[2023] IEHC 467

THE HIGH COURT
JUDICIAL REVIEW

[2022 No. 8 JR]

IN THE MATTER OF SECTION 50, 50A AND 50B OF THE PLANNING AND DEVELOPMENT ACT 2000 AND IN THE MATTER OF THE PLANNING AND DEVELOPMENT (HOUSING) AND RESIDENTIAL TENANCIES ACT 2016

BETWEEN

CLANE COMMUNITY COUNCIL

APPLICANT

AND

AN BORD PLEANÁLA, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

DEBUSSY PROPERTIES LTD

NOTICE PARTY

JUDGMENT of Humphreys J. delivered on the 28th day of July, 2023

1. The applicant impugns a permission granted by the board under the now-repealed strategic housing development (SHD) procedure pursuant to the Planning and Development (Housing) and Residential Tenancies Act 2016 for the proposed construction of 192 residential units and associated works at a site on the western side of Millicent Road and the southern side of Prosperous Road, Clane, Co. Kildare on the outskirts of Clane, Co. Kildare.

2. The Kildare County Development Plan 2017-2023 and the Clane Local Area Plan 2017-2023 were adopted in 2017.

3. A pre-application consultation occurred on 28th May, 2020 involving the developer, the local authority and the board.

4. Variation No. 1 to the development plan was adopted on 9th June, 2020. The written statement of the variation, at Section 1.0 explains that the variation was in response to national policy requirements under the NPF and the RSES, stating:

> "… The reason for the proposed variation report is to respond to the recent changes in national and regional policy, namely the publication of Project Ireland 2040: National Planning Framework (NPF), The Implementation Roadmap for the National Planning Framework and the Eastern and Midland Regional Assembly (EMRA) Regional Spatial and Economic Strategy (RSES)."

5. The Variation explains the changes to the settlement strategy stating at Section 2.9 that:

> "Growth targets have been allocated to towns, villages and settlements based on the NPF Implementation Roadmap and the RSES."

6. Returning to the pre-application consultation for this application, this resulted in an inspector's report which concluded that the proposed application required further consideration and amendment (ABP Ref 306944-20). A Board Order to that effect issued on 16th June, 2020.

7. An application for planning permission pursuant to section 4 of the 2016 Act was submitted by the Developer dated 6th January, 2021.

8. On 13th April, 2021, the board granted permission for a separate development in Clane (area KDA1) involving 333 dwellings (ABP Ref 308943) which is currently challenged before the court [2021 No. 507 JR].

9. The application in the present case resulted in a permission dated 22nd April, 2021 for 192 units on the site. The applicant brought judicial review proceedings to quash this permission [2021 No. 558 JR]. The proceedings were conceded by the board and an order of *certiorari* without remittal was made on 11th October, 2021. The terms of that order are relevant to the present case and are set out below.

10. On foot of the order of *certiorari*, the developer did not initiate a new pre-application consultation – rather it relied on the previous consultation despite the order of *certiorari*. The developer simply proceeded to a new planning application which was lodged with the board on 21st July, 2021.

11. The applicant made a submission to the board during the public participation process.

12. Kildare County Council's Chief Executive's report signed on 9th September, 2021 recommended grant of permission although it attached some quite negative comments from officials dealing with traffic issues.

13. The board's inspector Mr Stephen Rhys Thomas prepared a 94-page report dated 19th October, 2021 that recommended that planning permission be granted subject to 26 conditions.

14. On 21st October, 2021, the board granted a separate permission in Clane (area KDA1) for the construction of 91 residential units and associated works (ABP Ref 309367-21). That is challenged currently before the court [2021 No. 1076 JR].

15. In the present matter, the Board agreed generally with the inspector's report and granted planning permission for the development, with 26 conditions, by direction of 4th November, 2021 and order dated 8th November, 2021 (ABP Ref 310892-21), both signed by Ms Michelle Fagan, at that time a board member.

16. The order rejected the need for stage 2 appropriate assessment notwithstanding the submission of a Natura Impact Statement by the developer. That wasn't challenged by the applicant in these proceedings. The board carried out EIA screening and concluded that full EIA was not required. Again, that is unchallenged here.

17. The order concluded as follows regarding material contravention:

> "The Board considered that, while a grant of permission for the proposed Strategic Housing Development would not materially contravene a zoning objective of the statutory plans for the area, a grant of permission could materially contravene the Kildare County Development Plan 2017-2023 in relation to the core strategy allocation of 145 number dwelling units for Clane up to 2023 and the estimated residential capacity of 158 number units for Key Development Area 5 Millicent of the Clane Local Area Plan 2017-2023. The Board considers that, having regard to the provisions of section 37(2)(b)(i), (ii), (iii) and (iv) of the Planning and Development Act 2000, as amended, the grant of permission in material contravention of the Kildare County Development Plan 2017-2023 and Clane Local Area Plan 2017-2023 would be justified for the following reasons and consideration:
>
> (a) In relation to section 37(2)(b)(i) of the Planning and Development Act 2000, as amended: the proposed development is in accordance with the definition of Strategic Housing Development, as set out in section 3 of the Planning and Development (Housing) and Residential Tenancies Act 2016, as amended, and in the context of Clane comprises a significant amount of housing units (192) located in Key Development Area 5 of the Clane Local Area Plan 2017-2023, in order to deliver on the Government's policy to increase delivery of housing from its current under supply as set out in Rebuilding Ireland Action Plan for Housing and Homelessness 2016.
>
> (b) In relation to section 37(2)(b)(ii) of the Planning and Development Act 2000 as amended: the matter of conflicting objectives in the development plan, table 4.1 of the Clane Local Area Plan 2017-2023 estimates density per hectare of 30 number units, but detailed guidance under section 12.2.5 Key Development Area 5, Millicent states the Key Development Area is likely to accommodate medium density residential development in the order of 30 to 35 number units per hectare. The statutory plan contains conflicting objectives for the area, the Board invokes section 37(2)(b)(ii) of the Planning and Development Act 2000, as amended, in this instance.
>
> (c) In relation to section 37(2)(b)(iii) of the Planning and Development Act 2000, as amended: The proposed development in terms of scale, design and density is in accordance with national policy as set out in Project Ireland 2040 National Planning Framework, specifically National Policy Objective 3a, 4 and 13. In terms of regional guidelines, the proposal accords with the Eastern and Midland Regional Assembly Regional Spatial and Economic Strategy 2019-2031 that seeks to promote compact urban growth – targets of at least 50 percent of all new homes to be built, to be within or contiguous to the existing built up area of Dublin city and suburbs and a target of at least 30 percent for other urban areas. In terms of the provision of conventional houses and apartment units, the proposed development meets the requirements set out in section 2.4 of the Sustainable Urban Housing: Design Standards for New Apartments, Guidelines for Planning Authorities issued by the Department of Housing, Planning and Local Government in December 2020."

18. The SHD legislation was repealed by the Planning and Development (Amendment) (Large-scale Residential Development) Act 2021, enacted on 14th December, 2021, which was commenced on 17th December, 2021 by the Planning and Development (Amendment) (Large-scale Residential Development) Act 2021 (Commencement) Order 2021 (S.I. No. 715 of 2021), art. 2.

19. Legislative policy now is that new planning applications of the kind impugned here should be made to planning authorities in the first instance.

Procedural history

20. The proceedings challenging this decision were instituted on 10th January, 2022. Leave was granted on 17th January, 2022. The case was modularised as against the State on 31st January, 2022.

21. On 7th February, 2022, a costs protection issue had broken out, and the applicant was given liberty to bring a motion against the board and the developer.

22. On 28th March, 2022 the developer indicated that they were not taking further part in the matter. The costs issue was then dealt with on a pragmatic basis and ultimately was resolved. The board's statement of opposition was filed on 11th November, 2022.

23. The matter was then to be listed for certification but on 27th February, 2023, the court was told that the parties had not arranged for the agreement regarding costs to be embodied in an order. A draft order was to be sent in.

24. The List to Fix Dates for Trinity, 2023 took place on 20th March, 2023, and a hearing date of 27th to 29th June, 2023 was fixed. The matter was heard on those dates and on 11th July, 2023 when judgment was reserved.

Relief sought

25. Reliefs 1 and 2 are the ones of primary concern at the present time:

> "1. An order of certiorari quashing the decision of the Respondent granting planning permission to Debussy Properties Ltd ('the Developer') for the construction of 192 no. residential units and associated works at a site on the western side of Millicent Road and the southern side of Prosperous Road, Clane, Co. Kildare on the outskirts of Clane, Co. Kildare dated 8th November 2021 (ABP Ref 310892-21).
>
> 2. Such declaration(s) of the legal rights and/or legal position of the Applicants and/or persons similarly situated and/or of the legal duties and/or legal position of the respondent(s) as the Court considers appropriate."

