental assessment, and (ii) the Natura impact report and appropriate assessment, of the planning authority". Subsection (10) requires the board to have regard to any report so prepared.

Step 8 - final decision

15. Leaving aside cases of minor change, the final decision is made under sub-s. (4)(b) where the amendment constitutes the making of a material change, but is within the criteria set out in subsection (3)(b) and so does not have to be subjected to the more onerous procedures for making a planning scheme in the first place under s. 169. Under such circumstances, subject to sub-s. (5), the board "may approve the making of the amendment to the planning scheme with such amendment, or an alternate amendment, being an amendment that would be different from that to which the request relates but would not represent, in the opinion of the Board, a more significant change than that which was proposed."

Steps taken in this case

16. With that statutory sequence firmly in mind, it is a much more comprehensible task to isolate the material facts out of the morass of material here.

Step 1

17. The application for an amendment was submitted to the board by the council on 31st May, 2019.

Step 2

18. The decision as to whether the change was material was taken in the board's direction of 26th September, 2019 and was to the effect that the amendments did constitute a material change.

Step 3

19. A decision regarding whether s. 169 should apply was also taken in that same direction to the effect that the proposed amendments did fall within the criteria in s. 170A(3)(b) and thus s. 169 did not have to be applied.

Step 4

20. We then come to the decision on whether there were significant effects on the environment or any European site, which is where the board now claims that things went wrong.

21. The inspector's report dated 16th September, 2019 clearly stated that neither an AA nor an SEA was required. The report couldn't have been more helpful in identifying the question – section 6.0 is headed "Section 170A(4)(a): Do the proposed amendments need to be the subject of SEA and/or AA?". The inspector states: "[i]t is reasonable to conclude that on the basis of the information on the file, which I consider adequate in order to issue a screening determination, that the proposed amendment, individually or in combination with

other plans or projects would not be likely to have a significant effect on European Site No. 003000, or any other European site, in view of the site's conservation objectives, and a Stage 2 AA is not therefore required" (para. 6.1.6), and given "the nature and scale of the proposed amendments, it is considered that the proposed amendments would not be likely to have significant effects on the environment and so a SEA of this amendment is not necessary" (para. 6.1.8).

22. The board's direction of 26th September, 2019 notes unsurprisingly that "[t]he submissions on this file and the Inspector's report were considered at a Board meeting held on 25/09/2019." The direction expressly states that the amendments would not "be likely to have a significant effect on the integrity of Natura 2000 sites in the vicinity, either individually or in combination with other plans or projects". The wording of the direction unfortunately does not expressly mention SEA, but the language of the actions proposed mirrors the recommendation of the inspector overall.

Step 5 - requirement to conduct a full SEA and AA

23. Importantly, no actual requirement whatsoever was imposed on the council to conduct an SEA or AA, which makes no sense other than as consistent with an implied adoption of the inspector's view that no SEA was required as well as of course the explicit adoption of her view that no AA was required.

Step 6 - public notice

24. The board direction of 26th September, 2019 required the council to send notice of the amendments to the Minister of the prescribed authorities and to publish such notice to the public. The board issued a letter of 15th October, 2019 to the council formally requiring such notices to be issued. As noted above, public consultation must be on the basis of the decision taken in relation to whether full SEA and AA is required. So again, the decision to proceed to public consultation without full SEA or AA can only be consistent with an implied adoption of the inspector's view that no full SEA was required as well as the adoption of the view that there need be no full AA.

Step 7 - council report

25. Following publication of notice of the amendment, 29 submissions were made to the council. The council prepared a public consultation report in December 2019 in which it concluded that no further amendments were required. A copy of the report and of the submissions were sent to the board in the same month.

Step 8 - the final decision

26. The board appointed another inspector who prepared a supplementary report dated 10th March, 2020. This report noted in particular as follows:

    (i). That the board, in September 2019, did not require that the proposed amendments be the subject of either SEA or AA (para. 1.8).

    (ii). That the amendments are acceptable with regard to the planning policy (sections 4 and 5).

(iii). That the amendments "would accord with the Development Management Principles set out in Section 3.1 and, insofar as they are applicable to the PS [Planning Scheme] as a masterplan for the SDZ, the Development Management Criteria set out in Section 3.2 of the UDBH [Urban Development and Building Height] Guidelines. Thus, under SPPR [Specific Planning Policy Requirement] 3(B) of these Guidelines, these amendments, subject to the omission from proposed amendment ref. no. 5 of the reference to a reduction in the height of Sub-block 3D, would ensure that the Government policy of increasing building height in appropriate urban locations is met" (para. 6.1).