26. Relief 3 has been modularised:

> "3. A declaration that (to the extent that it is not capable of bearing a conforming construction) section 8 of the Planning and Development (Housing) and Residential Tenancies Act, 2016 ('the 2016 Act[']) is incompatible with Articles 6(2) to (4) of Directive 2011/92/EU and/or the requirements of fair procedures and natural and constitutional justice."

27. Reliefs 4 to 7 don't raise any particular issue that needs to be decided in the present judgment:

> "4. A stay on works being carried out pursuant to the Decision pending the resolution of these proceedings.
>
> 5. An order that section 50B of the Planning and Development Act, 2000 (the '2000 Act'), and/or sections 3 and 4 of the Environment (Miscellaneous Provisions) Act, 2011, and/or Article 9 of the Aarhus Convention apply to the present proceedings.
>
> 6. Further or other orders
>
> 7. Costs."

Grounds of challenge

28. Core grounds 1 and 2 provide:

> "1. The proposed development granted permission by the Board is in material contravention of the settlement policy and housing allocation relating to Clane in the Kildare County Development Plan 2017-2023, the Clane Local Area Plan which was varied to implement national policy contained in the Regional Spatial and Economic Strategy for the Eastern and Midland Regional area, and the Board erred in purporting to justify the same by applying section 37(2)(b) of the 2000 Act as amended, by, inter alia, misinterpreting national policy in particular the Regional Spatial and Economic Strategy for the Eastern and Midland area, taking into account irrelevant considerations, failing to take into account relevant considerations, misinterpreting the development plan, and gave inadequate reasons and/or acted irrationally and/or materially contravened the sequential approach mandated by §3.4.6 of the CDP, further particulars of which are set out in Part 2 below.
>
> 2. The Board acted ultra vires and in breach of section 9(6)(c) of the 2016 Act in granting permission for development in material contravention of the car parking requirements in the Kildare County development plan and/or MTO4.1 of the Clane Local Area Plan without purporting to justify the same by virtue of the reasons contained in section 37(2)(b) of the 2000 Act, further particulars of which are set out in Part 2 below."

29. These arise for decision now.

30. Core ground 3 has been withdrawn. This provided:

> "3. The impugned decision is invalid in that it contravenes the bicycle provision requirements of the Sustainable Urban Housing: Design Guidelines for New Apartments (2020) which the Board is required to comply with and/or have regard to pursuant to section 28 of the Planning and Development Act 2000. Further or in the alternative the Board's decision in respect of bicycle provision relied on irrelevant considerations/failed to take into account relevant considerations and or was irrational, further particulars of which are set out in Part 2 below."

31. Core grounds 4 and 5 provide:

> "4. The Board erred in failing to consider the Kildare County Development Plan objectives 2017 to 2023 relating to edge of town development and/or failed to consider that the

proposed development was in material contravention relating to the same, further particulars of which are set out in Part 2 below.

5. The impugned decision is invalid as the Board did not conduct a pre-consultation procedure in respect of the proposed development as required by sections 4, 5 and 6 of the Planning and Development (Housing) and Residential Tenancies Act, 2016 (the '2016 Act') or at all, further particulars of which are set out in Part 2 below."

32. These grounds also arise for decision now.

33. Core ground 6 has been modularised. This provides:

"6. Sections 8(1) and 8(5) of the Planning and Development (Housing) and Residential Tenancies Act 2016 are invalid insofar as the Report of the Chief Executive of the planning authority is prepared and not made available until after the period of submissions of the public has expired in breach of and/or do not validly transpose Article 6(3)(b) of the EIA Directive which requires the making available to the public concerned of '…the main reports and advice issued to the competent authority or authorities at the time when the public concerned is informed in accordance with paragraph 2 of this Article' and so thereby in breach of and/or do not validly transpose Articles 6(2) and 6(4) relating to the requirements for public participation. The decision of the Board on foot of such invalid legislative provisions is also invalid."

Core ground 1 – material contravention regarding settlement policy

34. The impugned decision allows for 192 dwellings in the development. This materially exceeds (by 47 dwellings or 32%) the allocation for additional housing provision in Clane of 145 dwellings as set out in the core strategy to address the period 2020-2023, and the assessment of a capacity for 158 dwellings for the site (not itself a housing allocation) in the Clane Local Area Plan to address the period 2017-2023.

35. Sub-ground 11 states:

"The grant of permission is further in material contravention of CS1 of the Kildare County Development Plan 2017 to 2023 which requires to provide new housing in accordance with the County Settlement Hierarchy. The provision of 192 no. residential units significantly exceed the overall housing allocation of 145 no. units, as set out for Clane until 2023, even leaving aside the already permitted permissions elsewhere in the town."

36. I note in passing that the words "even leaving aside the already permitted permissions" seem to mean that, for whatever reason, the applicant was not arguing that permission was excessive having regard to the total level of permissions already granted in Clane. That total is significant – if one includes this permission for 192 units and the separate under-challenge SHD permissions for 333 and 91 units, as well as a goodly amount of other planning consents (possibly in the order of 726 units, although it is all-too-possible that I am misreading the not-immediately-decipherable table in p. 26 of the applicant's submission to the board) one gets to quite a sizeable overflow beyond the plan provision, the vast majority of which seem to have been consented. If we were to factor those in, then the plan would be not only contravened but massively so by several multiples of the strategic provision as laid out in the settlement hierarchy of the plan. The applicant doesn't seem to have pleaded this "cumulative" issue so obviously I won't consider it.

37. To contextualise the issue that *does* fall for decision, we need to see where Clane sits in the settlement hierarchy as set out in the development plan as varied by Variation No. 1. Where it sits is in the bottom category of the list:

Table 2.2 Settlement Hierarchy & Typology County Kildare

Hierarchy	Description	Locations
Key Towns	Large towns which are economically active that provide employment for their surrounding areas. High quality transport links and the capacity to act as regional drivers to complement the Regional Growth Centres.	Naas Maynooth
Self-Sustaining Growth Towns	Moderate level of jobs and services.	Newbridge Leixlip Kildare Town Athy

Self-Sustaining Towns	High levels of population growth and a weak employment base.	Celbridge Kilcock Monasterevin
Towns	Local service and employment functions in close proximity to higher order urban areas.	Sallins Kilcullen Kill Clane Prosperous Rathangan Athgarvan Castledermot Derrinturn

38. The new residential provision to be assigned to settlements must reflect the latter's position in the settlement hierarchy. This is expressly set out in a number of relevant instruments including section 4.2 of the RSES which concerns settlement strategies and states as a "guiding principle":

> "Local authorities, in the preparation of their core strategies should have due regard to the settlement typology of towns in the Region and carefully consider the phasing of development lands to ensure that towns grow at a sustainable level appropriate to their position in the hierarchy. See Tables 4.2 and 4.3 for further guidance."

39. Objective RPO 4.1 states:

> "RPO 4.1: In preparing core strategies for development plans, local authorities shall determine the hierarchy of settlements in accordance with the hierarchy, guiding principles and typology of settlements in the RSES, within the population projections set out in the National Planning Framework to ensure that towns grow at a sustainable and appropriate level, by setting out a rationale for land proposed to be zoned for residential, employment and mixed-use development across the Region. Core strategies shall also be developed having regard to the infill/brownfield targets set out in the National Planning Framework, National Policy Objectives 3a-3c".

40. The strategy relates the concept of the hierarchy of settlements and related residential provision directly to the principle that towns grow at a "sustainable and appropriate level". This links the provision to the statutory principle of sustainable development, which binds the board and all other actors under the statute just as it binds a planning authority.

41. This all makes total sense in logical, systemic and policy terms. The size and growth rate of settlements is linked to all other aspects of social organisation – such as school provision, transport provision, social services, retail provision, recreational facilities and green spaces, and to a whole range of other aspects of the concept of proper planning and sustainable development. The sustainable growth of settlements *is* sustainability writ large. And sustainable development is a binding statutory concept – not a mere local detail that can be materially contravened by the board with a tick of a checklist. At the risk of stating the obvious, it is a matter of record that the Irish planning system has already been through a period of developer-driven residential expansion without adequate provision for supporting facilities, supported by some elected members, as set out in the reports of the Flood/Mahon Tribunal operating from 1997 to 2012. One can take it that there were many voices invoking housing crises and the benefit of housing to the public during the heyday of rezoning. The matters uncovered by Flood and Mahon JJ. and their colleagues led to various safeguards being introduced, including among other things the enactment of the Planning and Development (Amendment) Act 2018 providing for a National Planning Framework (NPF) and an Office of the Planning Regulator. That NPF was the basis relied on here by the council in setting out the settlement strategy.

42. The point made in *Protect East Meath Limited v. Meath County Council* [2023] IEHC 69, [2023] 2 JIC 1704 (Unreported, High Court, 17th February, 2023) at para. 47, albeit in a different context, has a resonance here, to the effect that a departure from the necessary relationship with population provision could, if generalised, severely undermine the overall approach to plan-led development nationwide. If the board here is entitled to significantly exceed the provision that is required by a population projection, then generalising that approach across all local authority areas and the State as a whole would be entirely destructive of the careful hierarchy of population assessment and provision that informs the national approach to planning and development. While the board has a certain amount of latitude that is not available to councils, it is not unlimited latitude.

43. It follows from all of this that the settlement hierarchy and residential provision within the settlement strategy is an absolute lynchpin of the whole development plan process and in turn of the overall binding statutory concept of proper planning and sustainable development.

44. We now turn to the board's attempt to override this core concept of the settlement strategy on the basis of a developer-led proposal.

45. Section 37(2)(b) of the 2000 Act provides as follows:

> "(b) Where a planning authority has decided to refuse permission on the grounds that a proposed development materially contravenes the development plan, the Board may only grant permission in accordance with paragraph (a) where it considers that—
>
> (i) the proposed development is of strategic or national importance,
>
> (ii) there are conflicting objectives in the development plan or the objectives are not clearly stated, insofar as the proposed development is concerned, or
>
> (iii) permission for the proposed development should be granted having regard to regional spatial and economic strategy for the area, guidelines under section 28, policy directives under section 29, the statutory obligations of any local authority in the area, and any relevant policy of the Government, the Minister or any Minister of the Government, or
>
> (iv) permission for the proposed development should be granted having regard to the pattern of development, and permissions granted, in the area since the making of the development plan."

46. The board offers three excuses for the material contravention:

(i) the application was strategic in nature (s. 37(2)(b)(i));
(ii) there were conflicting objectives in the plan (s. 37(2)(b)(ii)); and
(iii) permission should be granted having regard to national and regional policy (s. 37(2)(b)(iii)).

47. A fourth excuse was offered but no attempt whatsoever to provide reasons for it was made – we will come back to that botched wording in due course.

48. Unfortunately none of these purported justifications stand up.

49. As regards the alleged strategic nature of the development, the board and the inspector's report use more words than a mere assertion that the formula "this is SHD" (which the board doesn't defend here), but it comes to the same thing. Indeed the inspector puts it even more bluntly:

> "In relation to section 37(2)(b)(i), the matter of strategic or national importance, the current application has been lodged under the Strategic Housing legislation and comprises a significant amount of housing units (192) in the context of Clane overall, in order to meet the housing need of the area, and the proposal could therefore be considered to be strategic in nature. Given the site's location within Key Development Area 5 of the Clane Local Area Plan, the application site has the potential to contribute to the achievement of the Government's policy to increase delivery of housing from its current under-supply as set out in Rebuilding Ireland Action Plan for Housing and Homelessness issued in July 2016."

50. If language means anything, the words "and therefore" imply the concept of logical consequence, or in other words a read-across from the application being SHD to the conclusion that it is strategic. The fact that it involves "a significant amount of housing units (192) in the context of Clane overall" adds nothing of substance because something similar could be said about the significant amount of housing involved in all SHD, which requires over 100 units. If, on the other hand, this wording means that a project becomes strategic if it is forcibly superimposed on a modest town where large development is presumptively inappropriate due to the settlement hierarchy (and hence involves "a significant amount of housing units ... in the context of [such a town] overall") when it would not be strategic if built in a large city, where large development might be presumptively appropriate, then we really have reached an all-time low point in the logical integrity of planning reasoning.

51. The board says that the project:

> "... in the context of Clane comprises a significant amount of housing units (192) located in Key Development Area 5 of the Clane Local Area Plan 2017-2023, in order to deliver on the Government's policy to increase delivery of housing from its current under supply as set out in Rebuilding Ireland Action Plan for Housing and Homelessness 2016."

52. But we need to unpack that. The "context of Clane" sounds impressively merits-based, but what is it about the context of Clane that makes any difference? The board relies, again impressively, on "Key Development Area 5 of the Clane Local Area Plan", but that is to use bureaucratic language in a way that creates a distortion of context. The concept of "key development area" is simply a definition created by the plan, a terminological designation that is merely intended to indicate that some new residential provision is involved. The plan sets out a hierarchy of settlements, and Clane is well down the list. There is nothing about being a "Key Development Area", that would mean that it is somehow strategic to allow not just the local area plan itself but the development plan to be violated. The concept of a key development area is just a definition, and moreover a definition that arises from the Local Area Plan itself – the very thing the board is trying to circumvent based on that definition. The plan provides as follows:

> "2.2 KEY DEVELOPMENT AREAS

> In accordance with Section 3.8 of the Guidelines on Sustainable Residential Development in Urban Areas, this LAP includes design briefs for Key Development Areas to promote the development of a number of key areas within the town. 5 No. Key Development Areas identified within the Clane LAP as follows:
> The location of the KDAs are shown on Map 12.1. Design briefs have been prepared to guide development in these areas. These design briefs set out broad parameters for the future development of these areas and are indicative in nature; a more detailed urban analysis will be required to be prepared as part of any development proposal. The briefs will assist the different parties involved in the planning process such as landowners, developers, design teams, residents and the Council. The briefs are based on an appraisal of the area and its urban context. The character and layout of each area in terms of design, heights and finishes will vary depending upon the street hierarchy, existing topography, environmental features, open space, amenity and heritage features and views. This analysis is used to form a vision for each area based on the key principles of urban design outlined above.
> KDA1 Dublin Road: New Residential/Open Space & Amenity Lands at Capdoo Commons, south-east of Dublin Road.
> KDA2 Capdoo: New Residential/Open Space & Amenity Lands at Capdoo between Capdoo Road and the Kilcock Road.
> KDA3 Kilcock Road: New Residential/Open Space & Amenity Lands at Loughbollard (between Kilcock Rd & Ballingappa Rd).
> KDA4 Nancy's Lane: New Residential/Community & Educational Lands at Nancy's Lane (between College Manor Wood and Prosperous Road)
> KDA5 Millicent: New Residential Lands between Prosperous Road and Millicent Road."

53. Delivery on "the Government's policy" is predictably relied on by the board, but in the sense that is deployed by the board in its order, that could be relied on to consent any additional housing anywhere. The fact that more housing gratifies government policy doesn't in itself make this particular project strategic. There isn't any proper identification either expressly or implicitly as to something that on a proper interpretation would make the development strategic in the sense of s. 37. The board tries to revisit the meaning of "strategic" by reference to dictionaries which refer to something proceeding from strategy. But the most elastic dictionary meaning isn't what s. 37 of the 2000 Act means by strategic. That has already been dealt with in caselaw: see for example *Jennings and O'Connor v. An Bord Pleanála, Ireland and The Attorney General* [2023] IEHC 14, [2023] 2 JIC 1711 (Unreported, High Court, 17th February, 2023) where Holland J. held that a formula in very similar terms (para. 481) fell short of the elaboration required in section 37(2)(b)(i).

54. Anything done by any public law entity (including the courts) proceeds from some sort of strategy. That doesn't make it strategic in the sense used in s. 37. Such an endlessly accommodating definition would allow massive contraventions of development plans in a way that undermines the balance of functions as between local government and national institutions. The board's argument that this adds something to the assertion that "this is SHD" falls flat. Any and every SHD involves a "significant" amount of housing "in order to deliver on the Government's policy". Strip away the verbiage and all that is left is the term "key development area" which, as the applicant puts it, is merely a "local description" conferred by a local area plan as shorthand for there being provision for some new residential units. It is just a definition, and words can be defined to mean anything – like "strategic" housing development itself in the 2016 Act. That nomenclature doesn't make a project strategic in the normal sense of the word, or as used in the 2000 Act, any more than, say, a local authority defining a "zoning" based on density makes that a zoning provision. Terms can have autonomous meanings. As the applicant submits, the reason given could with appropriate cosmetic adjustments justify any amount of housing anywhere. That would nullify the clear statutory restrictions on material contravention.

55. The maxim *noscitur a sociis* gets some fairly contestable outings from time to time but it has some relevance here. Murdoch and Hunt in their excellent and go-to legal dictionary define this as meaning that "[t]he meaning of a word may be determined by reference to its context" (Murdoch and Hunt, *Irish Law Dictionary*, 6th ed. (Dublin, Bloomsbury, 2016), p. 1152), although while that is a very pertinent principle, it is a slightly broader formulation than that implied by the particular maxim in question. David Dodd captures it more specifically in *Statutory Interpretation in Ireland* (Dublin, Tottel, 2008) as the concept that "statutory words are liable to be affected by other words with which they are associated" (p. 136).