(iv). The inspector thus recommended that: "under Section 170A(4)(b) ... the Board approve the proposed amendments, subject to the omission cited in the conclusion above ..." (para. 7.0).

27. There was then a long and unexplained delay of over one year during which nothing identifiable happened, at the end of which the board issued a direction on 16th March, 2021 stating that it had decided not to approve the amendments.

28. The council's position on the present application is that it is only at this latter point that matters went wrong, so the process should be remitted to immediately prior to that direction.

29. The "Note" contained in the direction contains the erroneous statement that "the Planning Authority indicated that an SEA of the proposed amendments to the 2014 scheme was submitted". That is a fundamental misunderstanding of the material that was prepared by the council. It comes out of the blue as the very first time such a suggestion entered into the matter and, as appears from the foregoing narrative, completely contradicts how matters had been viewed and dealt with by all actors including the board, up to that point. The direction also suggests that a comprehensive SEA and AA would be required, thus revisiting previous decisions without any accurate understanding of the process up to that stage.

30. The board's formal order followed on 23rd March, 2021. That stated that "no Appropriate Assessment appeared to have been carried out", and that this would be required, which is a very confused position given the procedural history and especially the explicit decision by the board that this was not required. That conclusion, and the fact that the board only managed to address the matter in terms of what "appeared" to be the case, despite the position having been previously expressly set out, is unfortunate in that it seems to incorrectly condemn the council for alleged failures, without accurately checking clearly available facts that appeared on the board's own record.

31. The decision also goes on to condemn the council's SEA screening report for not being a comprehensive and complete SEA, but it could never have been intended as such. The allegation that this document is "deficient" is a misunderstanding of the process that had been engaged in prior to that point. We will return to all that in more detail later in addressing the council's counter-arguments. The order concludes with the boot-strapping

claim that the board had had regard to all matters to which it was required to have regard. That adds nothing, even if it were true, which unfortunately it isn't.

32. The primary relief sought in the present proceedings is *certiorari* of the order of 23rd March, 2021 but it is important to note that in relation to core grounds 1 to 5 of the council's amended statement of grounds, all of the core grounds arose at the point of the board's direction and decision in 2021 and not before then.

33. The board wrote to the council on 21st October, 2021 conceding an order of *certiorari* on the purported basis that it had misconstrued the SEA screening report and had failed to make an SEA screening determination. The first point is certainly correct, although that is not the only error on the face of the board's 2021 material. The second allegation, to the effect that the board had failed to make an SEA screening determination, is not accepted by the council. Consequently, the parties disagree as to the point in time to which the process should be remitted.

Law in relation to remittal

34. The law in relation to remittal following *certiorari* is not normally massively contentious. The principles emerge from cases such as *Usk and District Residents Association Ltd. v. An Bord Pleanála* [2007] IEHC 86, [2007] 2 I.L.R.M. 378, *Christian v. Dublin City Council* [2012] IEHC 309, [2012] 7 JIC 2704 (Unreported, High Court, Clarke J., 27th June, 2012), *Clonres CLG v. An Bord Pleanála* [2018] IEHC 473, [2018] 7 JIC 3130 (Unreported, High Court, Barniville J., 31st July, 2018)*, Fitzgerald v. Dún Laoghaire Rathdown County Council* [2019] IEHC 890, [2019] 10 JIC 2002 (Unreported, High Court, Barniville J., 20th December, 2019*), Barna Wind Action Group v. An Bord Pleanála* [2020] IEHC 177, [2020] 4 JIC 1701 (Unreported, High Court, McDonald J., 17th April, 2020), *Kemper v. An Bord Pleanála* [2021] IEHC 281, [2021] 4 JIC 2704 (Unreported, High Court, Allen J., 27th April, 2021), *Cork Harbour Alliance for a Safe Environment v. An Bord Pleanála* [2021] IEHC 629 (Unreported, High Court, Barniville J., 1st October, 2021). Among these principles is that the court should aim to undo the consequences of any wrongful or invalid act, but should go no further, and so should rewind the process only back to the point where it went wrong. The court should thereby consider whether any delay and duplication of processes can be avoided.

35. What is notable about the present application is that the board is seeking to have parts of the process declared invalid which the applicant is seeking to uphold. This is a misconceived procedure for a whole series of reasons which I can summarise as follows:

    (i). the point now "conceded" was not a point ever made by the applicant as part of its primary case, but was only ever a fall-back position in case it was wrong;

    (ii). judicial review is not a procedure whereby the respondent can seek to quash its own processes on grounds that an applicant is not contending for or consenting to;

    (iii). the case now made by the board is inconsistent with the board's own pleadings;

(iv). if I am wrong that the board is not entitled to make this point, it fails on the merits because the board clearly impliedly accepted the inspector's report that SEA could be screened out;

(v). the argument that the quashed 2021 decisions assist the board is misconceived; and

(vi). acceding to the board's application to unwind the whole public consultation process would lead to duplication and delay.