56. A requirement of "strategic or national importance" means that "strategic" can't be taken out of context or straight from a dictionary, and must be read in a sense *associated with* "national" (not as *equivalent to* national – that would be the usual fallacy of being unable to knock down a point so having to distort the point into a straw man to enable the knock-down to happen). This elevates the word "strategic" above the pedestrian level of meaning something proceeding from some kind of strategy, however modest, and brings it to a level commensurate with, or at least

similar to, that of national importance. The particular project has to be in some way pivotal. Not routine, run of the mill, replaceable, repeatable.

57. Given the dictionary-scraping exercise attempted here, Stamp J. could see the board coming from the vantage point of a lifetime ago in *Bourne (Inspector of Taxes) v. Norwich Crematorium Ltd* [1967] 1 W.L.R. 691, [1967] 2 All E.R. 576, [1967] 3 WLUK 24, 44 T.C. 164, (1967) 46 A.T.C. 43, [1967] T.R. 49, (1967) 111 S.J. 256 at 696:

> "Sentences are not mere collections of words to be taken out of the sentence, defined separately by reference to the dictionary or decided cases, and then put back again into the sentence with the meaning which one has assigned to them as separate words, so as to give the sentence or phrase a meaning which as a sentence or phrase it cannot bear without distortion of the English language."

58. In the present case, an SHD development delivering 192 dwellings is similar to dozens of other applications that have come to the court and is similar to other permissions cumulatively amounting to thousands of units annually that came before the board before the ill-fated SHD procedure was scrapped. There isn't anything beyond the run-of-the-mill SHD about this one, still less anything particularly pivotal or prominently important that makes it "strategic" in the sense of s. 37 of the 2000 Act, even if developments of this kind are artificially defined as "strategic" for the separate purposes of the 2016 Act, by a wording hinging on the scale, rather than the nature, of the development.

59. As Holland J. pointed out in *Jennings and O'Connor v. An Bord Pleanála* at para. 482, to invoke s. 37(2)(b)(i), the board did not need to hold that the proposed development was of national importance as well as strategic importance. That is clear on the wording of s. 37. He said "I need not here consider how the two concepts may differ" so his judgment doesn't support the proposition that the two terms should be read entirely independently, which they shouldn't. On the facts, if a provision of a local area plan that indicates possible development areas in a relatively modest town in a particular county can be labelled "strategic" then there is no meaningful standard, and "strategic" is something that is totally independent of "national" contrary to the *noscitur a sociis* approach and contrary to the natural interpretation of the phrase.

60. The board argued that the provision of housing provides a benefit to the public, that there is a housing crisis, and that therefore the board was entitled to find that this application was of strategic importance. I appreciate that judges occasionally make introductory topical or contextual comments (I will reluctantly admit to having occasionally done so myself in unguarded moments, despite Scalia J.'s (dissenting) warning on such matters in *Obergefell v. Hodges* (2015) 576 U.S. 644 at 719, n. 22), such as reporting that there is a crisis in housing (*Shay Murtagh Limited v. Cooke* [2022] IEHC 436, [2022] 7 JIC 1501 (Unreported, High Court, Phelan J., 15th July, 2022) at para. 76) or that additional housing provides a benefit to the public (*Dublin City Council v. An Bord Pleanála* [2023] IECA 155 (Unreported, Court of Appeal, Collins J., 16th June, 2023) at para. 45). That is of course an understandable and purely contextual reference to a visible side of a complex social equation, but any complex problem has other sides, which a court has to bear in mind where relevant.

61. The argument that "there is a housing crisis, therefore anything that provides more housing is not only a benefit but strategic" is ultimately a political position which a court can't endorse in those terms. Yes of course, housing is a benefit to those being housed, but on the other hand poorly planned housing is a detriment to the public in the medium to longer term, a consideration which in principle is likewise capable of being relevant to legal standards to be applied by the court. The court isn't of course concerned with quality of developments as such, but only insofar as relevant to legal standards. But since the standards are there generally to achieve quality, a poor quality project is empirically more likely to come up against a legal tripwire. The matters examined by Flood and Mahon JJ. and their colleagues continue to be relevant in the overarching sense that there is a relationship between integrity of the decision-making process and quality of the output on the ground. That is not something that can be solved once-and-for-all – it requires ongoing checks and balances. And as against the "strategic" argument, one could equally say that any stampede to consent developments could raise significant issues about whether planning standards and principles and the integrity of the planning process have been upheld at all times. The questions faced by the board in that regard are well documented at this stage. No complex problem can be reduced to 280 characters without a loss of critical information. The upshot is that the court shouldn't endorse a definition of the statutory term "strategic" in a way that sees it disappear up the funnel of the popular concerns of the day. To do so drains the statutory term of its objective and autonomous meaning and improperly nullifies a check and balance enacted in statute law to restrain the power of the board to set aside development plans.

62. Turning to the second alleged justification, as regards conflicting objectives, even assuming for the sake of argument that there are conflicting objectives in the *local area plan*, that can't be a basis for material contravention of the *development plan*. The board basically accepts that the

wording is erroneous but tries to re-write the decision by claiming in submissions that it couldn't have "messed up" in the manner alleged by the applicant and the reason "must" have meant to apply to the LAP only. *Must* it? Somehow the invitation to the court to interpretatively re-write the decision in the way it should have been written, on an assumption in effect that the board had a completely legally accurate analysis which was foiled merely by a typo, is less appealing than the board seems to think. It is not an assumption I would be prepared to make; certainly not on these facts. Perhaps it would be worth thinking about if this were an otherwise impregnable decision, free from any other error or ambiguity, where it is obvious that only a proven clerical error stands between the board and complete logical and legal vindication. But we are so far from that scenario here that it isn't worth discussing further.

63. Even more fundamentally, if that were possible, the conflict is only about densities, not about the total number of units that can be provided in Clane. The law is not that if the board can find *any* conflict of *any* kind whatsoever in the plan, then it can materially contravene the plan in some totally different respect. That would make no sense whatever and would undermine the statutory intention. The meaning and intention of the legislation is that the contravention has to be in relation to the matter to which the conflict relates. That certainly isn't the case here. The analysis of conflict is wholly misconceived and essentially involves opportunistically seizing on an apparent contradiction (not that it is really much of a contradiction when you get down to it) about a matter that is separate from the quantum of housing issue in order to piggy-back on that to provide a totally artificial justification for a developer-led proposal for more housing than has been allocated in the settlement strategy. Indeed, in fairness to him, the inspector specifically identified that density was not to be confused with the overall housing provision.

64. As regards the third point which is the alleged entitlement to violate the development plan by reference to governmental policy, the specific policy relied on is identified as follows:

> "The proposed development in terms of scale, design and density is in accordance with national policy as set out in Project Ireland 2040 National Planning Framework, specifically National Policy Objective 3a, 4 and 13. In terms of regional guidelines, the proposal accords with the Eastern and Midland Regional Assembly Regional Spatial and Economic Strategy 2019-2031 that seeks to promote compact urban growth - targets of at least 50 percent of all new homes to be built, to be within or contiguous to the existing built up area of Dublin city and suburbs and a target of at least 30 percent for other urban areas. In terms of the provision of conventional houses and apartment units, the proposed development meets the requirements set out in section 2.4 of the Sustainable Urban Housing: Design Standards for New Apartments, Guidelines for Planning Authorities issued by the Department of Housing, Planning and Local Government in December 2020."

65. Section 37(2)(b)(iii) of the 2000 Act doesn't say that the plan can be materially contravened if any particular application is "in accordance with" national or regional policy. What it says is that "the Board may only grant permission in accordance with paragraph (a) where it considers that … permission for the proposed development should be granted having regard to regional spatial and economic strategy for the area, guidelines under section 28, policy directives under section 29, the statutory obligations of any local authority in the area, and any relevant policy of the Government, the Minister or any Minister of the Government".

66. Many applications are "in accordance with" national or regional policy in the passive sense that they don't contradict such policies. You could say, for example, that a development on a site that doesn't have any protected structures is "in accordance with" national and regional policy on protected structures. Of course it is *in accordance with* policy – there isn't anything in the development that contravenes such policy. That isn't the kind of weak and flabby relationship to policy of an essentially negative kind that is envisaged by s. 37(2)(b)(iii). What that provision involves is a determination that permission *should be granted* having regard to national or regional policy. That means that there is something about the policy that makes the grant imperative, not merely that there is a kind of negative absence of contravention.

67. As the applicant points out, there is simply no relationship between the alleged policies and the result being achieved. What is identified specifically in the board order is as follows (the fact that the inspector's report is worded differently doesn't change the picture much and is of limited significance because the board has specifically identified the policies concerned):

(i) National Policy Objective 3a, 4 and 13;

(ii) the Eastern and Midland Regional Assembly Regional Spatial and Economic Strategy 2019-2031 that seeks to promote compact urban growth - targets of at least 50 percent of all new homes to be built, to be within or contiguous to the existing built-up area of Dublin city and suburbs and a target of at least 30 percent for other urban areas; and

(iii) section 2.4 of the Sustainable Urban Housing: Design Standards for New Apartments, Guidelines for Planning Authorities issued by the Department of

Housing, Planning and Local Government in December 2020.

68. NPO 3a says that it is an objective to:

"Deliver at least 40% of all new homes nationally, within the built-up footprint of existing settlements".

69. That is about where new homes should be. There isn't anything in that which in itself allows or requires settlement hierarchies in development plans to be overridden. If a plan provided for, say, only 30% provision within existing footprints, then there could be contravention on that basis but that isn't the issue here. Implementing this here would involve reasoning that the provision for Clane is X, so 40% of X should be within the built-up footprint of the existing settlement of Clane. It is not a basis for saying that the provision for Clane must now be X+32% as the board did here.

70. NPO 4 provides for an objective to:

"Ensure the creation of attractive, liveable, well designed, high quality urban places that are home to diverse and integrated communities that enjoy a high quality of life and well-being".

71. Again that is about quality of housing and communities. It is no basis at all to allow the careful settlement hierarchy and allocation of population provision within a development plan to be torn up and to allow a developer-led distortion of the plan at whatever settlement level any particular developer manages to make an application. Indeed as the applicant points out, disregarding the hierarchy of the development plan tends to undermine the national policy objectives, not support them.

72. NPO 13 states:

"In urban areas, planning and related standards, including in particular building height and car parking will be based on performance criteria that seek to achieve well-designed high quality outcomes in order to achieve targeted growth. These standards will be subject to a range of tolerance that enables alternative solutions to be proposed to achieve stated outcomes, provided public safety is not compromised and the environment is suitably protected".

73. Again that is about quality, not quantity.

74. As regards the regional strategy, insofar as it is asserted that the Eastern and Midland Regional Assembly Regional Spatial and Economic Strategy 2019-2031 seeks to promote compact urban growth – targets of at least 50 percent of all new homes to be built, to be within or contiguous to the existing built-up area of Dublin city and suburbs and a target of at least 30 percent for other urban areas – that is about location of housing, not quantity of housing. The same problems arise as with NPO 3a.

75. Section 2.4 of the guidelines referred to is as follows:

"2.4 Identification of the types of location in cities and towns that may be suitable for apartment development, will be subject to local determination by the planning authority, having regard to the following broad description of proximity and accessibility considerations:

1. Central and/or Accessible Urban Locations

Such locations are generally suitable for small- to large-scale (will vary subject to location) and higher density development (will also vary), that may wholly comprise apartments, including:

• Sites within walking distance (i.e. up to 15 minutes or 1,000-1,500m), of principal city centres, or significant employment locations, that may include hospitals and third-level institutions;

• Sites within reasonable walking distance (i.e. up to 10 minutes or 800-1,000m) to/from high capacity urban public transport stops (such as DART or Luas); and

• Sites within easy walking distance (i.e. up to 5 minutes or 400-500m) to/from high frequency (i.e. min 10 minute peak hour frequency) urban bus services.

The range of locations outlined above is not exhaustive and will require local assessment that further considers these and other relevant planning factors.

2. Intermediate Urban Locations

Such locations are generally suitable for smaller-scale (will vary subject to location), higher density development that may wholly comprise apartments, or alternatively, medium-high density residential development of any scale that includes apartments to some extent (will also vary, but broadly >45 dwellings per hectare net), including:

• Sites within or close to i.e. within reasonable walking distance (i.e. up to 10 minutes or 800-1,000m), of principal town or suburban centres or employment locations, that may include hospitals and third level institutions;

• Sites within walking distance (i.e. between 10-15 minutes or 1,000-1,500m) of high capacity urban public transport stops (such as DART, commuter rail or Luas) or within reasonable walking distance (i.e. between 5-10 minutes or up to 1,000m) of high frequency

(i.e. min 10 minute peak hour frequency) urban bus services or where such services can be provided;

• Sites within easy walking distance (i.e. up to 5 minutes or 400-500m) of reasonably frequent (min 15 minute peak hour frequency) urban bus services.

The range of locations is not exhaustive and will require local assessment that further considers these and other relevant planning factors.

3. Peripheral and/or Less Accessible Urban Locations

Such locations are generally suitable for limited, very small-scale (will vary subject to location), higher density development that may wholly comprise apartments, or residential development of any scale that will include a minority of apartments at low-medium densities (will also vary, but broadly <45 dwellings per hectare net), including:

• Sites in suburban development areas that do not meet proximity or accessibility criteria;

• Sites in small towns or villages.

The range of locations outlined above is not exhaustive and will require local assessment that further considers these and other relevant planning factors."

76. Again this is about locations for particular types of development, and has absolutely nothing to do with violating the careful balance of population provision for settlement hierarchies that is painstakingly set out in the housing allocations of the development plan.

77. So the board has achieved the remarkable result of listing out an impressive-sounding host of policy objectives, not a single one of which actually relates to increasing the quantum of housing over and above that allocated in the development plan's hierarchy of settlement provision.

78. The board in submissions did a sterling job of re-trawling national policies in submissions and highlighting provisions that could have been, but of course weren't, referred to in the decision. But it would be a far too respondent-friendly approach by a court for such provisions to be introduced or implied at this stage. Nobody stopped the board from referring to whatever it wanted to, and indeed it was quite specific in that regard. Its work product shouldn't be re-written by creative interpretation by the court after the event.

79. For good measure, the board's whole approach ignores the fact that the plan is grounded on an evidence-based approach that is intended to give effect to national and regional policies as most recently implemented through Variation No. 1. Of course ultimately the board could potentially adopt a different view as to what permission should be granted to serve such policies, but there would need to be a valid jurisdictional basis to do so and a logically sustainable reasoning process, as well as compliance with overriding statutory requirements such as the principle of sustainable development. That isn't the case here.

80. As the applicant crushingly observes in oral submissions regarding the policy objectives that the board has identified: "none of those objectives deal with quantum". There simply has been no substantial, let alone persuasive, answer to that.

81. The board submitted that it "takes wilful blindness" not to see the connection between density and quantum. But it doesn't. The fact that a development could legitimately be allowed to have a higher density than one reading of the LAP provides doesn't have the logical consequence that the board can go on from that to say that the application can *also* violate the overall housing provision for the settlement hierarchy. Irvin D. Yalom has a locution from Jewish *Mitteleuropa*, "the patient may have two diseases. Fleas and lice too ..." (*When Nietzsche Wept* (New York, Basic Books, 1992) p. 79), which is a folksy way of telling people who don't want to hear it that just because there is one problem doesn't mean that there isn't also another problem. Applied here, surprisingly for the board here perhaps, it's possible for an application to involve more than one breach of the plan. The fact that the board comes up with a cure for a density problem doesn't automatically mean that it will cure a quantum problem. And even if there is only one difficulty to be treated, the board still needs something relevant to that specifically.

82. The board relies on *Pembroke Road Association v. An Bord Pleanála & Minister for Housing, Local Government and Heritage* [2021] IEHC 403, [2021] 6 JIC 1602 (Unreported, High Court, Owens J., 16th June, 2021) para. 102, and *Ballyboden Tidy Towns Group v. An Bord Pleanála, Minister for Housing, Local Government and Heritage, Ireland and the Attorney General* [2022] IEHC 7, [2022] 1 JIC 1001 (Unreported, High Court, Holland J., 10th January, 2022). But there is no analogy. Holland J. summarises the situation at para. 210 of *Ballyboden*:

> "As the Board submits, in *Pembroke Road*, Owens J in fact held that it was not necessary, in order to reach a decision under S.9(6) PD(H)A 2016 to allow a material contravention by reference to SPPR3, for the Board to come to the view, envisaged in §3.1 of the 2009 Guidelines, that the policies and objectives in respect of building heights in a development plan did not align with the policies and objectives of the NPF on building height. That seems to me to be the ratio of that judgment on the height issue – with which I agree."

83. But that was a case where the SPPR concerned involved a procedure by which development plans were to be superseded or amended depending on compliance with the s. 28 guidelines. It has

no relevance here. To put it another way, to rely on government or regional policy to justify a material contravention doesn't involve a finding that the plan itself fails to align with the policies and objectives of national policy. But that doesn't mean that all the board has to do is to assert that the development is "consistent" with the policy. As mentioned, many things could be "consistent with" policy for many reasons, including for purely negative reasons such as the absence of elements that bring the policy into play. The test is that the permission "should be granted" having regard to the policy, which implies a degree of imperative support for the development on a basis that could override development plans, arising from policy.