36. These are all independent grounds, and I will deal with each in turn.

This was not a point made by the applicant

37. Ground 19 of the applicant's amended statement of grounds expressly pleads that "[t]he Board therefore screened out the need for SEA in accordance with the requirements of s. 170A(5) of the 2000 Act and thus had no such jurisdiction to make any findings in relation to same in the impugned Board Order." That is reinforced further by paras. 22 and 24 of the amended statement of grounds. The council goes on to reinforce this point at paras. 25-29 of the amended statement of grounds.

38. Insofar as the board alleged that the applicant's case was that the SEA material was "misconstrued", that is unfortunately not an accurate representation of the applicant's pleadings. The references to misconstruction in core ground 2, the heading to grounds 25-29, and ground 32, are clearly in the context of a misconstruction that occurred in the 2021 direction and order. The board's submission bends the pleadings out of shape by erroneously wrenching the term "misconstrued" from its context and using that decontextualised term as a basis to "concede" that some form of fundamental misconstruction took place in 2019 rather than in 2021. That is not a legally correct or intellectually valid exercise.

39. The only fragment of the pleadings which could possibly provide any support to the board is the single sentence at the start of ground 28 which reads in full as follows: "[w]ithout prejudice to the foregoing, even if (which is denied) the documentation produced by Council was "deficient", this was entirely irrelevant insofar as the Board had already determined that an SEA was not required and/or in the alternative, if it failed to make such determination, it abdicated responsibility in accordance with its statutory obligation to do so."

40. However, the board conveniently ignores by far the most important part of that sentence which is the phrase "without prejudice to the foregoing". It is clear that the council's attack is on the 2021 direction and decision. Any hypothetical alternative argument that there was no SEA screening decision is a fall-back position which is expressly made without prejudice to the primary position. The bald argument that the decision was invalid because there was no SEA screening is just not an argument the applicant ever made. It was only ever a fall-back reserve argument if it was wrong about its primary claim that the decision was invalid *because* an SEA screening decision had been made. The respondent is not entitled to "concede" a point which an applicant actually rejects and which it only advances

if it is wrong about the primary submission. Such a "concession" would be determinative only if the applicant agreed to it or if the court heard and rejected the primary submission, but neither of those apply here. Quite the reverse – the applicant rejects the contention that there was no SEA screening determination and I agree with that position.

41. The board says at para. 6 of submissions that "[i]n terms of the basis on which the Board has conceded in this instance, it has stated that it accepts *precisely* the Applicant's case that it "misconstrued" the SEA Screening Report, and that it therefore failed to properly address its obligation to determine if SEA should be screened in or not. It appears that the Court would be entitled to conclude from the papers that the Board *proceeded on the basis* from 26 September 2019 (at the latest) that it was legally correct in determining that SEA had actually been carried out and was "in" rather than screened out". Viewed as a legal proposition, this submission unfortunately disintegrates on comparison with the applicant's actual pleaded case. We will look later at how it measures up if judged as an evidential proposition.

Judicial review is not a procedure whereby a respondent can quash its own decision on grounds that the applicant is opposing

42. The respondent seemed to be suggesting that it was entitled to propose grounds for judicial review that were not advocated by an applicant. Reliance was first placed on *Clonres (No. 1) v. An Bord Pleanála* [2018] IEHC 373 at para. 38 which mentions *Usk District Residents Association Ltd. v. Environmental Protection Agency* [2007] IEHC 86, [2007] 2 I.L.R.M. 378, although without specifically discussing how the issue arose there. However, when one turns to *Usk* at paras. 27 and 28, it becomes apparent that a completely different scenario arose in that situation. There, the board drew the attention of the applicant and the court to a problem of which the applicant was not otherwise aware. The applicant then sought and obtained leave to amend the statement of grounds for the purposes of incorporating that point. That has absolutely no analogy to the present case. Neither *Clonres* nor *Usk* provide any support whatsoever to the erroneous concept that a respondent can use judicial review to have its own lawful processes quashed by order of the court on the basis of an argument that an applicant is not only not making, but is actively opposing. The board's entire strategy here is misconceived in principle. A judicial review respondent is not entitled to piggy-back on an applicant's challenge in order to get its own acts and decisions invalidated if the applicant isn't challenging those decisions or processes.