84. Severance doesn't arise having regard to the foregoing. In abstract theory if the various grounds of a decision were independently watertight, only one need be valid. But here, the material contravention conclusions are presented as a mixum-gatherum whereby everything is lumped together, in that the contraventions of both the development plan and the local area plan, while dealing with very distinct things, are justified on the basis of exactly the same wording in the same paragraphs. Indeed the board admits that the wording is flawed in that regard as noted above. Such a bolus of largely formulaic verbiage seems to have been formulated as a job-lot and in such circumstances is not properly severable. But if I am wrong, each element of the decision is suffering from infirmity anyway, so the decision falls under this heading either way on the basis set out in core ground 1.

85. As a cherry on the cake of illegality under this heading, we should return to the phantom fourth excuse offered by the board, as to which the applicant quite correctly points out in sub-ground 13:

> "The Board's purported application of section 37(2)(b) of the 2000 Act was fundamentally flawed and erroneous. The Board purported to invoke section 37(2)(b)(i), (ii), (iii) and (iv). However, it gave no reasons at all in terms of section 37(2)(b)(iv)."

86. There is a clear and obvious mis-match between the legal basis of the decision – the bracing enthusiasm of seizing on the grand slam of every single possible ground for material contravention – and the reasons actually given, which fail to even attempt to fill in the blanks in relation to sub-para. (iv) of s. 37(2)(b). Even acknowledging in fairness to the board that the applicant did not particularly develop this footnote to the case in submissions, this further botching of the decision is both an additional reason to quash the permission under core ground 1 and to decline the invitation to sever the decision even if such severance were otherwise appropriate.

Core ground 2 – material contravention regarding car parking

87. The LAP includes an objective as follows:

> "Policy MT4 - Car Parking It is the policy of the Council to manage the provision of parking to provide for the needs of residents, businesses and visitors to Clane Town Centre.
> Objectives
> MTO4.1 To apply the parking standards set out in the County Development Plan to all applications for planning permission in Clane."

88. Para. 17.4.10 of the County Development Plan provides as follows:

> "17.4.10 Vehicular Parking in Residential Areas Car parking standards are set out in Table 17.9. Residential areas should not be dominated by car parking along access streets. The design quality of the street is paramount (Refer to the Design Manual for Urban Roads and Streets, DTTS and DECLG (2013). New residential development should take account of the different criteria regarding car parking including: −Vehicular parking for detached and semi-detached housing should be within the curtilage of the house; −Vehicular parking for apartments, where appropriate, should generally be at basement level. Where this is not possible, parking for apartments and terraced housing should be in informal groups overlooked by residential units; −The visual impact of large areas of parking should be reduced by the use of screen planting, low walls and the use of different textured or coloured paving for car parking bays; and −Consideration needs to be given to parking for visitors and people with disabilities."

89. Paragraph 17.7.6 states:

> "The Council will normally require the provision of car parking spaces within the curtilage of the site or convenient to the development. The provision should be based on the extent to which the development is likely to generate demand for additional parking spaces.
> Car parking standards are set out in Table 17.9 below to guide proposed development. Other than 'Residential', parking standards are maximum standards, having regard to the need to balance demand for parking against the need to promote more sustainable forms of transport, to limit traffic congestion and to protect the quality of the public realm from the physical impact of parking. Therefore the number of spaces provided should not exceed the maximum provision set out below.
> Additionally, the maximum provision of parking should not be viewed as a target. Lower rates of parking may be appropriate at certain sites. In determining this, the Council will

have regard to the proximity of the site to public transport. −The proximity of the site to the town centre and services that fulfil day-to-day needs; −The potential for linked trips (where multiple needs are fulfilled in one journey); −The nature of the uses of the site and likely durations of stays; −The nature of surrounding uses and potential for dual use of parking spaces depending on peak hours of demand; −Proximity to public car-parking areas; −The need to protect the vibrancy of town centres and regenerate vacant / underused buildings; −Any modal shift demonstrated through a Traffic and Mobility Assessment; and −The suitability of a contribution in lieu of parking in accordance with the Development Contribution Scheme, as part of a grant of planning permission. The Council reserves the right to alter the requirements outlined below, having regard to the circumstances of each particular development. For any commercial use not specified, the default parking rate will be calculated based on those of a comparable use and / or as part of Transport and Traffic Assessment. Large complex developments may be assessed separately with regard to the circumstance of each case. The Council requires the submission of a Mobility Management Plan with planning applications where developments include substantial parking requirements. This should outline a series of measures to encourage sustainable travel modes and reduce carborne traffic within a development in addition to car parking standards, sufficient space will be required within the curtilage of the site for all service vehicles involved in the operation of the business or building. Set-down / drop off areas and coach parking areas should be provided as appropriate.

The minimum size for a car parking space shall be 2.5m x 5.0m and circulation aisle 6m wide. Loading bays shall be a minimum of 3 x 6m. 5% of parking spaces in non-residential developments should be set aside for disabled parking. The Council will liaise with ESB Networks to continue the roll-out of rapid charge points throughout the county. Non-residential developments shall provide facilities for the charging of battery operated cars at a rate of up to 10% of the total car parking spaces in order to meet the targets of the Governments Electric Transport Programme and in response to 'Climate Change the Government's National Policy Position on Climate Action and Low Carbon Development'."

90. One has to ask where is the flexibility and discretion so relied on by the board in submissions? The only thing flexible is the word "normally". The board tries to rely on the flexibility in the term "generally" as recognised in *O'Donnell v. An Bord Pleanála, Minister for Housing, Local Government and Heritage, Ireland and the Attorney General* [2023] IEHC 381 (Unreported, High Court, 5th July, 2023). But here, the term "normally" is counterbalanced by the specific exception of residential from the general point that provision are maxima. Any fair reading of this provision is such that it doesn't confer discretion save in exceptional circumstances of the type referred to, such as very large complex developments that need to be assessed on their own circumstances. But there isn't anything complex about this development that compels a different approach – it just presumably suits the developer to maximise profit by providing extra apartments at the expense of the parking provision dictated by the plan. More fundamentally the inspector didn't engage with that at all. There was no finding that the development triggered the exception, no finding that this was a complex development, no finding that such complexity dictated or warranted a departure from the required parking provision. There was no finding that the complex developments exception applied at all. The board's legal submissions are in effect an attempt to re-write the flawed inspector's report with the benefit of subsequent legal analysis. In the report actually adopted, the inspector merely blandly asserted that the plan was flexible and that other guidelines could be called in aid:

"10.6.6. In relation to car parking, the proposed houses and créche [*recte* crèche] meet the car parking standard in Table 17.9 of the KCDP, while the duplex units meet the standards set out in the Apartment Guidelines. I consider this approach to be reasonable and to be in accordance with national guidance. I do not concur with the view that this would be in contravention of Objective MTO4.1 of the Clane LAP or the KCDP standards. The KCDP offers a level of flexibility in relation to the car parking standards set out in Table 17.9. I consider that the rate of provision overall would not represent a material deviation from these standards.

10.6.7. A total of 160 bicycle parking spaces are proposed, a combination of long stay and short stay spaces. 144 spaces are provided for the duplex units. The TTA states that the level of provision is higher than the development plan standard (Table 17.10) and that it represents a good compromise between the development plan standard and the standards set out in the Apartment Guidelines. I consider the approach to cycle parking to be reasonable having regard to the site's locational context."

91. Other guidelines are irrelevant at this stage of the analysis. That only comes in if the board identifies a material contravention and then seeks to justify it. So this was an irrelevant consideration at the stage at which it was considered.

92. The critical finding was that a significant shortfall on the parking provision was "not … a material deviation". That is totally unsustainable.

93. The relevant part of table 17.9 is:

Table 17.9
Car Parking Standards

Residential House	2 spaces per unit
Apartment	1.5 spaces per unit + 1 visitor space per 4 apartments
…	…
Crèche	0.5 per staff member plus 1 per 4 children

94. That is simple, straightforward and mathematical, and doesn't confer any planning judgement. Applying that here there should have been 376 parking spaces including 137 for duplexes. Of those, there was a 36-space shortfall or a 26% deficit within that heading.

95. The inspector acknowledges this at para. 8.2 of the report:

> "Car and cycle parking is noted, there is a shortfall of car parking spaces (deficit of 26% or 36 car spaces)."

96. By no stretch of the imagination could that rationally be regarded as non-material, as the inspector asserted: see for example *per* Holland J. in *Ballyboden Tidy Towns Group* 7 at para. 140.

97. That is doubly so where the Roads, Transport and Public Safety Department of the Council stated that the proposed development will result in an endangerment of public safety due to the direct frontage of residential development and open space onto a 50 kph road and the hazard arising from the reduced car parking provision and resulting unauthorised parking along a 50 kph road, even bearing in mind that the chief executive didn't elevate that concern to one in the formal report.

98. The argument that the reasons can be supplemented from elsewhere is unconvincing, not least because nothing has been established elsewhere in the inspector's report that can cure all of the difficulties under this heading.

99. The board says that the applicant's submission to it was in a sense that supported less car parking provision such that the applicant can't make this point without self-contradiction, but that is a misreading. The sense of the applicant's submission was that the development would create car-dependent transport movements. That is not an argument for restricting car parking for those who need it in the absence of alternatives.

100. So the decision regarding material contravention falls under this heading as well. I would thus uphold core ground 2 insofar as it refers to the following points made in sub-ground 32:

> "However, there is a specific mechanism in section 37(2)(b)(iii) which allows the Board to justify a material contravention of the CDP or the LAP by reference to national guidelines. The Board cannot however grant planning permission for a proposed development that constitutes a material contravention of the CDP and LAP without going through that process. Nor can the Board rely on the flexibility in the CDP in relation to parking provision for the apartments when no reliance was placed on any of the factors identified therein in justifying a departure from the CDP standards."

Core ground 4 – material contravention regarding greenfield development

101. One thing that is clear from the outset in relation to this ground is that the proposed development is on a greenfield site. The inspector said so expressly at para. 10.2.5:

> "The site is a greenfield site located close to the centre of Clane and close to educational and sporting facilities along the Prosperous Road."

102. Section 15.5.2 of the Kildare County Development Plan 2017-2023 states:

> "Development in edge of town/greenfield edge sites will primarily be residential development with supporting community uses and neighbourhood centres. The character of these areas should have less intensity of development, providing a transition towards the open countryside. Table 15.1 outlines the key principles for consolidation and expansion areas".

103. The guiding principles for edge of town/greenfield edge sites includes:

> "Development shall be of low intensity, providing a transition to the countryside. It shall generally be block structure and comprise a mix of house types. Apartments will not normally be permitted. Housing facing open countryside or addressing parkland may have the ability to absorb larger type houses".

104. These provisions were never referred to in the developer's material, which presumably explains why they aren't referred to by the board either. While cutting and pasting of developers' material into board material is a practice which has been at this point well illustrated in previous caselaw, this case now illustrates what we might call shadow cutting-and-pasting – silence by the board in relation to something that the developer's analysis is silent about.

105. While the board inevitably refers in general terms to the development plan, it doesn't refer to this policy. The applicant's submissions on this issue are worth quoting and are as follows:

> "95. The proposed development is on a greenfield/edge of town site (per the Inspector §10.2.5) and includes duplex apartment blocks of 3 storeys notwithstanding the objective that apartments will not normally be permitted at this location. Both the planning application and the Board failed to address and/or consider this relevant policy and failed to give reasons as to why apartments should be permitted at this location notwithstanding the clear presumptive statement of policy in the development plan that 'Apartments will not normally be permitted'. The precise status of this provision in the development plan, is not relevant for present purposes, as the ground of challenge is simply [that] this was not considered and if [it] was considered (which it was not), there were no reasons relating to the same. It was equally not considered anywhere in the entire documentation adduced by the developer before the Board.
>
> 96. The Board's response to this point is, with respect, telling. The Board does not deny that the CDP includes a presumption against apartments. Nor does the Board deny that this presumption was not considered by the Board. Rather than taking the obvious step of pointing out where precisely it was allegedly considered by the Board and thus potentially disposing of the point, the Board contrives to say nothing at all (§37):
>
> > 'It is denied that the Board erred in failing to consider the Kildare County Development Plan objectives relating to edge of town development and/or failed to consider that the proposed development was in material contravention relating to the same as alleged at Core Ground 4 and paragraphs 36 to 39 of E(Part II) of the Statement of Grounds or at all. The Board will refer to the actual text of its Inspector's Report, the County Development Plan, the Chief Executive's Report and other documentation submitted by the Notice Party as part of the subject application for their true meaning and effect at the hearing of this judicial review application in lieu of the Applicant's characterisation of same.'
>
> 97. If, as is plainly the case, the Board did not consider this part of the CDP it is obliged to simply say so. The Board as a public authority has a duty of candour to state whether this matter was considered or not. Notably the Board has not sworn an Affidavit confirming the same. Instead, regrettably the opposition paper[s] are entirely evasive and seeks to avoid addressing the matter by vaguely saying it will refer to the 'actual text' of the Inspector's report and other matters. However, the text of none of these matters addressed the same.
>
> 98. Secondly, the Board says (§38) that the wording of the policy is not inflexible and the wording of 'not normally permitted' does not preclude or prohibit the grant of permission for apartments.
>
> 99. However, the problem for the Board is that, as it did not consider this element of the CDP at all it cannot now invoke an alleged flexibility to justify that non-consideration. Furthermore, a requirement that apartments will not normally be permitted, implies that there are exceptional circumstances (or some non-normal circumstances) relating to the development justifying a departure from apartments not being normally permitted. This is not addressed at all and there are no reasons explaining why apartments should be permitted for this development. The Board's duty in these proceedings is to defend the decision it actually made, not the decision it may wish it had made. What §38 of the SOO amounts to is, effectively, the argument that hypothetically had this element of the CDP been hypothetically considered the Board could hypothetically have granted permission for the proposed development."

106. If the applicant thought that the board was being "evasive" in the statement of opposition, the board's submissions won't have cured that. Those submissions confine themselves (quite properly and understandably given the pleadings) to legalistic objections about burden of proof as well as referencing the fact that some inevitable and standard reference was made to the plan (not any specific provision) in the introductory part of the board order, the lack of a point made by the applicant in the process (which doesn't matter – this is jurisdictional and invokes the homework principle), and certain points which could have been made by the board in the decision but weren't, with a final sprinkling of denials on top (obviously those don't help as to what the actual fact situation was).

107. Normally a statement that something was considered (even if phrased in general terms) would be enough to thrust the onus on the challenger to displace that. But I don't think that is the final answer here. The problem here is that the board has been quite explicit on the provisions of the plan that it has considered for the purposes of the material contravention discussion. *Expressio unius* is the operative principle in this situation. A general reference to considering the plan doesn't quite cut the mustard in circumstances such as here where:

(i) The plan provision (para. 15.5.2) specifically applies to "edge of town/greenfield edge sites".
(ii) The inspector actually expressly found that this was a "greenfield" site (para. 10.2.5).
(iii) That is in any event obvious from the satellite photograph at p. 12 of the Planning Report & Statement of Consistency that was before the board.
(iv) That photograph also shows that the development site is an edge of town site and a greenfield edge site. The board didn't seem to disagree with that.
(v) The fact that the inspector also found that the site was near the centre doesn't mean that it isn't also near the edge. In fact that just illustrates the fact that Clane is a relatively small town, albeit not evenly developed sequentially particularly around the direction of the development site.
(vi) In those circumstances the board had material which made it necessary to consider paragraph 15.5.2.
(vii) The board has been very explicit on all other specific provisions of the plan that it has considered.
(viii) The board did not make any reference to paragraph 15.5.2 of the plan or the test contained in that provision, or engage with the test in any way – *expressio unius*.
(ix) The fact that a reasoning process might be constructed after the event which could be theoretically capable of justifying the decision is irrelevant – we are reviewing the decision rather than writing a new one.
(x) The fact that the applicant didn't raise the issue is irrelevant – compliance with the plan or in the alternative valid consideration of the material contravention power is an autonomous duty on the board.
(xi) This is not equivalent to a non-existent requirement to give micro-specific reasons. Indeed the board's attempt to reclassify this as a reasons point at all is totally misconceived. It isn't just a reasons point – the operative issue is failure to consider a matter that the board was required to consider autonomously, as pleaded in sub-ground 38. The issue not considered was material contravention by reason of a provision of the plan which is clearly applicable on foot of material that was plainly before the board.
(xii) Insofar as there is any remaining doubt (which isn't the case), it does not assist the board that it has been totally silent on whether it did consider this provision, in response to a direct allegation that it has been "evasive", and that it has not volunteered a full account of the decision-making process.