The application is inconsistent with the board's own pleadings

43. If I am wrong about all of the foregoing and if the board is at least at a level of principle entitled to seek to have the process quashed for the period going back to 2019, that can't be done in this case because it would be inconsistent with the board's opposition papers which accept that the inspector and board carried out an AA and SEA screening. The statement of opposition, para. 2, accepts the applicant's factual narrative which therefore includes the positive statement that SEA screening took place.

44. To allow the board to disregard this and to now claim, in contradiction to its own pleadings, that no SEA screening was carried out, would impermissibly violate O. 84, r. 22(5) RSC.

On the facts, the board impliedly accepted the inspector's report

45. Assuming that I am wrong that the board is not entitled to seek to quash its own processes as a matter of principle, and that I am also wrong that it is not entitled to do so on its pleadings here, we turn to the actual evidence. It is claimed that the process should be quashed for the period between 2019 and 2021 on the basis, as noted above, that the board claims that on the evidence it did not carry out SEA screening. As the council correctly argues in written submissions, "[t]his position lacks all credibility and is not borne out by a consideration of the planning file/documents."

46. Leaving aside an EU law dimension (which was not argued in the present case), there are numerous cases where a board has been held to impliedly accept the inspector's report, whether or not that specific language is used: cases where this and related issues are touched on are myriad and the following were cited: *Fairyhouse Club Limited v. An Bord Pleanála* (Unreported, High Court, Finnegan J., 18th July, 2001), *Cork City Council v. An Bord Pleanála* [2006] IEHC 192, [2007] 1 I.R. 761*, Maxol v. An Bord Pleanála* [2011] IEHC 537, [2011] 12 JIC 2113 (Unreported, High Court, Clarke J., 21st December, 2011), *Ogalas Ltd. (t/a Homestore & More) v. An Bord Pleanála* [2015] IEHC 205, [2015] 3 JIC 2008 (Unreported, High Court, Baker J., 20th March, 2015), *Buckley v. An Bord Pleanála* [2015] IEHC 572, [2015] 7 JIC 0909 (Unreported, High Court, Cregan J., 29th July, 2015), *Aherne v. An Bord Pleanála* [2015] IEHC 606, [2015] 10 JIC 0605 (Unreported, High Court, Noonan J., 6th October, 2015), *Dunnes Stores v. An Bord Pleanála* [2016] IEHC 226, [2016] 5 JIC 0405 (Unreported, High Court, Hedigan J., 4th May, 2016), *Ardagh Wind Farm Limited v. An Bord Pleanála* [2019] IEHC 795, [2019] 10 JIC 2206 (Unreported, High Court, Simons J., 22nd November, 2019), *Redrock Developments Ltd. v. An Bord Pleanála* [2019] IEHC 792, [2019] 10 JIC 2107 (Unreported, High Court, Faherty J., 21st October, 2019*), Waltham Abbey Residents Association v. An Bord Pleanála* [2021] IEHC 312, [2021] 5 JIC 1002 (Unreported, High Court, 10th May, 2021), *Kerins v. An Bord Pleanála (No. 2)* [2021] IEHC 612, [2021] 10 JIC 0408 (Unreported, High Court, 4th October, 2021).

47. This landslide of jurisprudence sweeps into oblivion the board's argument that there is no evidence that the inspector's report was adopted. The board direction here reflects the recommendation of the inspector. Of particular importance is the fact that, under the statutory scheme, the board has to decide on screening before the public consultation. The fact that the board directed such consultation, without directing a full SEA, means that it impliedly screened out the need for full SEA. The direction for such consultation by definition was consultation on the basis of the existing documents. That amounts to an implied acceptance of the inspector's view that SEA could be screened out.

48. The board more or less admitted that it would shoo such an argument out of court but for the alleged relevance of what the board later decided in 2021. On that basis, the "we didn't impliedly adopt the inspector's report here" argument is advanced as something of a restricted railroad ticket, good for this day and this journey only (*Smyth v. Allwright*, 321, U.S. 649, 669 (1944), *per* Roberts J. (dissenting)). But unfortunately, the 2021 materials have no relevance to this evidential question, doubly so where all of the factual and contextual aspects clearly indicate that SEA *was* screened out in 2019.

The 2021 decisions are irrelevant

49. The 2021 direction and decision are irrelevant to the evidential question of what the board did in 2019 for a number of separate reasons. First of all, they're being quashed; and while it is true that a quashed decision does not automatically have no consequences, it doesn't have any relevant evidential consequences here. Self-generated evidence of this kind is no evidence at all, and the board's very belated attempt to claim that because it said something in 2021, this is evidence that it did not realise in 2019 that it was screening out SEA and did not in fact do so, is unfortunately something of a re-writing of history. The 2021 decisions are simply not evidence as to what happened in 2019 in the circumstances of the present case.