108. Yes an applicant has the initial burden of proof to displace the starting presumption in favour of a respondent that says in the decision that it has considered something. To do so she has to demonstrate that there is a point that requires an answer – that there is material tending to demonstrate on the particular facts that an inference arises that the issue was not properly considered. That is frequently, and is in this case, a fairly fact-specific exercise. Often it can be done simply by formally calling on the board to answer some specific question as to what it considered. More laboriously, if there is not a simple question to be answered, an applicant can request directions compelling the decision-maker to provide a full account of the process. But either way, once an applicant has shown material tending to demonstrate an inference that something was not properly considered, as the applicant has done here, the burden falls on the decision-maker to demonstrate evidentially that the point was in fact considered. The board certainly hasn't done that here. Indeed by remaining majestically silent in response to the complaint of evasion, they haven't even properly attempted it.

109. In such circumstances I would uphold core ground 4 insofar as it refers to the lack of consideration alleged in sub-ground 38.

Core ground 5 – unlawful reliance on pre-*certiorari* pre-consultation

110. The basic point here was that the pre-application procedure was spent and could not be relied on after the planning permission was quashed without remittal.

111. The order of remittal is in the following terms:

"JUDICIAL REVIEW
2021 No 558 JR
In the matter of Section 50, 50A and 50B of the Planning and Development Act 2000 and in the matter of the Planning and Development (Housing) and Residential Tenancies Act 2016
Monday the 11th day of October 2021
BEFORE MR JUSTICE HUMPHREYS
BETWEEN/
CLANE COMMUNITY COUNCIL
APPLICANT

AND
AN BORD PLEANÁLA

RESPONDENT

AND
DEBUSSY PROPERTIES LTD

NOTICE PARTY

Upon Originating Notice of Motion of Counsel for the Applicant being mentioned before the Court on this day and coming before the Court by way of a remote hearing seeking the following reliefs

'1. An order of certiorari quashing the decision of the Respondent granting planning permission to Debussy Properties Ltd ('the Developer') for the construction of 142 no. residential units and associated works at a site on the western side of Millicent Road and the southern side of Prosperous Road, Clane, Co. Kildare on the outskirts of Clane, Co. Kildare dated 22 April 2021 (ABP Ref 309087-21).

2. Such declaration(s) of the legal rights and/or legal position of the Applicants and/or persons similarly situated and/or of the legal duties and/or legal position of the respondent(s) as the Court considers appropriate.

3. A stay on works being carried out pursuant to the Decision pending the resolution of these proceedings.

4. An order that section 50B of the Planning and Development Act, 2000 (the '2000 Act'), and/or sections 3 and 4 of the Environment (Miscellaneous Provisions) Act, 2011, and/or Article 9 of the Aarhus Convention apply to the present proceedings.

5. Further or other orders

6. Costs.'

Whereupon and on reading the said Notice the amended Statement of Grounds filed on the 16th day of June 2021 the Affidavit of Paul Carroll filed on the 15th day of June 2021 verifying the facts set out in the Statement filed on the 15th day of June 2021 together with the documents and exhibits therein referred to and the Orders of the Court dated the 28th day of June 2021 and the 12th day of July 2021

And on hearing said Counsel

And the Court noting that the Respondent is consenting to an Order of Certiorari herein

By Consent the Court Doth Grant an Order of Certiorari quashing the decision of the Respondent granting planning permission to Debussy Properties Ltd ('the Developer') for the construction of 142 no. residential units and associated works at a site on the western side of Millicent Road and the southern side of Prosperous Road, Clane, Co. Kildare on the outskirts of Clane, Co. Kildare dated the 22nd day of April 2021 (ABP Ref 309087-21).

And in lieu of directing that an Order of Certiorari do issue IT IS ORDERED that the aforesaid decision dated the 22nd day of April 2021 and all records and entries relating thereto be quashed without further Order

And IT IS ORDERED that there be no remittal of this matter back to the Respondent

AND IT IS FURTHER ORDERED that the Applicant do recover its costs of the proceedings including reserved costs as against the Respondent such costs to be adjudicated in default of agreement

...
REGISTRAR
Perfected 25/11/2021

FP Logue
Solicitors for the Applicant"

112. If I had been asked on that date whether that order was intended to cover the pre-application stage, I would have said that that should have been dealt with expressly by agreement or, if there was a lack of such agreement, then it should be presented for decision of the court. One possibility even at the late stage of the hearing would have been for the parties to make such an application, but they didn't. One then asks the question as to who has the onus to clarify that – the answer arises from the fact that this was an order against the board.

113. The problem for the board is that the pre-application process, which resulted in a formal decision of the board, was an interim step in an overall procedure. The basic principle of judicial review is that interim decisions should not be challenged separately but rather the challenge should be saved for the final decision: *Spencer Place Development Company Limited v. Dublin City Council* [2020] IECA 268, [2020] 10 JIC 0202 (Unreported, Court of Appeal, Collins J., 2nd October, 2020). That was a case actually cited by the applicant in its submission to the board here arguing that there was a lack of a valid pre-application procedure (p. 8 of 45).

114. In *Cork Harbour Alliance for a Safe Environment v. An Bord Pleanála* [2021] IEHC 203, [2019] 3 JIC 1904 (Unreported, High Court, 19th March, 2021) Barniville J. said in respect of the analogous provisions of the SID procedure at para. 221 that:

> "Section 37E forms part of a scheme which provides for a two-stage procedure in respect of applications for permission for developments which are SID. Section 37E which provides for the application for permission must, in my view, be read in the context of the earlier sections which provide for the procedure leading up to the making of the application."

115. Sometimes people make the academic argument that if something is quashed without remittal, the decision-maker can still make a fresh decision because she should treat matters as if the decision was never made. But that simplistic view ignores the central role of the court. Where the court has power to remit, but doesn't exercise that, it is unlawful to proceed as if the matter had been remitted. The abstract analysis that sees only an absence of a decision doesn't acknowledge the court's supervisory position. The absence is in any event a deemed product of judicial doctrine, rather than being something that automatically equates to a situation where the decision was never made as a matter of fact (analogously to the point that an invalidated statute is not a metaphysical nullity from day one but has had a factual existence with potentially ongoing consequences: see *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940) *per* Hughes C.J. at 374; *Heneghan v. Minister for Housing, Planning and Local Government* [2023] IESC 18 (Unreported, Supreme Court, 26th July, 2023) *per* O'Donnell C.J. at paras. 27 and 28)

116. Here the development and the board simply proceeded as if there had been remittal to immediately after the pre-application stage. That isn't the case. The quashing of the ultimate decision also involved impliedly quashing any interim steps (in the absence of remittal, which wasn't applied for). While the pre-application process was prior to what the legislation formally calls the application, it is still an interim step in the overall process, so it falls implicitly once the ultimate decision is quashed. The developer should therefore have either asked the court to remit the matter to after that point, or gone back to square one.

117. This is doubly so where, as put by the applicant at para. 116 of submissions, on the facts here:

> "The artificial regrafting of the pre-application consultation and opinion on to a second planning application, has further resulted in specific deficiencies with the planning application itself. The Inspector's report was dated 8 June 2020. The pre-application consultation meeting itself was held on 28 May 2020. The Board Order for the pre-application was made on 16 June 2020. However, Material Variation No 1 of the Kildare CDP was adopted by Kildare County Council on 9 June 2020. While the draft of the Variation No. 1 was noted in the Inspector's report (§5.3.6), the Board would not have been entitled to rely on a draft of Variation No. 1 before it was adopted as to do so would have been ultra vires."

118. The applicant also makes the valid point at para. 119:

> "Furthermore, no Statement of Material Contravention was submitted for the purposes of section 5(5)(b)(i) of the 2016 Act in respect of the contravention of Variation 1 of the CDP during the pre-application consultation phase or during the submission of the first quashed application. The Developer cannot rely on a pre-consultation process which incorrectly did not take into account the impact of Variation 1."

119. None of this enhances the case for regarding the initial process as having any continuing validity as a basis for a renewed application.

120. The upshot is that the pre-application process is spent following *certiorari* with no remittal. But if I am wrong about that, it is spent where (as here) the plan has been varied since then in a way that means that the pre-application process can no longer fully stand on its own terms.

121. If I had any remaining doubts (which isn't the case), those are not assuaged by the failure of the respondent to apply to the court for directions, clarifications or further order on foot of the order of *certiorari* which I made, either at the time of that order or at any subsequent time. That was an order *against the board*, which puts the onus on the board to seek any clarification that would be appropriate for it to be allowed to proceed notwithstanding the order.

122. On this basis I would uphold core ground 5.

Order

123. Arising from the foregoing I uphold core grounds 1, 2, 4 and 5 to the extent outlined. Each of those grounds is independent.

124. For the foregoing reasons, it is ordered that:

(i) there be an order of *certiorari* removing the impugned decision of the board for the purpose of being quashed; and

(ii) unless the parties apply otherwise by written submission within 7 days, the foregoing order be perfected forthwith thereafter on the basis of costs to the applicant against the board including reserved costs and costs of written submissions.