50. In any event, the 2021 material is unfortunately so confused that one cannot consider it coherent evidence of anything definite in terms of procedure. Its wording implies that no AA screening decision was carried out either, which is so clearly inaccurate that it is hard to see how the 2021 material could be reliable evidence of what the board thought it was doing in 2019 whether as to SEA screening or otherwise.

51. Further, there is no direct admissible evidence that the board incorrectly thought that full SEA had been carried out in 2019. The board does not even attempt to offer such evidence now. It only invites the court to draw an inference from the pre-existing material. But the overwhelming inference from the material is that the board thought no such thing. The council's response in oral submissions is that the case now made by the board is "an extremely unlikely construct". The council's written submissions contend that the board "appears to be seeking to engineer a result that will allow it to have *"another go"* at the application" (para. 4).

52. To say that the board as a matter of fact and evidence thought in 2019 that no SEA screening decision had been carried out is to contend that the board at that time completely misunderstood the council's application and supporting material, completely misunderstood and ignored its own inspector's report, ignored the crystal clarity of the language of that report and even the explicit headings that couldn't have been better signposts to the issues involved, completely misunderstood the statutory process of directing public consultation, completely misunderstood its obligations under s. 170A to determine whether SEA or AA were required prior to such consultation, completely misunderstood the actual conduct and nature of the public consultation, and finally maintained these fundamental misunderstandings over a lengthy period of years. There is absolutely no contemporaneous evidence of any of that. The first suggestion that there was no SEA screening determination simply crashes into the case out of nowhere in the 2021 decisions. The conceit that that was somehow the board's position all along simply lacks credibility, as the council submits.

The board's position would lead to duplication and delay

53. The caselaw on remittal emphasises the need to avoid an unnecessary reproduction of legitimate processes and the questions of avoiding expense and inconvenience of remitting matters to the drawing board. The fact that the board's submission involves a laborious and cumbersome repeat of statutory processes is a strong factor militating against remittal to such an early stage. If I am wrong on the previous questions of the board's entitlement

to argue for that position either in principle, or on these pleadings, and if I am wrong to reject the board's contention that the evidence shows that it thought there was no SEA screening decision all along, I do not think it is in the public interest to compel a repetition of the lengthy processes that have taken place so far, especially in the context where the board had already delayed for over a year in processing the amendment following the second inspector's report, which hardly strengthens the argument for yet further delay.

Possible directions

54. I have considered whether the remittal should be accompanied by directions, as permitted by O. 84 r. 27(4), to assist in minimising any further legal disagreement in the next phase of the process. The parties drew a blank at this suggestion and I am afraid I have too. That's mainly because the remaining disagreement doesn't seem to centre on any technical or procedural question that is capable of easy clarification. Maybe I am misinterpreting the board's substantive position but it seems to be premised on a number of propositions which seem implicitly to include the following. Firstly, that it can require a council to conduct an assessment of environmental effects allegedly caused by a *failure* to allow development of a more extensive nature, as opposed to by the development that *is* allowed by the amended scheme. Secondly, that it can revisit the question of assessment at this late stage in the process. And thirdly, that (contrary to the impression possibly created by s. 170A that the board's role is quite limited – see *e.g.*, sub-ss. (4)(b) and (5)) it has an entitlement to refuse to approve an amendment on the grounds that a significantly more extensive set of amendments are appropriate, even if it didn't propose such amendments at an earlier stage of the process. At first sight, some or all of those propositions may have a degree of novelty, and might not be thought to be beyond debate, but any such debate would be best conducted in the context of a specific further decision, assuming for the sake of argument that the board maintains those perspectives and of course assuming that I have the correct sense that those are its perspectives to begin with. Maybe there will be other major points of contention which I haven't highlighted here, and again we can simply await all of that in due course. Or maybe the amendment will be approved – at this juncture there's probably no point trying to anticipate what might happen.

Order

55. Accordingly, I will make the following orders:

(i). by consent, an order of *certiorari* of the board's decision of 23rd March, 2021;

(ii). by consent, an order of *certiorari* of the board's direction of 16th March, 2021 under the heading of further and other relief;

(iii). an order remitting the application for approval of the amendments to the planning scheme back to the board for consideration and decision, such process to re-commence at the point in time immediately prior to the board's direction of 16th March, 2021.